FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS JULY 1, 2017, TO DECEMBER 31, 2017

PUBLISHED BY THE COMMISSION

VOLUME 164

Compiled by
The Office of the Secretary
Robert F. Swenson, Editor

MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JULY 1, 2017 TO DECEMBER 31, 2017

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

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

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

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JULY 1, 2017, TO DECEMBER 31, 2017

IN THE MATTER OF

SON LE
A/K/A
SONNY LE,
AND
BAO LE
A/K/A
ROBERT LE,
A/K/A
BOBBY LE,
BOTH D/B/A
RECREATIONAL PRODUCTS,
TRAMPOLINE JUMPERS,
INFINITY TRAMPOLINES,
OLYMPUS PRO TRAMPOLINES,
HAPPY TRAMPOLINE,
TRAMPOLINE SAFETY OF AMERICA,
BUREAU OF TRAMPOLINE REVIEW, AND
TOP TRAMPOLINE REVIEW, AND
FORMERLY D/B/A
TRAMPOLINE STORE
AND
TRAMPOLINE SUPERSTORE

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

Docket No. C-4619; File No. 162 3178
Complaint, July 5, 2017 – Decision, July 5, 2017

This consent order addresses Son Le and Bao Le's advertising for their Infinity and Olympus Pro brand trampolines. The complaint alleges that respondents violated Section 5(a) of the FTC Act by deceptively representing that purportedly independent ratings entities and ordinary consumers recommended their trampolines and by deceptively failing to disclose Bao Le's financial interest in the sale of respondents' trampolines in reviews he posted of those and other trampolines. The consent order prohibits these alleged violations and fences in similar and related violations.

Participants

For the *Commission*: *Karen Mandel* and *Shira Modell.*

For the *Respondents*: *Paul J. Wisniewski, The Law Offices of Paul J. Wisniewski.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Son Le and Bao Le (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 Son Le, also known as Sonny Le, owns and does business as Recreational Products, Trampoline Jumpers, Infinity Trampolines, Olympus Pro Trampolines, Happy Trampoline, Trampoline Safety of America, Bureau of Trampoline Review, and Top Trampoline Review, and formerly did business as Trampoline Store and Trampoline Superstore. Individually or in concert with others, he controlled, or had the authority to control, or participated in, the acts and practices alleged in this complaint. His principal office or place of business is 1401 East Ball Road, #C, Anaheim, California 92805.

2. Respondent Bao Le, also known as Robert Le and Bobby Le, does business as Recreational Products, Trampoline Jumpers, Infinity Trampolines, Olympus Pro Trampolines, Happy Trampoline, Trampoline Safety of America, Bureau of Trampoline Review, and Top Trampoline Review, and formerly did business as Trampoline Store and Trampoline Superstore. Individually or in concert with others, he controlled, or had the authority to control, or participated in, the acts and practices

alleged in this complaint. His principal office or place of business is 1401 East Ball Road, #C, Anaheim, California 92805.

3. Using the fictitious business names listed above, Respondents have advertised, offered for sale, sold, and distributed products to consumers, including Infinity and Olympus Pro trampolines.

4. 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.

Course of Conduct

5. Respondents have advertised, offered for sale, and sold Infinity and Olympus Pro trampolines online through the following websites: Infinity Trampolines (www.infinitytrampolines.com), Happy Trampoline (www.happytrampoline.com), and Trampoline Jumpers (www.trampolinejumpers.com) (the "Sales Websites"). Depending on the model, an Infinity trampoline costs between $798.00 and $2898.00 and an Olympus Pro trampoline costs between $799.00 and $4895.00.

6. All of the Sales Websites have prominently displayed the Trampoline Safety of America logo. The Infinity Trampoline website also displayed logos for the Bureau of Trampoline Review and Top Trampoline Review. These logos linked to their respective websites (the "Review Websites"), Trampoline Safety of America (www.trampolinesafetyofamerica.com), Bureau of Trampoline Review (www.bureauoftrampolinereview.com), and Top Trampoline Review (www.toptrampolinereview.com), which have purported to provide prospective purchasers with objective information about trampolines, including unbiased expert reviews of specific brands and models and ratings based on safety, performance, and other attributes.

7. The Review Websites have recommended Infinity and Olympus Pro trampolines.

8. Respondent Son Le owns the Sales Websites and the Review Websites. Respondents Son Le and Bao Le control the content of the Sales Websites and the Review Websites.

9. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Infinity and Olympus Pro trampolines, including but not necessarily limited to the attached Exhibits A through G. These materials have contained the following statements and depictions, among others:

a. Exhibit A, Infinity Trampoline website, www.infinitytrampolines.com (the below logos have appeared on each page of the website and linked to the respective Review Websites).

3rd Party Rating

b. Exhibit B, Happy Trampoline website, www.happytrampoline.com (the below logo containing a link to the Trampoline Safety of America website appears on each web page).

c. Exhibit C, Trampoline Jumpers website, www.trampolinejumpers.com (the below logo containing a link to the Trampoline Safety of America website appears on each web page).

d. Exhibit D, Trampoline Safety of America website, www.trampolinesafetyofamerica.com

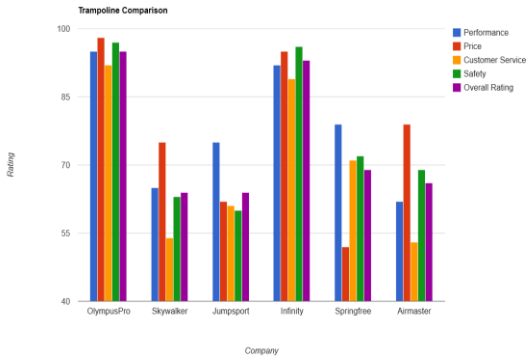
About Us

Trampoline Safety of America is a third party organization involved in studying the technical aspects of all the major trampoline distributors in America. It is comprised of structural engineers, trampoline gymnastic coaches, professional trampoline installers, seasoned customer service sales reps and also experienced trampoline owners. Our goal is to educate the public about the safeties of trampolines and how to get the maximum performance out of your trampoline.

Our Mission

To make sure that trampoline-end users are educated about the product they are purchasing and understand the safety standards that comes with each trampoline. Every month, we have independent experts writing articles about trampolines. We will compare every aspect of the trampolines. Why do some trampolines only have 4 legs? Why certain safety nets are safer than others? Why are some trampolines $200 and some over $2500? What about the springless trampolines?? We will give you all the answers you need to buy the best trampoline for your money.

* * *



Complaint

* * *

Trampoline Safety of America is a third party organization involved in styding [sic] the technical aspects of all the major trampoline distributors in America. It is comprised of structural engineers, trampoline gymnastic coaches, aling [sic] with many other experts who have been involved in trampolines all their lives. From a non-biased position, we grade every factors [sic] that is involved with every major trampoline out there. We review their structural performances, warranties, custormer [sic] service, as wess [sic] as the best pricing so that you can make an educated and informed decision when considering a tramploline [sic]. Our sites are updated constantly to make sure that all the data are cureent [sic]. We do not get paid or endorsed by any of these companies.

* * *

In conclusion we highly recommend the **Infinity Trampoline** [link to InfinityTrampolines.com]. It is by far one of the safest and best trampolines we've reviewed. . . .

* * *

In conclusion I highly recommend the **Olympus pro trampoline** [link to TrampolineJumpers.com]. It is the heaviest frame and highest weight capacity of all the trampolines we've reviewed. The double security net with the clips and zipper makes it one of the safest as well. As you can see from their website they have been featured on many TV shows / commercials. . . .

e. Exhibit E, Bureau of Trampoline Review website, www.bureauoftrampolinereview.com

The Bureau of Trampoline Review is an independent organization whose main purpose is to provide end users up to date factual data and comparisons when making a trampoline investment. We have a board of

gymnastic and certified trampoline experts compiled to create this database. . . . Here at the Bureau of Trampoline Review, we provide independent research for you so that you don't have to do it yourself.

* * *

The Bureau of Trampoline Review is an independent research organization made up of former gymnastics and trampoline experts. Our mission is to provide accurate research data and comparisons for end-users to make a sound decision when purchasing a trampoline. Safety, reliability, and performance are our main focus. We are not paid by any sponsors or manufacturers, so our data are unbiased nor [sic] influenced.

* * *

We, at The Bureau of Trampoline Review, went out and purchased many types of trampolines for our testing as well as interviewed the manufacturers themselves. Through rigorous testing and abuse to the trampoline, we too at The BTR have narrowed down to only a select few that stood the ultimate test.

The Frame Test. We placed anywhere from 5 – 10 person [sic] on each trampoline to test the strength and if it will hold up. On some, we even conducted a car drop test on them as well. Sad to say, but most of them failed. When we did the car test, most of them got flattened like a pancake. Except for [Infinity Trampoline].

f. Exhibit F, Top Trampoline Review website, www.toptrampolinereview.com

To help you in your search for the best trampoline on the market, this website has compiled reviews of the top trampoline brands and the most popular trampolines that they produce. Here you will find detailed specifications as well as expert opinions on

the quality of the materials and construction that go into the best-selling trampolines today. Rather than spending hours upon hours searching through customer reviews, read through the reviews in this website to quickly assess which trampolines are worth the cost and which ones fall short. Whether you are wanting a trampoline to be used by your children or you are a gymnast looking for a way to train at home, having the best trampoline available is vital. Use this site to find the the [sic] info and expert advice that you need to go out and buy the best possible trampoline.

* * *

Top Trampoline Review is a group comprised of mechanical engineers, former gymnastic athletes, and mommies. We like to be the watchdog organization for Trampoline Safety. We are all parents ourselves, so we understand what is important to our family. How to spend our hard earn [sic] money. Investing on [sic] a product that will last for a long time. As well as keeping our youth forever happy and carefree. We hope that our information serves you right. If you have any particular questions or concern [sic] about a certain product, please feel free to let us know. If we are outdated on certain details, please also let us know, as we are not a paid organization, so we do the best we can to make our data insightful.

g. Exhibit G, online review, http://trampolinemom.blogspot.com/2013/05/best-trampoline-on-market.htm

Best Trampoline on the Market
How do you find the best trampoline? . . . How can a consumer like us determine all this without seeing or testing the trampoline out? . . .

Some of the companies that have the strongest trampoline frames in the industry that I've researched are below:
www.infinitytrampolines.com
www.trampolinejumpers com

www.happytrampoline.com

Posted by Bobby Le at 9:49 AM

h. Exhibit H, online review, https://www.youtube.com /watch?v=PyJKoQzoW0w

Bobby Le 6 months ago

I found this trampoline on the Bureau of trampoline review [sic] and this is the best trampoline that I've ever owned. I had the jumpsport [sic] recently and It [sic] is not as advertised. Within 2 yrs. [sic] the frame started rusting. This crap is definitely china [sic] made. Don't waste your money [sic]

Count I
False Claims -- Review Websites

10. In connection with the advertising and promotion of Infinity and Olympus Pro trampolines, Respondents have represented, directly or indirectly, expressly or by implication, that:

a. Trampoline Safety of America, the Bureau of Trampoline Review, and Top Trampoline Review were independent organizations providing objective information about the safety and performance of trampolines;

b. The product reviews on the Review Websites reflected the opinions of impartial experts, including trampoline experts, certified trampoline experts, professional trampoline installers, structural engineers, mechanical engineers, gymnastic experts, trampoline gymnastics coaches, and former gymnasts;

c. The product reviews posted online by Bobby Le reflected the opinion of an ordinary impartial trampoline owner; and

d. Bureau of Trampoline Review personnel purchased and rigorously tested the strength of the reviewed trampolines.

11. In fact,

a. Trampoline Safety of America, the Bureau of Trampoline Review, and Top Trampoline Review were not independent organizations providing objective information about the safety and performance of trampolines. Respondents created and controlled the Review Websites as part of their advertising campaign to promote the sale of Infinity and Olympus Pro trampolines;

b. The product reviews on the Review Websites did not reflect the opinions of impartial experts, including trampoline experts, certified trampoline experts, professional trampoline installers, structural engineers, mechanical engineers, gymnastic experts, trampoline gymnastics coaches, and former gymnasts;

c. The product reviews posted online by Bobby Le did not reflect the opinion of an ordinary impartial trampoline owner; and

d. Bureau of Trampoline Review personnel did not purchase and rigorously test the strength of the reviewed trampolines. For trampolines other than Infinity and Olympus Pro models, Respondents simply reported information they obtained from the websites of the manufacturers of those units.

Therefore, the representations set forth in Paragraph 10 are false or misleading.

Count II
False Claims – Sales Websites

12. In connection with the advertising, promotion, offering for sale, or sale of Infinity and Olympus Pro trampolines on their Infinity Trampolines website, their Happy Trampoline website,

and their Trampoline Jumpers website, Respondents have represented, directly or indirectly, expressly or by implication, that those trampolines were tested and approved by independent third-party organizations that provide objective information from both experts and ordinary consumers.

13. In fact, the Infinity and Olympus Pro trampolines sold on Respondents' Infinity Trampolines website, Happy Trampoline website, and Trampoline Jumpers website were not tested and approved by independent third-party organizations that provide objective information about trampolines from both experts and ordinary consumers. Therefore, the representation set forth in Paragraph 12 is false or misleading.

Count III
Deceptive Failure to Disclose Material Connections

14. In connection with the advertising, promotion, offering for sale, or sale of Infinity and Olympus Pro trampolines, Respondents have represented, directly or indirectly, expressly or by implication, that favorable online reviews posted by Bobby Le reflect his personal experience and research.

15. Respondents failed to disclose that Bobby Le sells Infinity and Olympus Pro trampolines and thus has a financial interest in promoting them. This fact would be material to consumers in their purchase or use decisions regarding Infinity and Olympus Pro trampolines.

16. Respondents' failure to disclose the material information described in Paragraph 15, in light of the representation set forth in Paragraph 14, is a deceptive act or practice.

Violations of Section 5

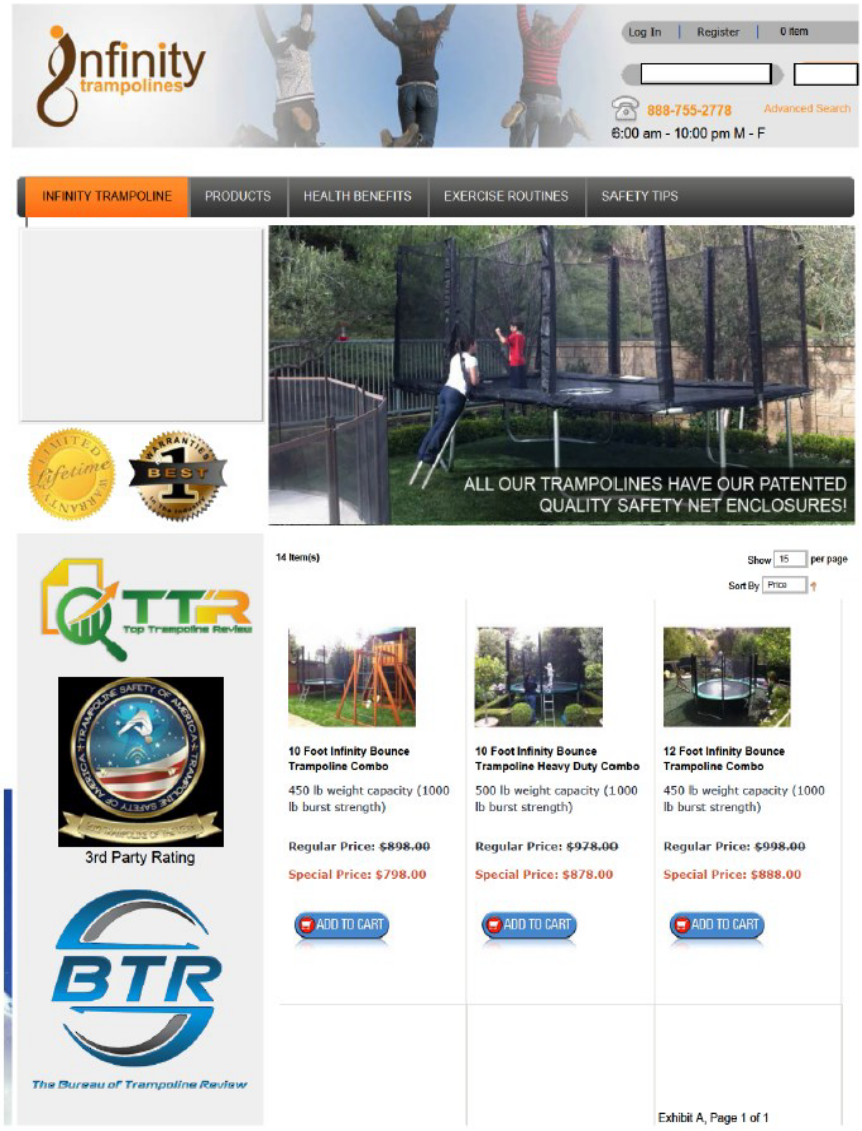
17. The acts and practices of Respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission on this fifth day of July, 2017, has issued this Complaint against Respondents.

Complaint

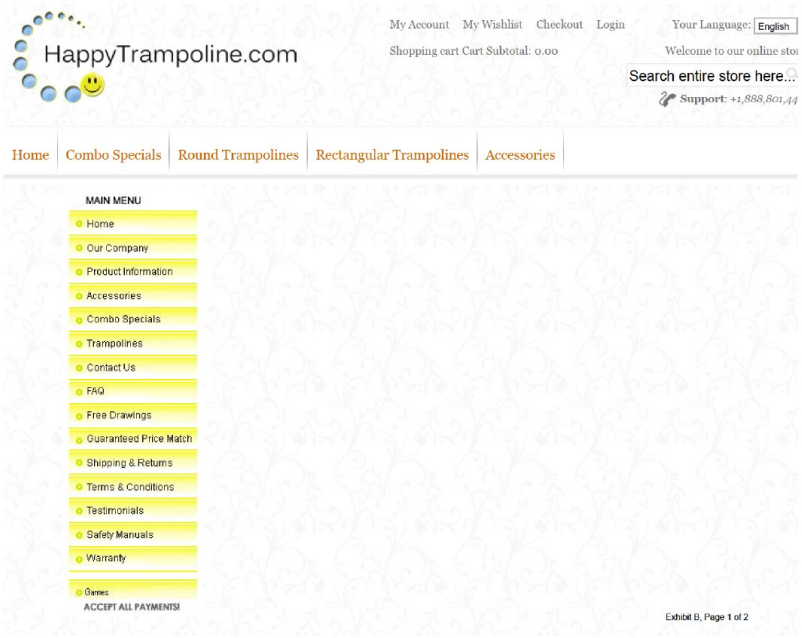
By the Commission.

Exhibit A



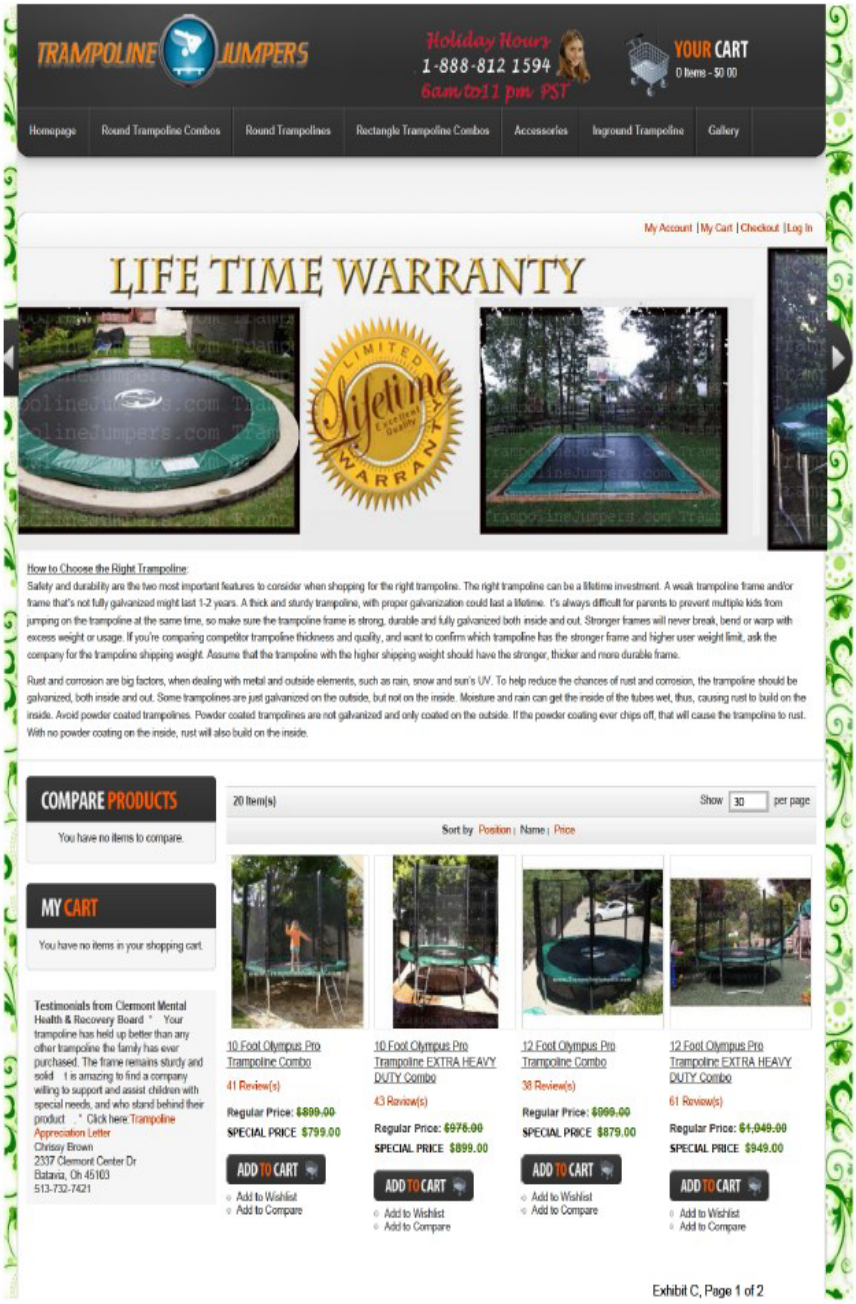
Complaint

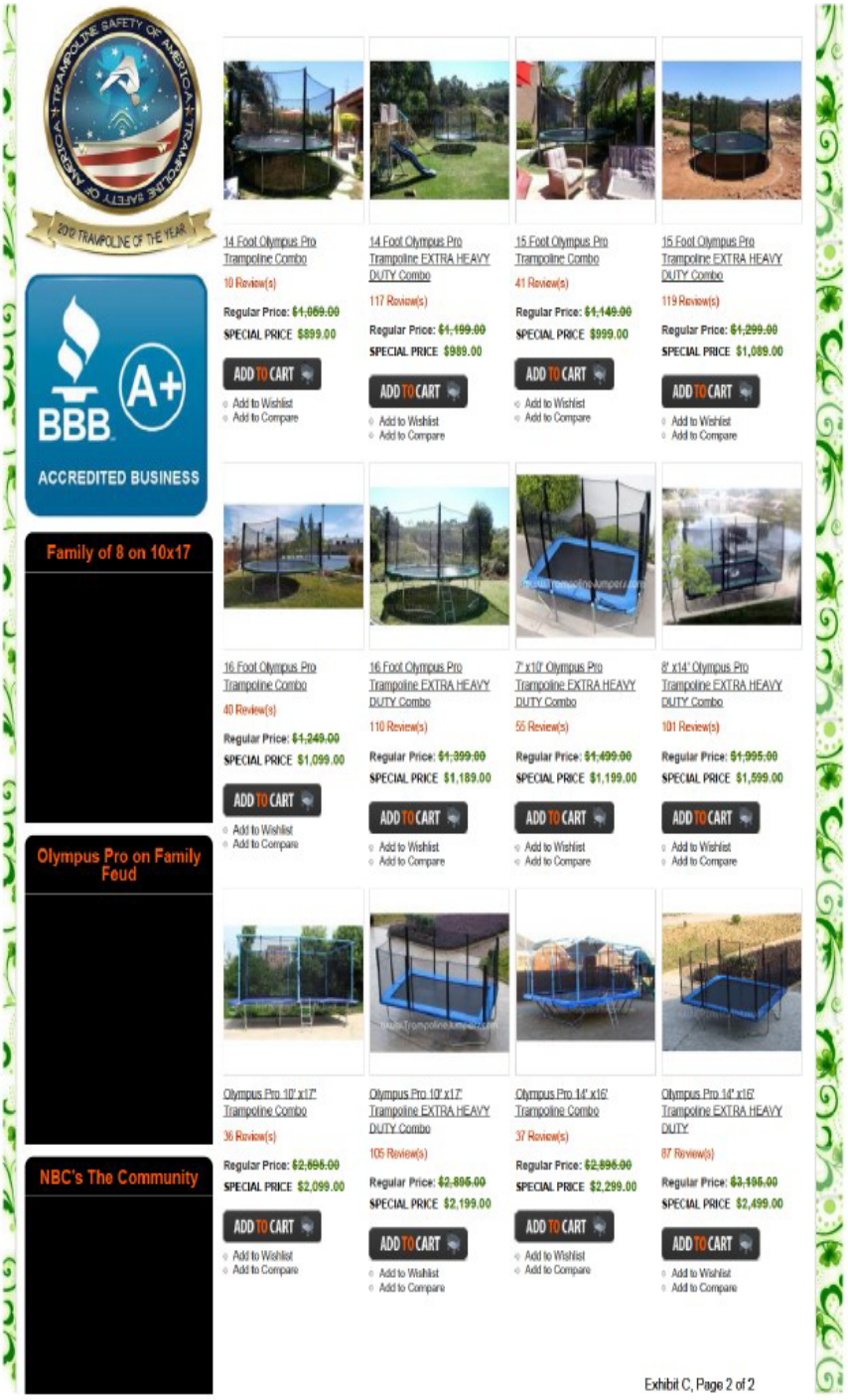
Exhibit B



Complaint

Exhibit C




2010 TRAMPOLINE OF THE YEAR
BBB A+
ACCREDITED BUSINESS
Family of 8 on 10x17
Olympus Pro on Family Feud
NBC's The Community
14 Foot Olympus Pro Trampoline Combo
10 Review(s)
Regular Price: $1,069.00
SPECIAL PRICE $899.00
ADD TO CART
Add to Wishlist
Add to Compare
14 Foot Olympus Pro Trampoline EXTRA HEAVY DUTY Combo
117 Review(s)
Regular Price: $1,199.00
SPECIAL PRICE $989.00
ADD TO CART
Add to Wishlist
Add to Compare
15 Foot Olympus Pro Trampoline Combo
41 Review(s)
Regular Price: $1,149.00
SPECIAL PRICE $999.00
ADD TO CART
Add to Wishlist
Add to Compare
15 Foot Olympus Pro Trampoline EXTRA HEAVY DUTY Combo
119 Review(s)
Regular Price: $1,299.00
SPECIAL PRICE $1,089.00
ADD TO CART
Add to Wishlist
Add to Compare
16 Foot Olympus Pro Trampoline Combo
40 Review(s)
Regular Price: $1,249.00
SPECIAL PRICE $1,099.00
ADD TO CART
Add to Wishlist
Add to Compare
16 Foot Olympus Pro Trampoline EXTRA HEAVY DUTY Combo
110 Review(s)
Regular Price: $1,399.00
SPECIAL PRICE $1,189.00
ADD TO CART
Add to Wishlist
Add to Compare
7' x10' Olympus Pro Trampoline EXTRA HEAVY DUTY Combo
55 Review(s)
Regular Price: $1,499.00
SPECIAL PRICE $1,199.00
ADD TO CART
Add to Wishlist
Add to Compare
8' x14' Olympus Pro Trampoline EXTRA HEAVY DUTY Combo
101 Review(s)
Regular Price: $1,995.00
SPECIAL PRICE $1,599.00
ADD TO CART
Add to Wishlist
Add to Compare
Olympus Pro 10' x17' Trampoline Combo
36 Review(s)
Regular Price: $2,695.00
SPECIAL PRICE $2,099.00
ADD TO CART
Add to Wishlist
Add to Compare
Olympus Pro 10' x17' Trampoline EXTRA HEAVY DUTY Combo
105 Review(s)
Regular Price: $2,895.00
SPECIAL PRICE $2,199.00
ADD TO CART
Add to Wishlist
Add to Compare
Olympus Pro 14' x16' Trampoline Combo
37 Review(s)
Regular Price: $2,895.00
SPECIAL PRICE $2,299.00
ADD TO CART
Add to Wishlist
Add to Compare
Olympus Pro 14' x16' Trampoline EXTRA HEAVY DUTY
87 Review(s)
Regular Price: $3,195.00
SPECIAL PRICE $2,499.00
ADD TO CART
Add to Wishlist
Add to Compare
Exhibit C, Page 2 of 2

Complaint

Exhibit D

the safety standards that comes with each trampoline.Every month, we have independent experts writing articles about trampolines. We will compare every aspect of the trampolines. Why do some trampolines only have 4 legs? Why certain safety nets are safer than others? Why are some trampolines $200 and some over $2500? What about the springless trampolines?? We will give you all the answers you need to buy the best trampoline for your money.

Price

How does price compare to other competitors of similar quality trampolines? Why are some trampolines only $200 vs $2500.

Performance

How is the quality of the bounce? Are the frame and springs thick enough to withstand heavy weight capacity? Thinner gauge frames will not have the same weight capacity and will not have the same type of bounce. Do longer springs make a difference? What about the length of the springs? What makes a rectangle trampoline bounce better than a round trampoline? These are a few of the questions that we will answer for you.

Customer Service

TRAMPOLINE SAFETY OF AMERICA

How knowledgeable is the trampoline sales person? Does he/she know everything there is to know about trampolines? Was that person helpful? How quick was the shipping? How fast was the order processed? How quick were issues addressed? Does company carry replacement parts? What about installation questions?

Safety

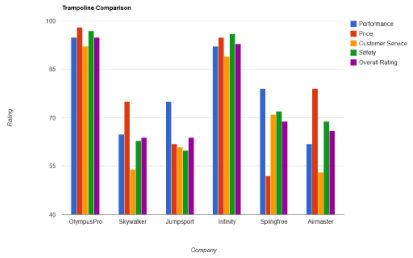
How safe is the trampoline? Is the net enclosure safe for small children? Are bigger or smaller holes better on the net enclosure? is it dangerous to have a net with no zipper or closure? Is the frame thick and heavy enough where it won't tilt or shift with too much weight on one end? Does the entire frame bend or flex when too much weight is on the trampoline? Will the trampoline fold if one of the frame pieces break? Are there a lot of welded joints, because welded joints can easily rust? What about Tjoints?

Overall Rating

Overall Rating is based on the quality of bounce, knowledgeable and helpful customer service, safety, ease of installation, accessibility of replacement parts and price.

Trampoline Chart of Popular Brands

TRAMPOLINE SAFETY OF AMERICA



is a chart comparison of quality trampolines of different brands, based on different sizes. To compare the best trampoline for your money, consider the price, frame thickness (if unsure of frame thickness, ask company for their assembled weight. Higher assembled weight should indicate the thicker frame) and maximum user weight. Thicker frames will allow for thicker gauge springs, thus allowing for greater weight capacity.

16' Trampoline Combo "Net Included" Brand Comparison

Items	Price	Gauge of Steel	Jumper weight	Assembled Weight	Spring Pad Thickness	Number of Legs	Spring count	Spring Length	Enclosure Height	Frame Height
Mega Bounce	$1795	2.0 mm	440 lbs	375 lbs	1.5"	4	112	9"	6"	36"
Olympus Pro Extra Heavy Duty	$999	2.0 mm	475 lbs	380 lbs	1.5"	6	120	9"	6"	36"
Olympus Pro	$925	2.0 mm	375 lbs	370 lbs	1.5"	6	120	9"	6"	36"
Infinity Bounce	$975	2.0 mm	475 lbs	375 lbs	1.5"	6	120	9"	6"	36"

14' Trampoline Combo "Net Included" Brand Comparison

Complaint

TRAMPOLINE SAFETY OF AMERICA

14' Trampoline Combo "Net Included" Brand Comparison

Company Name	Price	Steel Gauge/Metal Thickness	Spring Pad Size	Spring Size	Roof Pad	Total Weight of Trampoline	Weight Capacity	Warranty	Rating	Recommended
JumpSport	$2,329	14 Gauge / 1.90mm thick	7" Padding	7.3"	No	195 lbs	375 lbs	10 Years	37 out of 100	No
Olympia Pro	$2,799	11 Gauge / 2.8mm thick	12" Padding	9"	Yes	325 lbs	550 lbs	Lifetime	71 out of 100	Yes
AirMaster	$899	15 Gauge / 1.71mm thick	7" Padding	6.3"	No	175 lbs	275 lbs	10 Years	43 out of 100	No
MegaBounce	$1,495	12 Gauge / 2.66mm thick	1.5"Padding	7"	No	340 lbs	395 lbs	6 Years	44 out of 100	No
Spring Free	$1,349	15 Gauge / 1.71mm thick	N/A	N/A	No	230 lbs	375 lbs	4 Years	48 out of 100	No
Infinity Trampolines	$799	11 Gauge / 2.8mm thick	1.5"	8.25"	Yes	395 lbs	550 lbs	Lifetime	92 out of 100	Yes

10' X 17' Trampoline Combo "Net Included" Brand Comparison

10x17' Trampoline Combo "Net Included" Brand Comparison

Company Name	Price	Steel Gauge/Metal Thickness	Spring Pad Size	Spring Size	Roof Pad	Total Weight of Trampoline	Weight Capacity	Warranty	Rating	Recommended
JumpSport	$2,779	14 Gauge / 1.90mm thick	7" Padding	6.3"	No	195 lbs	350 lbs	10 Years	56 out of 100	No
Olympia Pro	$2,195	9 Gauge / 3.8mm thick	12" Padding	9"	Yes	565 lbs	550 lbs	Lifetime	93 out of 100	Yes
AirMaster	$2,095	15 Gauge / 1.71mm thick	7" Padding	7.3"	No	175 lbs	275 lbs	10 Years	49 out of 100	No
MegaBounce	$2,944	12 Gauge / 2.66mm thick	1.5"Padding	7"	No	240 lbs	395 lbs	6 Years	51 out of 100	No
Spring Free	$1,349	15 Gauge / 1.71mm thick	N/A	N/A	No	230 lbs	375 lbs	4 Years	33 out of 100	No
Infinity Trampolines	$2,195	9 Gauge / 3.8mm thick	1.25"Padding	9.25"	Yes	620 lbs	550 lbs	Lifetime	91 out of 100	Yes

Rebounder Mini Trampolines

Below is a chart of mini-rebounders of different brands. The quality of the rebounder will depend on the softness of bounce, depending on your weight. Spring count/bungee count and stiffness determines the softness of the bounce.

Items	Price	Gauge of Steel	Jumper Weight Capacity	Spring Type	Spring Count	Number of Legs	Frame Height
Needak	$396	n/a	n/a	Metal springs	n/a	4	10"
Cellenser	$325	n/a	n/a	Metal springs	n/a	6	n/a
Standard ReboundAIR	$269.95	n/a	n/a	Metal springs	36	6	n/a
Cellenser	$500	n/a	n/a	Bungee cords	n/a	6	n/a
Urban Rebounder	$99.99	n/a	300 lbs	Metal springs	n/a	6	n/a

Exhibit D, Page 5 of 11

http://trampolinesafetyofamerica.com/[6/1/2016 10:43:44 AM]

TRAMPOLINE SAFETY OF AMERICA

About Trampoline Safety of America

Trampoline Safety of America is a third party organization involved in styding the technical aspects of all the major trampoline distributors in America. It is comprised of structural engineers, trampoline gymnastic coaches, aling with many other experts who have been involved in trampolines all their lives. From a non-biased position, we grade every factors that is involved with every major trampoline out there. We review their structural performances, warranties, customer service, as wess as the best pricing so that you can make an educated and informed decision when considering a trampoline. Our sites are updated constantly to make sure that all the data are cureent. We do not get paid or endorsed by any of these companies.

Contact With Us

- Facebook
- Twitter
- Email
- Rss

Contact With Us

Home
Trampoline Articles
Contact Us List
Mailing List
Health Benefits
Privacy-Policy

Michael Brook December 26, 2015 at 11:44 pm - Reply

I'm glad there is an unbiased third party organization that is helping to educate the public about quality, safety and the health benefits of trampoline. I started jumping when I was 12 and I'm now 63 still playing at a fairly high level of activity. Through competitive trampoline and aerial acrobatic skiing I learned a lot about the mind / body connection And I have a real appreciation for the health benefits trampoline offers. I authored the book "New Dimensions in Health" that explores the positive benefits of rebound exercise such as increased lymphatic activity and how the forces of acceleration and deceleration strengthen every cell in the body. I produced a trampoline safety video that received some wonderful endorsements and a few other videos that detail some of the little known benefits of trampoline. I would love to support your efforts in educating the public on the health benefits of

Exhibit D, Page 6 of 11

http://trampolinesafetyofamerica.com/[6/1/2016 10:43:44 AM]

TRAMPOLINE SAFETY OF AMERICA

trampoline. If you'd like to learn more about what I may have to offer check out trampolinesafetyand fun.com & newdimensionsinhealth.com Thanks for your work michael@newdimensionsinhealth.info

Bobby Le March 16, 2016 at 10:03 pm - Reply

Hi, if u would like, i would allow for you to post your information on my website free of charge…

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Exhibit D, Page 7 of 11

http://trampolinesafetyofamerica.com/[6/1/2016 10:43:44 AM]

TRAMPOLINE SAFETY OF AMERICA – Trampoline-Review

Exhibit D, Page 8 of 11

http://trampolinesafetyofamerica.com/trampoline-review/[6/1/2016 10:44:34 AM]

Complaint

weight rating heavy enough for families to play together at once. Both mom/dad can join their kids inside this trampoline with the weight capacity of over 550lbs. Most trampolines only have a 250lbs rating that makes it almost impossible for families to play all together at once.

Infinity Trampoline is one of the last trampolines that are still manufactured in the USA. You can tell it is great domestically made product by how sturdy the frame is made. The weight of the frame was the first thing I notice when we opened up the boxes. The frame is over 3mm thick and each piece is super heavy. The 600 lb frame can easily support 550 lbs and has no chance to collapse or flip over. Another great feature about this trampoline is the frames are fully galvanized inside and out. Most trampolines are galvanized on the outside only, with an outdoor product that sits outside year round, the water will seep inside the frame and sit there and rust will start eating at the metal from the inside out. That is why it is important to have your frame fully galvanized inside and out.

The triple woven nylon netting system is very safe with the zipper and the clip to ensure the kids do not accidentally fall off. The net also sits on the frame and is 6 ft up with zero chance of anyone jumping out. The net enclosure poles that hold up the net have a 1/2" thick padding so kids don't get hurt with accidental contact with the frame. Infinity definitely had safety in mind when they designed this trampoline.

The 9" springs they use is one of the longest in the industry. Having the 9" springs and up to 124 springs will allow for great jumping heights and a bouncy jumping mat.

The warranty is also one of the best in the industry. The frames and springs come with a full lifetime warranty. This trampoline also comes standard with all the tools, spring puller and 3 step ladder. The only things you need are a few adults to help put it together as it is to heavy to do alone.

In conclusion we highly recommend the Infinity Trampoline. It is by far one of the safest and best trampolines we've reviewed. When purchasing a trampoline make sure you compare every detail spec for spec.

Trampoline Rating
Safety 95/100
Performance 91/100
Cost 90/100
Overall Value 92/100

Jumpsport Elite Review

The Jumpsport Elite is self proclaimed on their own website as the #1 rated. Lets take a look as some of their specs to see how they hold up. The first thing I notice is the 14 gauge steel. The smaller the number the thicker the steel. 14 gauge steel is equivalent to your standard Wal-mart trampoline selling at $299. The Jumpsport Elite starts off at $1149. They also boast about their frame being pre-galvanized. Most rust proof high end [illegible]

say their frame has a 1500 lb structural capacity, that is not the same as weight capacity. The 1500 lb structural capacity they are referring to is if you put 1500lbs on the frame it will not break. For example if a 1500 lb person sat on just the frame, not the trampoline. So this information is a little misleading.

The trampoline jumping mat is tested at 440 lbs but not rated at 440 lbs. There is a huge difference between tested and rated. Tested means it was done one time at 440 lbs vs rated means it was tested numerous time by a 3rd party company at many weight and they came to the conclusion that the trampoline was safe at 440 lbs. Megabounce spring pad is 1.5" thickness and 12.5" width. While that is nice and thick it is no thicker than most of the trampolines in the market. 99% of trampoline spring pad failures is on the cover material. The cover is made of PE, which is a tarp like material and will easily deteriorate over a few hot summers.

The Lifetime warranty is good on the frames however the 6 year warranty is very misleading. They only cover against manufacture defects and not wear and tear. Every outdoor product will have wear and tear because it is left out in the sun 365 days a year and exposed to the extreme elements.

In conclusion the megabounce trampoline when compared to your local Wal-mart trampoline is a tad bit better, but 6 times the cost. Their weight capacity is more than Wal-mart trampolines but was not rated so we do not know what the true weight capacity is. The only thing you are paying for here is the freight shipping cost. The trampoline is good but not great to warrant the price tag.

Trampoline Rating
Safety 47/100
Performance 58/100
cost 27/1000
Overall Value 44/10

Olympus Pro Trampoline

Olympus Pro is another popular brand trampoline that you can find a few websites. One of the first things that make Olympus Pro stands out from the rest is the thickness of the frame. They use fully galvanized hot dipped frame up to 9 gauge/ 3 mm thick steel. Keep in mind when comparing steel the lower the gauge numbers the thicker the steel. So 9 gauge is thicker than 14 gauge. Olympus Pro is the only trampoline in the industry that uses a frame this thick. This is why they are the only ones with a weight capacity up to 550lbs and a [illegible]

thrust rating. Olympus pro also offers a full lifetime warranty on their trampoline.

Now let's take a look at the safety of the trampoline. I like the fact that the holes on the netting are so small that kids cannot get their fingers or accessory stuck. The holes are less than ¼" double woven nylon; vs some of the competitors holes are over 1.5". The net also comes with a zipper and clips to safely enclose the jumpers inside. I also like the fact that the net has a sleeve for the padded net enclosure poles to sleeve thru. This is very safe feature. With the net sitting on the outside of the frame it gives the jumper more space and less chance of injury.

Another thing that customer over look is the aesthetics; how does the trampoline look in your back yard. With this trampoline the net wraps around all the corners of the frame and stands perfect straight with no sags in the net. There are very minimal flops of fabric floating around. It give has a very clean look.
The spring pad is 18" wide and close to 2" thick. While their website says 1.5", I measure and it was very close to 2". The nearest competitor use 1.5" thick spring pad. Also the spring pads have straps and clip at the front and back so they can easily be clipped onto the trampoline frame. This is a very safe feature so kids do not get their feet stuck in the springs while jumping.

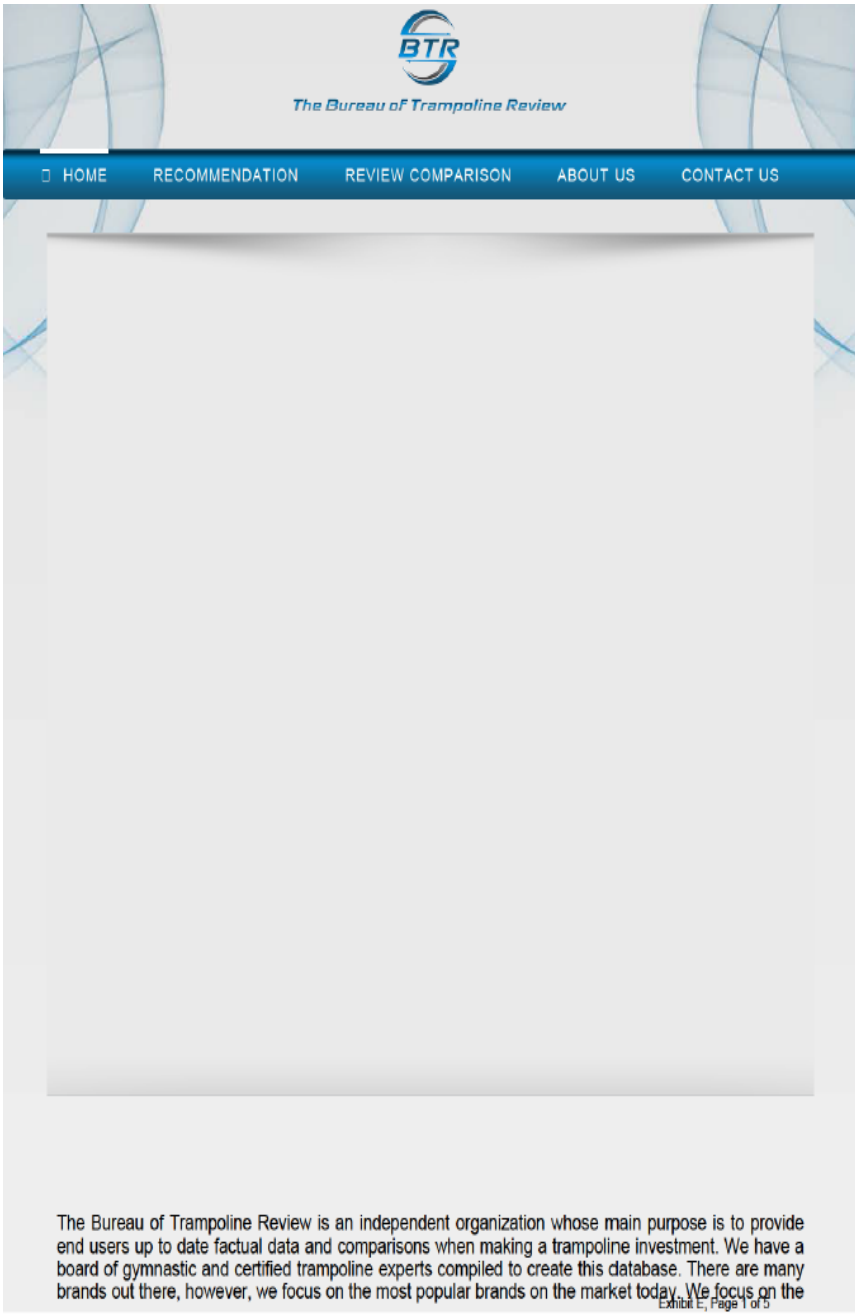
The one thing that I did find a nuisance with this trampoline is the shipping time and how it was shipped. They used a freight company to delivery and it took over a week to come. I found it very difficult to track and I was also required to be home when the freight company delivered it to me. I guess this is how it is when you purchase a trampoline weighing over 600 lbs. The packaging could also improve as there were a few rips in the corners. Another thing that I do recommend with the Olympus Pro trampoline is to make sure you have enough help when installing. While this installation is quite easy the pipes are pretty heavy and will require another person to help hold while you fit the pipes together. This is a 600lb plus frame, so you can imagine how heavy each piece can be. The installation manual can use some improvement but overall once the trampoline is fully setup there are no complaints.

In conclusion I highly recommend the Olympus pro trampoline. It is the heaviest frame and highest weight capacity of all the trampolines we've reviewed. The double security net with the clips and zipper makes it one of the safest as well. As you can see from their website they have been featured on many TV shows / commercials. You can also find Olympus pro trampoline featured at many autistic centers as well.

Trampoline Rating
Safety 95/100
Performance 91/100
Cost 87/100
Overall Value 91/100

Complaint

Exhibit E



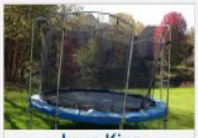
most pertinent specifications that is vital to making a trampoline great and heavy duty. While not all trampoline are created equal, how do a normal end-user know the difference between a great performing trampoline and a dud. What specs makes it stand out. By not seeing and testing a trampoline, how do you know if the trampoline will last? Not all high-end trampoline manufacturers are found in your local area to test them out. In fact, high-end trampoline distributors do not have trampolines at your local Walmart or Costco for you to just buy and return. So as a parent trying to find the best deal possible while looking for that ultimate play equipment that will last in their backyard for long time, how does one know what to look for? Here at the Bureau of Trampoline Review, we provide independent research for you so that you don't have to do it yourself.

See here for a detailed list of *trampoline comparisons*

Infinity Bounce

★ ★ ★ ★ ★

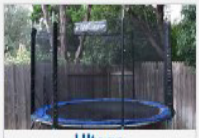
Weight Capacity : 550 lbs
Metal Thickness : 3.0mm
Price :$$



Jump King

★ ★ ★

Weight Capacity : 200 lbs
Metal Thickness : 1.2mm
Price :$



Ultega

★ ★ ★

Weight Capacity : 200 lbs
Metal Thickness : 1.2mm
Price :$

Olympus Pro

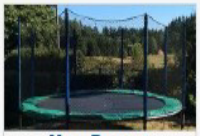
★ ★ ★ ★ ★

Weight Capacity : 550 lbs
Metal Thickness : 3.0mm
Price :$$

Magic Circle

★ ★ ★ ★

Weight Capacity : 450 lbs
Metal Thickness : 1.5mm
Price :$$$



MegaBounce

★ ★ ★

Weight Capacity : 225 lbs
Metal Thickness : 1.5mm
Price :$$

Orbounder

★ ★ ★

Weight Capacity : 200 lbs
Metal Thickness : 1.2mm
Price :$

Jumpzone

★ ★ ★

Weight Capacity : 200 lbs
Metal Thickness : 1.2mm
Price :$

Jumpsport

★ ★ ★

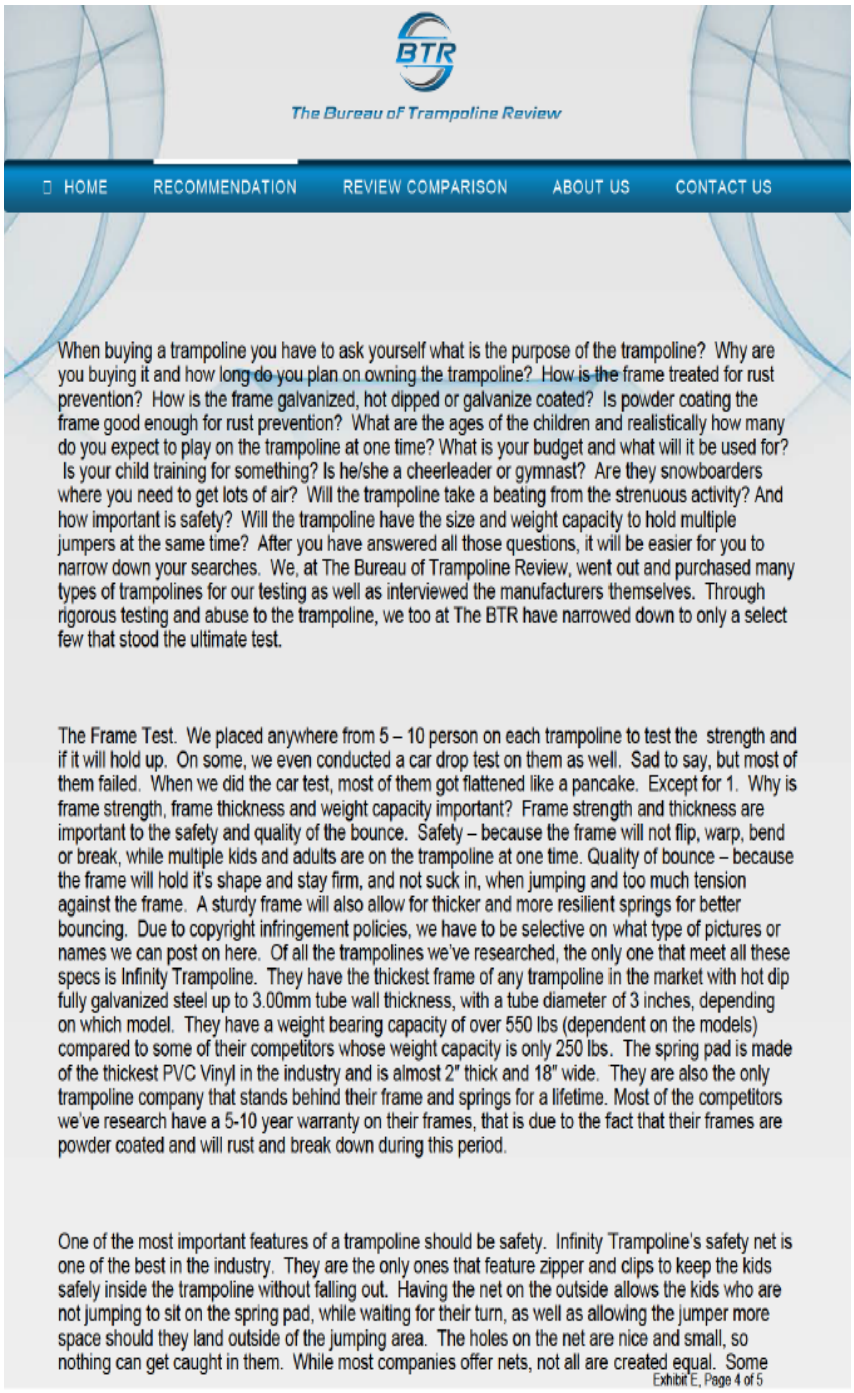
Weight Capacity : 240 lbs
Metal Thickness : 1.5mm
Price :$$$

Exhibit E, Page 2 of 5

Complaint

Exhibit E, Page 3 of 5

Complaint



The Bureau of Trampoline Review

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When buying a trampoline you have to ask yourself what is the purpose of the trampoline? Why are you buying it and how long do you plan on owning the trampoline? How is the frame treated for rust prevention? How is the frame galvanized, hot dipped or galvanize coated? Is powder coating the frame good enough for rust prevention? What are the ages of the children and realistically how many do you expect to play on the trampoline at one time? What is your budget and what will it be used for? Is your child training for something? Is he/she a cheerleader or gymnast? Are they snowboarders where you need to get lots of air? Will the trampoline take a beating from the strenuous activity? And how important is safety? Will the trampoline have the size and weight capacity to hold multiple jumpers at the same time? After you have answered all those questions, it will be easier for you to narrow down your searches. We, at The Bureau of Trampoline Review, went out and purchased many types of trampolines for our testing as well as interviewed the manufacturers themselves. Through rigorous testing and abuse to the trampoline, we too at The BTR have narrowed down to only a select few that stood the ultimate test.

The Frame Test. We placed anywhere from 5 – 10 person on each trampoline to test the strength and if it will hold up. On some, we even conducted a car drop test on them as well. Sad to say, but most of them failed. When we did the car test, most of them got flattened like a pancake. Except for 1. Why is frame strength, frame thickness and weight capacity important? Frame strength and thickness are important to the safety and quality of the bounce. Safety – because the frame will not flip, warp, bend or break, while multiple kids and adults are on the trampoline at one time. Quality of bounce – because the frame will hold it's shape and stay firm, and not suck in, when jumping and too much tension against the frame. A sturdy frame will also allow for thicker and more resilient springs for better bouncing. Due to copyright infringement policies, we have to be selective on what type of pictures or names we can post on here. Of all the trampolines we've researched, the only one that meet all these specs is Infinity Trampoline. They have the thickest frame of any trampoline in the market with hot dip fully galvanized steel up to 3.00mm tube wall thickness, with a tube diameter of 3 inches, depending on which model. They have a weight bearing capacity of over 550 lbs (dependent on the models) compared to some of their competitors whose weight capacity is only 250 lbs. The spring pad is made of the thickest PVC Vinyl in the industry and is almost 2" thick and 18" wide. They are also the only trampoline company that stands behind their frame and springs for a lifetime. Most of the competitors we've research have a 5-10 year warranty on their frames, that is due to the fact that their frames are powder coated and will rust and break down during this period.

One of the most important features of a trampoline should be safety. Infinity Trampoline's safety net is one of the best in the industry. They are the only ones that feature zipper and clips to keep the kids safely inside the trampoline without falling out. Having the net on the outside allows the kids who are not jumping to sit on the spring pad, while waiting for their turn, as well as allowing the jumper more space should they land outside of the jumping area. The holes on the net are nice and small, so nothing can get caught in them. While most companies offer nets, not all are created equal. Some

Exhibit E, Page 4 of 5

Complaint

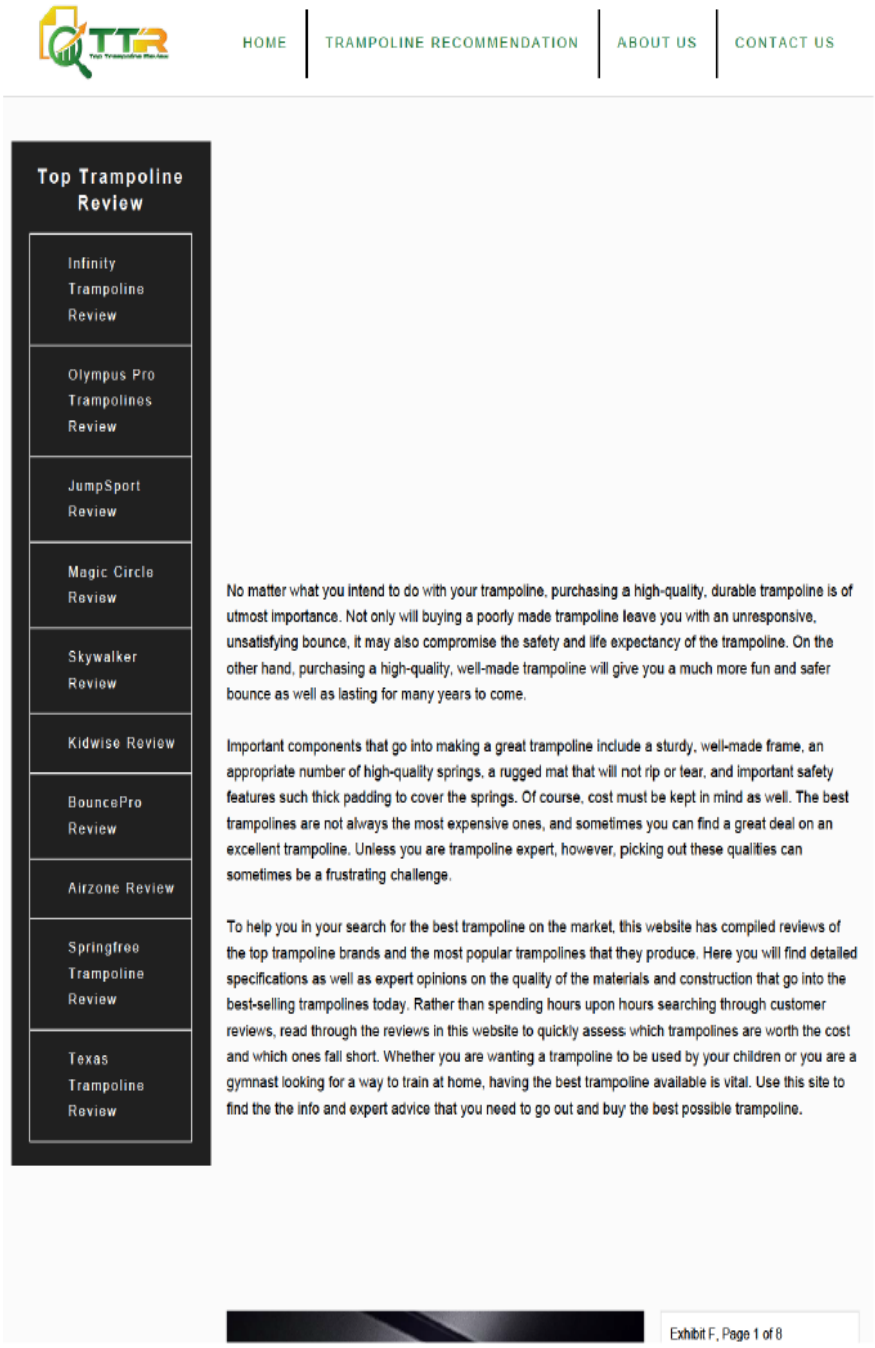
have holes in the net are over 2 inches wide and can easily catch kids' fingers causing a very dangerous situation. Others have overlays to enter the trampoline but have no zipper or clip to close the trampoline, making it very easy for small kids to accidentally fall off.

Attached, see the Volvo on top of the trampoline. (Courtesy of InfinityTrampolines.com)

Courtesy of Infinity Trampolines

Complaint

Exhibit F



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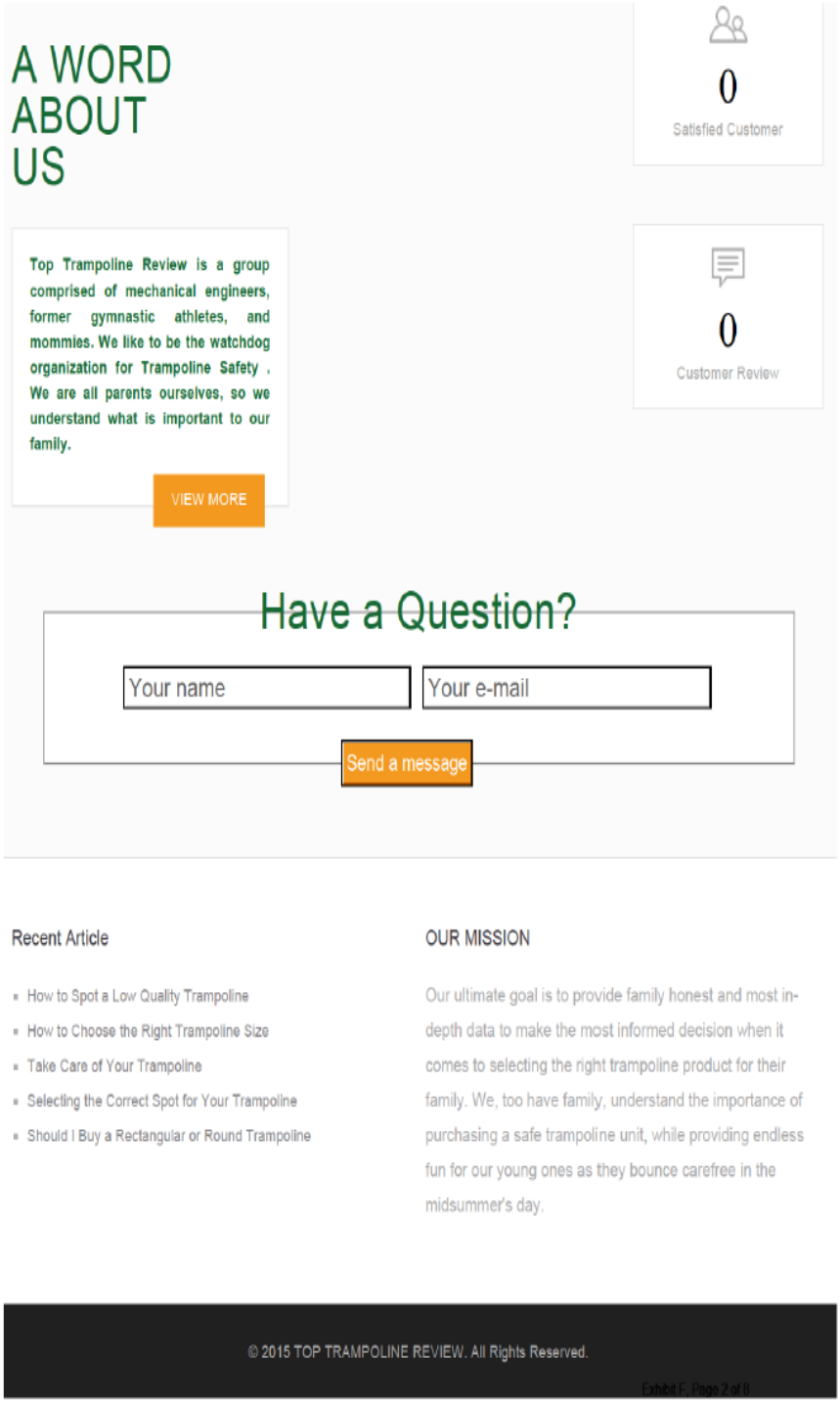
A WORD ABOUT US
0
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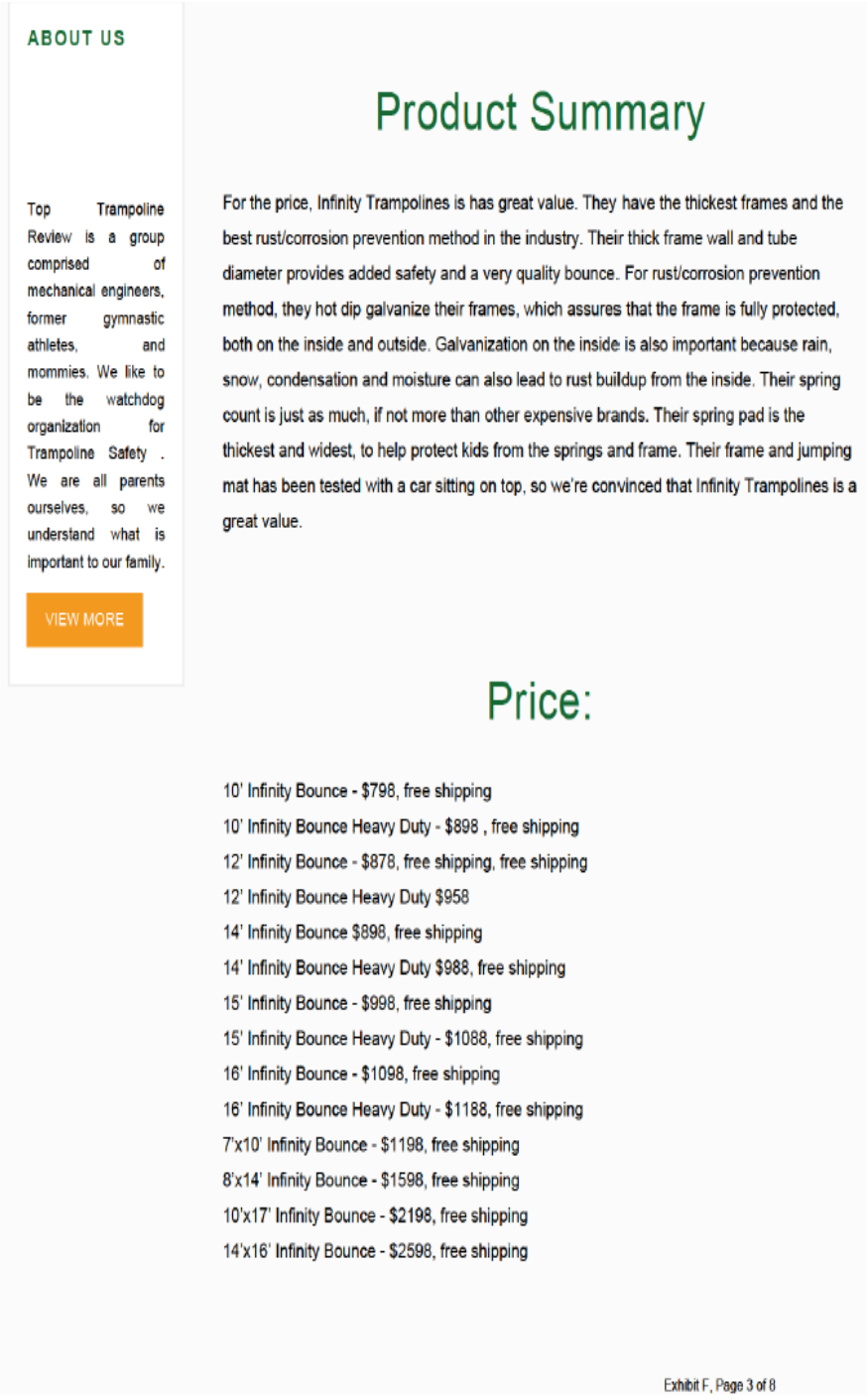

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Product Summary

For the price, Infinity Trampolines is has great value. They have the thickest frames and the best rust/corrosion prevention method in the industry. Their thick frame wall and tube diameter provides added safety and a very quality bounce. For rust/corrosion prevention method, they hot dip galvanize their frames, which assures that the frame is fully protected, both on the inside and outside. Galvanization on the inside is also important because rain, snow, condensation and moisture can also lead to rust buildup from the inside. Their spring count is just as much, if not more than other expensive brands. Their spring pad is the thickest and widest, to help protect kids from the springs and frame. Their frame and jumping mat has been tested with a car sitting on top, so we're convinced that Infinity Trampolines is a great value.

Price:

10' Infinity Bounce - $798, free shipping
10' Infinity Bounce Heavy Duty - $898 , free shipping
12' Infinity Bounce - $878, free shipping, free shipping
12' Infinity Bounce Heavy Duty $958
14' Infinity Bounce $898, free shipping
14' Infinity Bounce Heavy Duty $988, free shipping
15' Infinity Bounce - $998, free shipping
15' Infinity Bounce Heavy Duty - $1088, free shipping
16' Infinity Bounce - $1098, free shipping
16' Infinity Bounce Heavy Duty - $1188, free shipping
7'x10' Infinity Bounce - $1198, free shipping
8'x14' Infinity Bounce - $1598, free shipping
10'x17' Infinity Bounce - $2198, free shipping
14'x16' Infinity Bounce - $2598, free shipping

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Complaint

14' x 16' - 795 lbs

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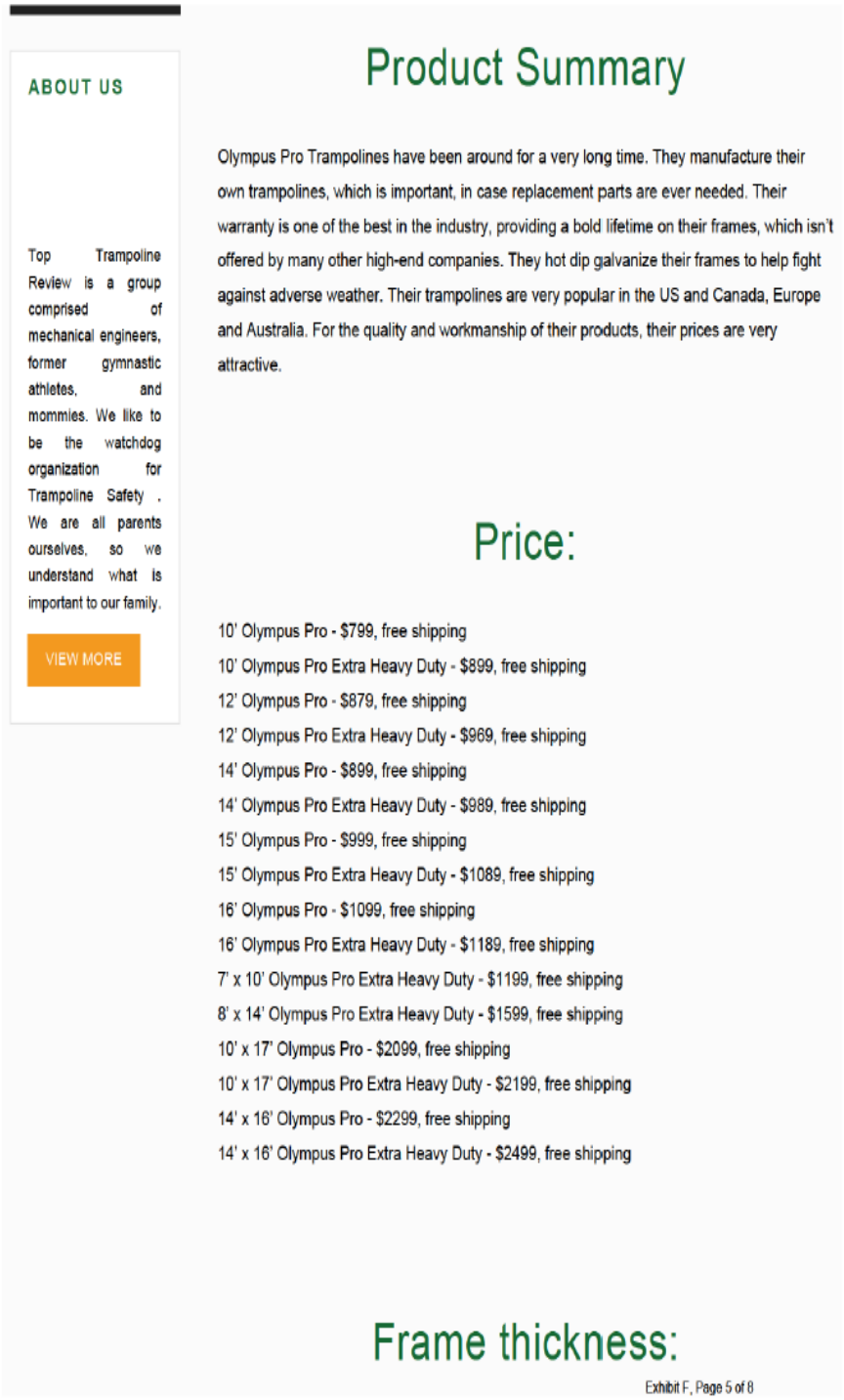

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Product Summary

Olympus Pro Trampolines have been around for a very long time. They manufacture their own trampolines, which is important, in case replacement parts are ever needed. Their warranty is one of the best in the industry, providing a bold lifetime on their frames, which isn't offered by many other high-end companies. They hot dip galvanize their frames to help fight against adverse weather. Their trampolines are very popular in the US and Canada, Europe and Australia. For the quality and workmanship of their products, their prices are very attractive.

Price:

10' Olympus Pro - $799, free shipping
10' Olympus Pro Extra Heavy Duty - $899, free shipping
12' Olympus Pro - $879, free shipping
12' Olympus Pro Extra Heavy Duty - $969, free shipping
14' Olympus Pro - $899, free shipping
14' Olympus Pro Extra Heavy Duty - $989, free shipping
15' Olympus Pro - $999, free shipping
15' Olympus Pro Extra Heavy Duty - $1089, free shipping
16' Olympus Pro - $1099, free shipping
16' Olympus Pro Extra Heavy Duty - $1189, free shipping
7' x 10' Olympus Pro Extra Heavy Duty - $1199, free shipping
8' x 14' Olympus Pro Extra Heavy Duty - $1599, free shipping
10' x 17' Olympus Pro - $2099, free shipping
10' x 17' Olympus Pro Extra Heavy Duty - $2199, free shipping
14' x 16' Olympus Pro - $2299, free shipping
14' x 16' Olympus Pro Extra Heavy Duty - $2499, free shipping

Frame thickness:

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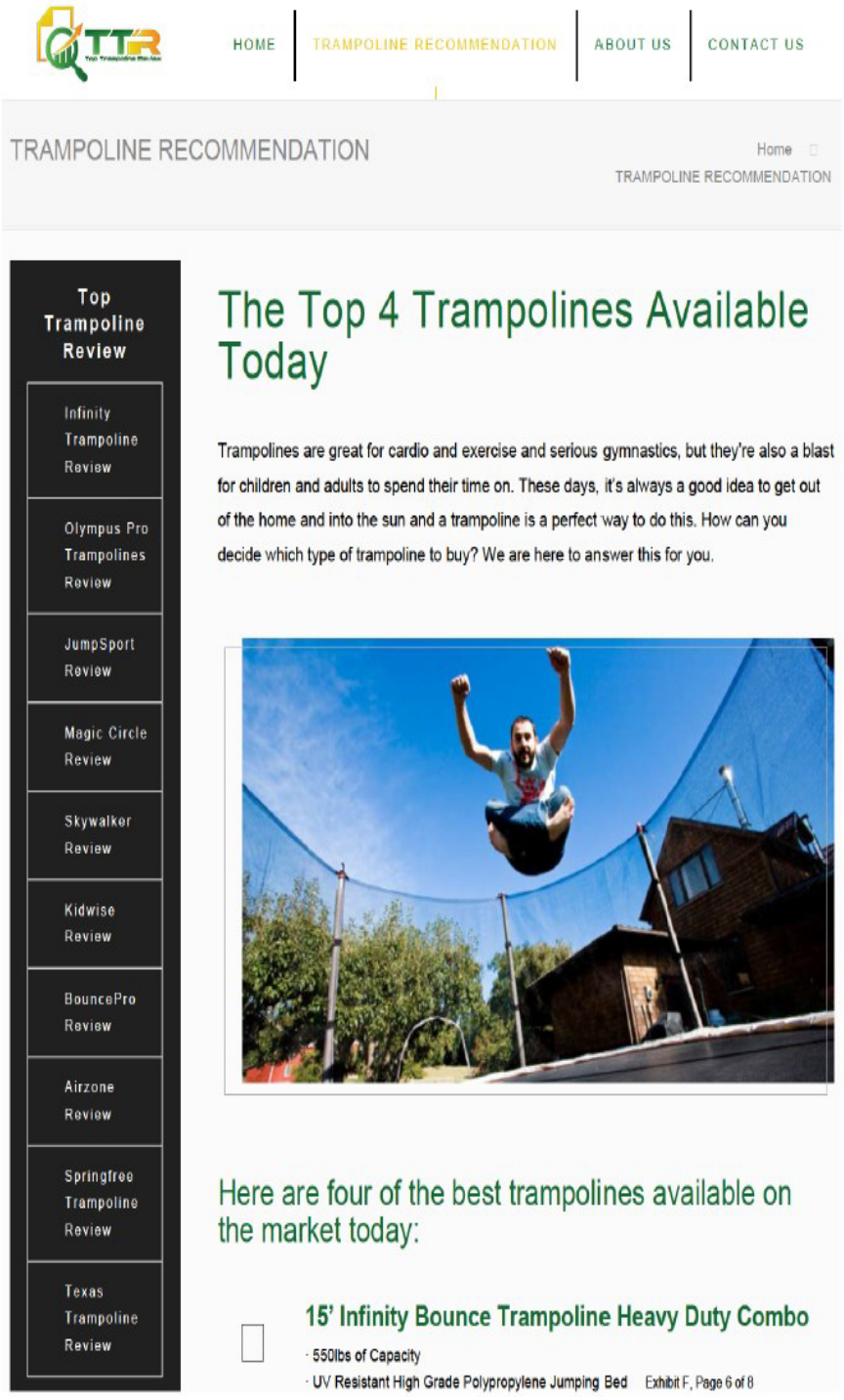
Complaint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JumpSport Review
Magic Circle Review
Skywalker Review
Kidwise Review
BouncePro Review
Airzone Review
Springfree Trampoline Review
Texas Trampoline Review
The Top 4 Trampolines Available Today
Trampolines are great for cardio and exercise and serious gymnastics, but they're also a blast for children and adults to spend their time on. These days, it's always a good idea to get out of the home and into the sun and a trampoline is a perfect way to do this. How can you decide which type of trampoline to buy? We are here to answer this for you.
Here are four of the best trampolines available on the market today:
15' Infinity Bounce Trampoline Heavy Duty Combo
· 550lbs of Capacity
· UV Resistant High Grade Polypropylene Jumping Bed
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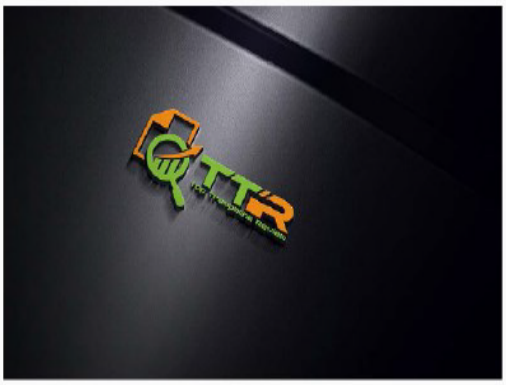

Technical Insight

We apologize, but we are not your ordinary review sites. Our languages are not about stating the obvious or rhetorical facts about how good a trampoline is, but rather we go the extra mile to give you the technical angle to the trampoline. The gauge thickness. The thrust. Why inside galvanization is

Complaint

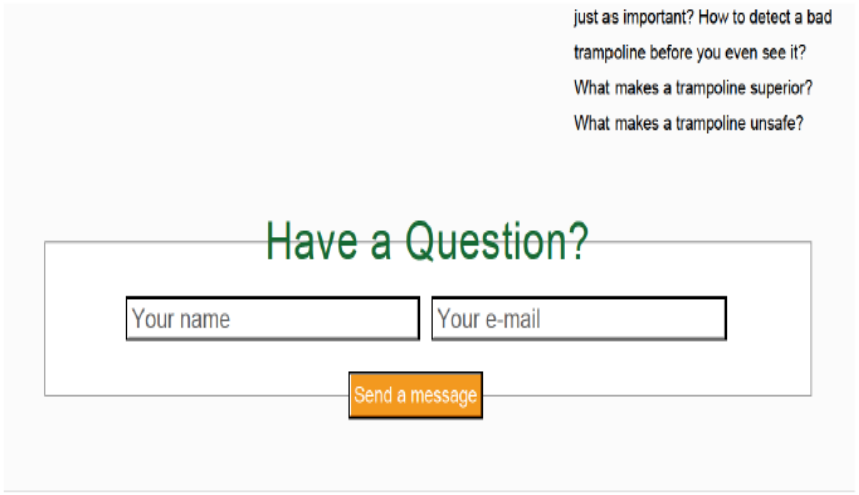

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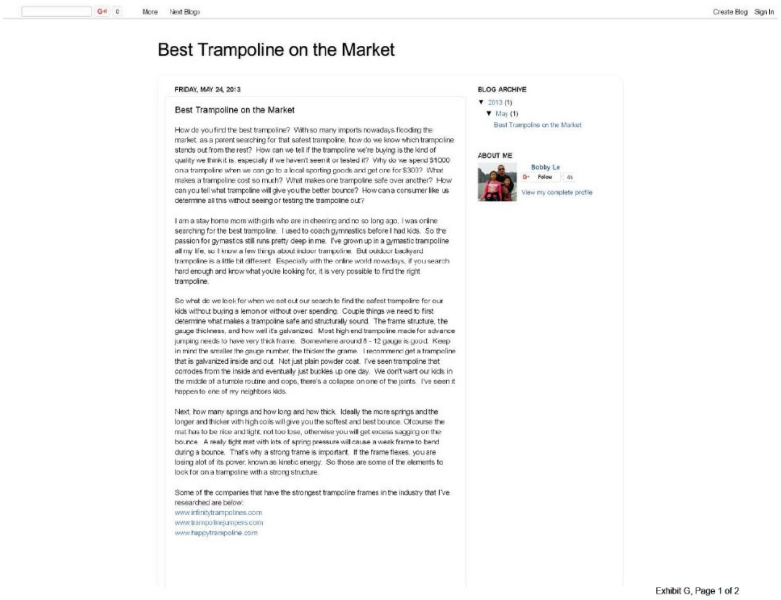
Exhibit G



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Best Trampoline on the Market

FRIDAY, MAY 24, 2013

Best Trampoline on the Market

How do you find the best trampoline? With so many imports nowadays flooding the market, as a parent searching for that safest trampoline, how do we know which trampoline stands out from the rest? How can we tell if the trampoline we're buying is the kind of quality we think it is, especially if we haven't seen it or tested it? Why do we spend $1000 on a trampoline when we can go to a local sporting goods and get one for $300? What makes a trampoline cost so much? What makes one trampoline safe over another? How can you tell what trampoline will give you the better bounce? How can a consumer like us determine all this without seeing or testing the trampoline out?

I am a stay home mom with girls who are in cheering and no so long ago, I was online searching for the best trampoline. I used to coach gymnastics before I had kids. So the passion for gymnastics still runs pretty deep in me. I've grown up in a gymnastic trampoline all my life, so I know a few things about indoor trampoline. But outdoor backyard trampoline is a little bit different. Especially with the online world nowadays, if you search hard enough and know what you're looking for, it is very possible to find the right trampoline.

So what do we look for when we set out our search to find the safest trampoline for our kids without buying a lemon or without over spending. Couple things we need to first determine what makes a trampoline safe and structurally sound. The frame structure, the gauge thickness, and how well it's galvanized. Most high end trampoline made for advance jumping needs to have very thick frame. Somewhere around 8 - 12 gauge is good. Keep in mind the smaller the gauge number, the thicker the grame. I recommend get a trampoline that is galvanized inside and out. Not just plain powder coat. I've seen trampoline that corrodes from the inside and eventually just buckles up one day. We don't want our kids in the middle of a tumble routine and oops, there's a collapse on one of the joints. I've seen it happen to one of my neighbors kids.

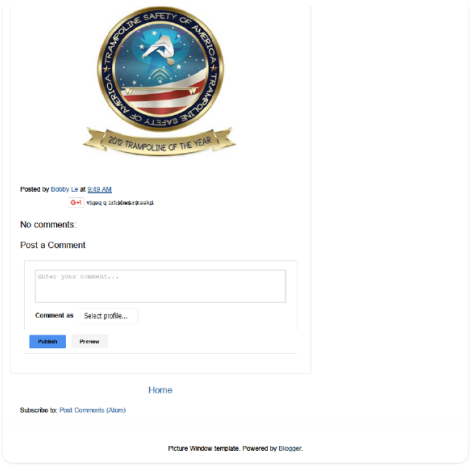
Next, how many springs and how long and how thick. Ideally the more springs and the longer and thicker with high coils will give you the softest and best bounce. Ofcourse the mat has to be nice and tight, not too lose, otherwise you will get excess sagging on the bounce. A really tight mat with lots of spring pressure will cause a weak frame to bend during a bounce. That's why a strong frame is important. If the frame flexes, you are losing alot of its power, known as kinetic energy. So those are some of the elements to look for on a trampoline with a strong structure.

Some of the companies that have the strongest trampoline frames in the industry that I've researched are below:
www.infinitytrampolines.com
www.trampolinesunlimited.com
www.happytrampoline.com

BLOG ARCHIVE
▼ 2013 (1)
▼ May (1)
Best Trampoline on the Market

ABOUT ME
Bobby Le
Follow 45
View my complete profile

Exhibit G, Page 1 of 2



Posted by Bobby Le at 8:53 AM

No comments:

Post a Comment

Enter your comment...

Comment as Select profile...

Publish Preview

Home

Subscribe to: Post Comments (Atom)

Picture Window template. Powered by Blogger.

Exhibit G, Page 2 of 2

Complaint

Exhibit H

0:00 / 1:23

The Volvo Challenge - Infinity Trampoline

Trampoline Superstore

Subscribe 1

1,563 views

Published on Nov 23, 2015
www.infinitytrampolines.com

Category Sports
License Standard YouTube License

SHOW LESS

COMMENTS • 3

Add a public comment...

Top comments

Bobby Le 6 months ago
I found this trampoline on the Bureau of trampoline review and this is the best trampoline that I've ever owned. I had the jumpsport recently and it is not as advertised. Within 2 yrs, the frame started rusting. This crap is definitely china made. Don't waste your money

Amit Prajapati 6 months ago
I can promote your Videos

ershad khan 6 months ago
I am ready to increase your customer traffic.

Up next Autoplay

High Flying Trampoline Flips (WK 224.7) | Bratayley
Bratayley
8,974,196 views

This Video Will Get Donald Trump Elected
Patrick Henry
Recommended for you

Best Trampoline Fails of 2016 | Funny Fail Compilation
The Best Fails
501,029 views

TRAMPOLINE ACCIDENT! STUNT GONE HORRIBLY WRONG!!!
JOOGSQUAD PPJT
1,945,430 views

TRAMPOLINE VS POOL OLYMPICS!!!
JOOGSQUAD PPJT
2,656,004 views NEW

HUGE TRAMPOLINE PARK, TRICKS AND FAILS!!!
JOOGSQUAD PPJT
367,666 views

Infinity Rectangle Trampoline Installation Video
Trampoline Superstore
149 views

TRAMPOLINE VS ROOF!!!
JOOGSQUAD PPJT
1,128,807 views NEW

INFINITE TRAMPOLINE in MCPE 0.15.0 - Slime Block Trampoline
JackFrostMiner
179,607 views

El Extraño Secreto de Carlos Villagrán (Quico del Chavo del 8)
gRUNgerOFICIAL
Recommended for you

COOLEST TRAMPOLINE PARK!
MoreJStu
716,616 views

Giant 6ft Water Balloon On Trampoline!
JOOGSQUAD PPJT
2,866,953 views

Funny Spring Loaded & Trampoline Fails Compilation || By FailArmy
FailArmy
8,194,769 views

Cadillac CTS-V Supercharged 800 hp: five girls reactions
Michael Berenis
Recommended for you

Infinity Trampoline Park!!
It's So Rhys
339 views

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondents named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondents a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondents with violation of the Federal Trade Commission Act.

Respondents and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondents that they neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, they admit the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure prescribed in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondents are:

    a. Respondent Son Le, also known as Sonny Le. He has done business as and, individually or in concert with others, has formulated, directed, or controlled the policies, acts, or practices of, Recreational Products, Trampoline Jumpers, Infinity Trampolines, Olympus Pro Trampolines, Happy Trampoline, Trampoline Safety of America,

Bureau of Trampoline Review, Top Trampoline Review, Trampoline Store, and Trampoline Superstore. His principal office or place of business is 1401 East Ball Road, #C, Anaheim, California 92805.

b. Respondent Bao Le, also known as Robert Le and Bobby Le. He has done business as and, individually or in concert with others, has formulated, directed, or controlled the policies, acts, or practices of, Recreational Products, Trampoline Jumpers, Infinity Trampolines, Olympus Pro Trampolines, Happy Trampoline, Trampoline Safety of America, Bureau of Trampoline Review, Top Trampoline Review, Trampoline Store, and Trampoline Superstore. His principal office or place of business is 1401 East Ball Road, #C, Anaheim, California 92805.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Clearly and conspicuously" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the

communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. On a product label, the disclosure must be presented on the principal display panel.

6. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.

7. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

8. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

9. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

B. "Close proximity" means that the disclosure is very near the triggering representation. For example, a disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering representation.

C. "Covered product" means any sports, recreational, or exercise equipment, including, but not limited to, Infinity, Olympus Pro, or other trampolines.

D. "Including" means including but not limited to.

E. "Respondents" means Son Le and Bao Le, individually or collectively.

Provisions

I. Prohibited Representations

IT IS ORDERED that Respondents, and Respondents' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product must not make any representation, expressly or by implication, including through the use of a product name, endorsement, depiction, illustration, trademark, or trade name:

A. That any reviewing entity is an independent organization or provides objective information about such product;

B. That any review of such product reflects the opinion of an impartial expert or an ordinary consumer;

C. About the existence, contents, validity, results, conclusions, or interpretations of any test, study, or other research, including that testing, studies, or other research prove the performance or safety of such product, or its superiority to a competing product; or

D. That such product is endorsed by an independent or third-party organization;

unless the representation is true and non-misleading.

II. Required Disclosures

IT IS FURTHER ORDERED that Respondents, and Respondents' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, sale, or distribution of any covered product must not make any representation, expressly or by implication, about any consumer, reviewer, or other endorser of such product or any competing product without disclosing, clearly and conspicuously, and in close proximity to that representation, any unexpected material connection between such consumer, reviewer, or endorser and (1) any Respondent, or (2) any other individual or entity affiliated with the product.

For purposes of this Provision, "unexpected material connection" means any relationship that might materially affect the weight or credibility of the testimonial or endorsement and that would not reasonably be expected by consumers, and includes, but is not limited to, the fact that Respondents sell the product being reviewed if such is the case, or that Respondents sell products that compete with the product being reviewed if such is the case.

III. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondents obtain acknowledgments of receipt of this Order:

A. Each Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 10 years after the issuance date of this Order, each Respondent for any business that such Respondent,

individually or collectively with any other Respondents, is the majority owner or controls directly or indirectly, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Respondent delivered a copy of this Order, that Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

IV. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondents make timely submissions to the Commission:

A. Sixty days after the issuance date of this Order, each Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Each Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (b) identify all of that Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Respondent (which Respondents must describe if they know or should know due to their own

involvement); (d) describe in detail whether and how that Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, each Respondent must (a) identify all telephone numbers and all physical, postal, email and Internet addresses, including all residences; (b) identify all business activities, including any business for which such Respondent performs services whether as an employee or otherwise and any entity in which such Respondent has any ownership interest; and (c) describe in detail such Respondent's involvement in each such business activity, including title, role, responsibilities, participation, authority, control, and any ownership.

B. Each Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Respondent must submit notice of any change in: (a) any designated point of contact; or (b) the structure of any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, each Respondent must submit notice of any change in: (a) name, including alias or fictitious name, or residence address; or (b) title or role in any business activity, including (i) any business for which such Respondent performs services whether as an employee or otherwise and

(ii) any entity in which such Respondent has any ownership interest and over which Respondents have direct or indirect control. For each such business activity, also identify its name, physical address, and any internet address.

C. Each Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Son Le.

V. Recordkeeping

IT IS FURTHER ORDERED that Respondents must create certain records for 10 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, each Respondent for any business that such Respondent, individually or collectively with any other Respondent, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold, the costs incurred in generating those revenues, and resulting net profit or loss.

B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Copies or records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. A copy of each unique advertisement or other marketing material making a representation subject to this Order;

E. For 5 years from the date of the last dissemination of any representation covered by this Order:

1. All materials that were relied upon in making the representation; and

2. All tests, studies, analysis, demonstrations, other research or other such evidence in Respondent's possession, custody, or control that contradicts, qualifies, or otherwise calls into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations;

F. For 5 years from the date received, copies of all subpoenas and other communications with law enforcement, if such communication relate to Respondents' compliance with this Order;

G. For 5 years from the date created or received, all records, whether prepared by or on behalf of Respondents, that demonstrate non-compliance or tend to show any lack of compliance by Respondents with this Order; and

H. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

VI. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondents' compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, each Respondent must submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with each Respondent. Respondents must permit representatives of the Commission to interview anyone affiliated with any Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondents or any individual or entity affiliated with Respondents, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on July 5, 2037, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 20 years;

B. This Order's application to any Respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

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

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order as to Son Le and Bao Le ("respondents").

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

This matter involves respondents' advertising for their Infinity and Olympus Pro brand trampolines. The complaint alleges that respondents violated Section 5(a) of the FTC Act by deceptively representing that purportedly independent ratings entities and ordinary consumers recommended their trampolines and by deceptively failing to disclose Bao Le's financial interest in the sale of respondents' trampolines in reviews he posted of those and other trampolines.

The order includes injunctive relief that prohibits these alleged violations and fences in similar and related violations. The order applies to any "covered product," which is defined as any sports, recreational, or exercise equipment, including, but not limited to, Infinity, Olympus Pro, or other trampolines.

Provision I prohibits, in connection with the sale of a covered product, any misrepresentation that a reviewing entity is an independent organization or provides objective information about such product, that any review of such product reflects the opinion of an impartial expert or an ordinary consumer, or that such product is endorsed by an independent or third-party organization. It also prohibits any misrepresentation about the existence, contents, validity, results, conclusions, or interpretations of any test, study, or other research.

Provision II prohibits respondents from making any representation about any consumer, reviewer, or other endorser without disclosing, clearly and conspicuously, and in close

proximity to that representation, any unexpected material connection between such consumer, reviewer, or endorser and (1) any respondent, or (2) any other individual or entity affiliated with the product. The order defines "clearly and conspicuously" as the term applies to the required disclosures.

Provisions III and IV require respondents to deliver a copy of the order to principals, officers, managers, and all employees, agents, and representatives who participate in conduct related to the subject matter of the order, and to obtain signed acknowledgments from those individuals; to file compliance reports with the Commission; and to notify the Commission of bankruptcy filings or changes in corporate structure that might affect compliance obligations.

Provision V contains recordkeeping requirements for accounting records, personnel records, consumer correspondence, advertising and marketing materials, and claim substantiation, as well as all records necessary to demonstrate compliance or non-compliance with the order.

Provision VI contains other requirements related to the Commission's monitoring of respondents' order compliance.

Provision VII provides the effective dates of the order, including that, with exceptions, the order will terminate in 20 years.

The purpose of this analysis is to facilitate public comment on the order, and it is not intended to constitute an official interpretation of the complaint or order, or to modify the order's terms in any way.

Complaint

IN THE MATTER OF

DRAFTKINGS, INC.
AND
FANDUEL LIMITED

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

Docket No. 9375; File No. 161 0174
Complaint, June 19, 2017 – Decision, July 14, 2017

This case addresses the merger to near monopoly of DraftKings Inc. and FanDuel Limited. The complaint alleges that this "merger of equals" would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the market for paid daily fantasy sports in the United States. The order dismisses the Complaint on the grounds that the Respondents terminated the proposed merger and withdrew the Hart-Scott-Rodino Notification and Report Forms that they filed.

Participants

For the *Commission*: *Charles Dickinson, Guia Dixon, Elisa Kantor, Matthew McDonald, David Owyang, Ryan Quillian, Sophia Vandergrift, Stelios Xenakis* and *Robert Zuver.*

For the *Respondents*: *Michael S. McFalls, Ropes & Gray LLP; Scott A. Sher, Wilson Sonsini Goodrich & Rosati; Jeff Tsai, Alston & Bird LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents DraftKings, Inc. ("DraftKings") and FanDuel Limited ("FanDuel") 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. DraftKings and FanDuel are the two dominant providers of daily fantasy sports ("DFS") in the United States. They propose to merge to near-monopoly in a market for paid DFS contests—that is, DFS contests that offer a prize. Respondents have competed ferociously in this market since 2012, when DraftKings entered to challenge FanDuel. Respondents compete to offer lower entry fees, larger contests, and a better selection of sports in an effort to win business away from each other. They closely monitor each other's prices, and try to lure away each other's most valuable customers. Competition between Respondents hit a fever pitch in 2015, when DraftKings and FanDuel each spent hundreds of millions of dollars on marketing to overtake each other in share of entry fees.

2. That competition has bestowed tremendous benefits on consumers, who enjoy the unique features that paid DFS offers. Users who want to play fantasy sports for prizes in short-duration contests today overwhelmingly look to DraftKings and FanDuel. Indeed, for users who want to play short-duration contests for large cash prizes, Respondents are essentially the only two options. As Respondents engage in this grueling battle against one another, they are still striving toward profitability, due largely to their significant investments in marketing and product innovations, as well as legal and regulatory issues that arose in certain states in 2015 and 2016. But Respondents' preferred solution is to merge to become a *de facto* monopolist, free of the competitive constraints that each firm has imposed on the other. Essentially, DraftKings and FanDuel assert that consumers will be better off with one paid DFS provider, rather than two.

3. This action reaffirms a core principle recognized by the U.S. Supreme Court in 1978, which is that antitrust "foreclose[s] the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote

trade and commerce than competition." *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 689 (1978). Here, the fact and benefits of competition are overwhelming. [redacted]

The proposed merger of DraftKings and FanDuel ("the Merger"), if consummated, would eliminate such vigorous price and non-price competition and the benefits it provides to DFS users, resulting in substantial consumer harm.

II.

BACKGROUND

A.

Jurisdiction

4. 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.

5. The Merger constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

B.

Respondents

6. Respondent DraftKings is a privately held Delaware corporation with headquarters in Boston, Massachusetts. In 2016, DraftKings earned [redacted] in revenue, the vast majority of which came from its DFS operations in the United States. Today, DraftKings is the country's largest DFS provider in terms of entry fees and revenues.

7. Respondent FanDuel is a private limited company organized under the laws of the United Kingdom with headquarters in Edinburgh, Scotland. FanDuel does business in the United States through its wholly owned subsidiary, FanDuel, Inc., which is incorporated in Delaware and headquartered in New York, New York. In 2016, FanDuel generated [redacted] in revenue, the vast majority of which came from its DFS operations in the United States. Today, FanDuel is the country's second-largest DFS provider in terms of entry fees and revenues.

C.

The Merger

8. On November 17, 2016, DraftKings and FanDuel entered into a Transaction Agreement (the "Merger Agreement"), pursuant to which DraftKings and FanDuel would each become a wholly owned subsidiary of a holding company. Due to the Respondents' similar size, revenue, and valuation, they have described the transaction as a "merger of equals." [redacted]

III.

DFS INDUSTRY BACKGROUND

9. Fantasy sports involve contests in which users assemble lineups of athletes currently playing in a given professional sports league—such as the National Football League ("NFL"), Major League Baseball ("MLB"), the National Basketball Association ("NBA"), or the National Hockey League ("NHL")—in order to compete with other users. Each fantasy lineup's performance depends directly on the real-life performance of the chosen athletes, with each athlete earning fantasy points according to a predetermined scoring system tied to objectively measurable statistical achievements (e.g., for NFL contests: passing yards, rushing yards, touchdowns, sacks, interceptions). Users with the best performing lineups in the contest win.

10. Fantasy sports include at least two distinct products: DFS and season-long fantasy sports ("SLFS"). DFS and SLFS provide drastically different user experiences and customers play them for different reasons. SLFS contests are limited to a relatively small number of users (typically between 10 and 20) and run over the course of an entire sports season (typically six months or more). Most SLFS contests do not require payment of an entry fee to the provider and do not offer any material prizes from the provider. Importantly, SLFS often serves as a vehicle for social interaction among friends, family members, or colleagues. By contrast, DFS's features are distinctly different and users' primary motivation for playing DFS is distinctly different.

11. As their name reflects, DFS contests are short-duration, lasting from one day to one week, depending on the sport.

12. In the vast majority of DFS contests, including in all contests offered by DraftKings and FanDuel, users create their lineups through a "salary cap" draft. Under the salary-cap drafting method, all users in a contest have the same imaginary budget with which to "buy" athletes for their lineups. The DFS provider assigns each available athlete an imaginary "salary" based on the athlete's projected performance, with more-promising athletes receiving higher salaries. Users may spend their budget on any athletes they want.

13. Athlete selections in DFS contests are not exclusive; in other words, the same athlete can appear on any or even all users' lineups in the same contest. As a result, the maximum number of users who can participate in a single DFS contest is almost limitless (although in practice DFS providers cap the number of users who may participate, as well as the number of lineups a user may submit, in a given contest).

14. After users select their lineups, a DFS contest begins when the first real-life sporting event on which the contest is based commences. For example, a weeklong NFL DFS contest begins when the first NFL game of the week begins. Users earn fantasy points based on the real-life statistical performance of the athletes in their lineup. The aggregate number of fantasy points generated by the athletes in each lineup determines that lineup's ranking in the contest. Based on this ranking and the rules of the contest,

DFS providers identify winning lineups and award prizes to users who entered winning lineups.

15. DFS providers offer contests at a wide range of sizes, from "head-to-head" contests involving only two users to large "tournament" contests with tens of thousands of entrants. DraftKings and FanDuel regularly offer contests that include 50,000 or more entries.

16. Most DFS contests require users to pay an entry fee for each lineup submitted and involve the potential for cash prizes. DFS providers, including Respondents, generate revenue from each contest by retaining a portion of the entry fees as their commission (or "rake"). The commission is the price that DFS providers charge their users to play DFS contests. The remaining portion of users' entry fees funds the contest's prize pool, which the provider ultimately pays to the contest's winners.

17. By law, DFS providers must disclose a contest's entry fee and total prize pool to all potential users. Most DFS providers, including DraftKings and FanDuel, also disclose the maximum number of entries allowed, the number of lineups already submitted, and the contest's payout structure (i.e., how many lineups win and how much each winning lineup earns in prizes). From this information, users can calculate a contest's target commission rate by multiplying the entry fee by the maximum number of lineups allowed to get total entry fees, subtracting the prize pool, and dividing the remainder by total entry fees. For example, in a contest with a $1 entry fee, a maximum of 110 lineups, and a $100 prize pool, the target commission rate is slightly greater than 9% (i.e., a $10 commission divided by total entry fees of $110 is 9.09%).

18. DFS providers can adjust at least three contest attributes—the size of the prize pool, the entry fee amount, and the maximum number of entries—to change a contest's commission rate. Holding everything else constant, reducing the size of the prize pool, increasing the entry fee amount, or raising the number of entries each independently increases the commission rate.

19. Many DFS contests feature a guaranteed prize pool ("GPP"). Contests with GPPs are guaranteed to pay out the

specified prize pool regardless of how many lineups enter. Even if a GPP contest does not fill—that is, does not attract the maximum number of entries—the provider nevertheless must pay out the guaranteed prize amounts, thereby reducing the provider's commission. Thus, a GPP contest that does not fill benefits users by reducing the effective commission rate for that contest. If the number of entries falls so far short that the total entry fees collected are less than the guaranteed prize amounts, the provider must cover the shortfall out of its own pocket, thereby running the contest at a loss. The cost of covering this shortfall is known in the industry as "overlay." DFS providers have sometimes offered GPP contests that they do not expect to fill, as a way to attract users.

20. By contrast, if a *non*-GPP DFS contest does not fill (i.e., does not take in the maximum number of allowed entries), it can be canceled, in which case the provider would refund users any entry fees already paid.

21. DraftKings and FanDuel recognize two general categories of DFS users: professional and casual. DraftKings uses the term "VIP" to refer to its professional users, while FanDuel uses the term "HVP," which stands for "high-value player." Professional users tend to participate in many contests, submit high volumes of entries, and win a meaningful amount of prizes. Professional users represent a small fraction of DFS customers but generate approximately half of Respondents' combined entry fees. By contrast, casual users tend to play DFS less often, submit fewer entries, and lose their entry fees at a higher rate.

IV.

RELEVANT MARKET

22. The provision of paid DFS in the United States constitutes a relevant market for evaluating the effects of the Merger.

A.

Relevant Product Market

23. Paid DFS constitutes a distinct relevant product market. As described more fully below, paid DFS contests are fantasy sports contests of short duration (typically one day to one week) in which the contest provider awards a prize of value (cash, experiential, in-kind, or otherwise) to the winner(s).

24. Paid DFS may be evaluated as the provision of paid DFS contests through an online platform.

25. Paid DFS may also be evaluated as the cluster of paid DFS contests for sports that both Respondents provide and for which competitive conditions are substantially similar.

26. Paid DFS constitutes a relevant market because Respondents compete to provide paid DFS contests, other potential alternatives are not sufficiently substitutable for paid DFS, and industry participants, including Respondents, recognize a market for paid DFS that is distinct from SLFS and other potential alternatives.

27. Crucially, other potential alternatives, including SLFS contests, are not sufficiently substitutable to belong in a paid DFS relevant product market.

28. Indeed, because paid DFS and SLFS contests provide fundamentally different experiences, users play them for different reasons.

Key Distinctions Between DFS and SLFS

29. There are several key distinctions between DFS (hereinafter, "DFS" refers to paid DFS unless otherwise specified) and SLFS, including:

Contest Duration

30. DFS contests run for one day or, at most, one week, while SLFS contests generally run for the duration of a sports league's

regular season (usually several months). As a result, DFS contests offer immediate fulfillment to their users, who need not wait until the end of a season to learn a contest's outcome. Respondents themselves market the fact that DFS, unlike SLFS, provides "instant gratification."

31. The shorter timeframe of contests gives DFS a faster pace with more condensed action compared to SLFS. In the words of FanDuel's Chief Marketing Officer, DFS offers "more winners, more excitement, more energy" than SLFS. The shorter duration of DFS contests also means that users can begin play on almost any day of the year, unlike SLFS, in which users generally can start to play only at the beginning of a sports season. Given these differences, DFS users tend to be motivated more by instant gratification than SLFS users.

Financial Component and Player Motivation

32. The chance to win money—potentially even large, "life-changing" amounts—is a primary reason users play DFS. Nearly all DFS contests require an entry fee paid to the DFS provider, and the DFS provider pays cash prizes to winning contest users, while most SLFS providers do not collect entry fees or pay prizes to winners. Consequently, SLFS participants play primarily for social reasons and because SLFS allows them to keep in touch with friends or coworkers by engaging in friendly competition. Some SLFS providers may offer promotional contests that involve prizes even though they are free to enter, while other providers offer paid SLFS contests where winners receive material prizes, usually money, funded by the entry fees paid by contest participants—but these represent a small minority of SLFS contests. SLFS contests with cash prizes typically offer much smaller prize pools for a given entry-fee amount (i.e., a materially smaller prize-to-entry-fee ratio than DFS contests) because of the limit on the number of users that may participate due to athlete exclusivity.

Lineup Drafting and Athlete Exclusivity

33. Another key difference between DFS and SLFS is athlete exclusivity, which leads to differences in maximum contest size and in the drafting process used to select athletes at the beginning

of each contest. In DFS contests, athlete selections usually are not exclusive, which means that they can theoretically accommodate unlimited entries. Indeed, in practice, DFS contests often have thousands, or tens of thousands, of entries. By contrast, in SLFS contests, each athlete typically can appear on only one user's team at a time. Accordingly, each SLFS participant's athlete selection shrinks the pool of athletes available to other participants in the draft. As a result, an SLFS league has a practical limit on how many participants may play in it—usually no more than 10 to 20, depending on the sport.

34. Because of athlete exclusivity, SLFS leagues typically use an interactive "snake" or "auction" draft system, in order to make sure that no athlete is selected by more than one participant. SLFS participants generally must schedule their draft for a date and time on which all (or most) of the league's participants are available. DFS contests, by contrast, usually do not involve athlete exclusivity, so athlete selection for a DFS contest is typically done via a salary cap draft—an individualized, and largely non-social, process that a user can engage in at any time prior to start of the contest without regard to when other users draft their lineups.

DFS As A Distinct Relevant Market

35. Respondents recognize DFS as distinct from other markets. [redacted] Other DFS providers also evaluate competition within the DFS market and generally do not view SLFS providers as competitors.

36. Likewise, SLFS providers do not view their products as substitutes for DFS. In their marketing, SLFS providers generally do not target DFS users specifically. This further demonstrates that, given the important differences between DFS and SLFS, most DFS users are not likely to turn to SLFS as a substitute product in response to a small but significant price increase. As a result, SLFS contests are not part of the relevant market.

37. Additionally, unpaid DFS contests—DFS contests in which there is no prize (cash, experiential, in-kind, or otherwise) available to contest winners—meaningfully differ from paid DFS contests. Although DFS providers may sometimes offer unpaid DFS contests as a promotion to try to attract users to its paid DFS contests, unpaid DFS contests make up a tiny fraction of all DFS contests, and users who play paid DFS do not view unpaid contests as a substitute for paid DFS. As a result, unpaid DFS contests are not part of the relevant market.

38. Although some DFS users also play SLFS, too few DFS users would switch to SLFS or any other potential substitute to render unprofitable a small but significant non-transitory increase in price ("SSNIP") on DFS contests. [redacted] DFS users did not respond by substituting SLFS (or any other activity) for DFS in substantial numbers. Respondents observed no meaningful decrease in demand for these contests, and their revenue increased as a result.

B.

Relevant Geographic Market

39. The relevant geographic market is no broader than the United States.

40. DFS providers must satisfy regulations promulgated by certain individual states in order to market contests in those states.

41. DFS providers generally do not offer state-specific contests; rather, users from all states in which the provider does business compete against one another, and contest rules are the same across all states, conforming to the requirements of the most stringent state that allows DFS. Commission rates charged by Respondents and other DFS providers do not vary by state.

42. Respondents themselves recognize a national market. They analyze their performance, and compare it to each other's, on a national basis.

43. The relevant geographic market includes all competitors, wherever they reside, that provide a relevant product to customers in the United States.

V.

MARKET STRUCTURE AND THE MERGER'S PRESUMPTIVE ILLEGALITY

44. DraftKings and FanDuel are by far the two largest providers of DFS contests in the United States.

45. [redacted]

46. The 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines") and courts typically measure concentration using the Herfindahl-Hirschman Index ("HHI"). The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. Under the Merger Guidelines, a merger is presumed likely to create or enhance market power—and is presumptively illegal—when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points.

47. The DFS market is already highly concentrated, and Respondents capture the vast majority of entry fees in DFS contests. The Merger would make the market substantially more concentrated than it is today. Post-Merger, the combined DraftKings/FanDuel would command more than 90% of the relevant market as measured by entry fees. That means the

Merger would result in a post-Merger HHI of at least 8,100 and an increase in concentration much greater than 200 points. Thus, the Merger would produce concentration levels well beyond what is necessary to establish a presumption of competitive harm.

48. The Merger is presumptively unlawful under relevant case law and the Merger Guidelines.

VI.

ANTICOMPETITIVE EFFECTS:

The Merger Would Eliminate Vital Head-to-Head Competition Between DraftKings and FanDuel

49. Respondents are each other's most significant competitor—and likely each other's only meaningful competitor. They are the two largest DFS providers in the United States. DraftKings and FanDuel are more similar to each other than to any other DFS provider, whether measured by number of active users, total entry fees, revenues, size of prize pools, or variety of contest sizes and types. Respondents are much larger than any other competitor on each of these metrics.

50. Respondents acknowledge that they are each other's most significant competitors. [redacted] Likewise, FanDuel views DraftKings as its "most significant competitor today."

51. Reflecting how closely and significantly they compete, Respondents are the first and second DFS choices for most users. Many users maintain accounts on both Respondents' sites, allocating their play between the sites based on price and quality factors. [redacted]

52. Throughout their history, Respondents have competed aggressively against each other on price and non-price factors to win and retain users. FanDuel entered the DFS market in 2009.

DraftKings did not enter until 2012, but it spent heavily on marketing, product innovation, and large prize pools in an effort to catch and surpass FanDuel. FanDuel responded to DraftKings' challenge by increasing its marketing spend, improving its product, and increasing the size of its prize pools.

53. Competition between Respondents intensified in 2014 and 2015, pushing DraftKings and FanDuel to spend hundreds of millions of dollars on advertising, offer increasingly large prize pools, and invest in product innovation. [redacted] This fierce competition led to tremendous market growth in 2015—the DFS market approximately tripled from 2014 to 2015, as measured by entry fees.

54. Beginning in 2016, the DFS industry's growth slowed, due, in part, to legal and regulatory challenges. Despite the slowdown in growth, however, DraftKings and FanDuel continued to track each other's performance and to compete vigorously against each other on price and quality terms. [redacted]

55. The Merger is likely to have anticompetitive effects on price, in the form of higher commission rates and lower promotional offers than would exist absent the merger.

56. The anticompetitive price effects caused by the Merger may affect users to differing degrees. For example, the merged firm could raise commissions only on certain types of contests, or certain entry fee levels, typically played by certain types of customers. Or it could raise commissions across the board, but offset the price increase for some customers—professional users, for example—by providing retention incentives directly to them. Accordingly, the anticompetitive price effects of the Merger may not necessarily affect all consumers with equal force.

57. The Merger is also likely to have anticompetitive effects on numerous non-price factors. The Merger is likely to lead to

reduced product quality, including contest size and platform features, and reduced innovation, including the development of new contest types and contests for additional sports.

Price Competition

58. Respondents compete aggressively on price, [redacted] In these ways, Respondents serve as the primary constraint on each other's prices.

59. This head-to-head price competition has existed for years and is ongoing. The following are but a few recent examples showing that Respondents (sometimes referred to as DK and FD) continue to compete vigorously on price and to constrain each other's commission rates:

a. [redacted]

b. In February 2016, [redacted]

c. [redacted]

[redacted]

d. [redacted]

60. As these examples show, the Merger would eliminate a significant constraint on Respondents' ability to increase commission rates. [redacted] Thus, there is no other firm that constrains Respondents' prices today and no firm that could constrain the prices of a merged DraftKings/FanDuel.

61. Competition between Respondents also has led to reductions in commission rates. For example, in July 2014, [redacted]

62. Respondents also compete on price by providing discounts to users. Both Respondents offer cash bonuses to new and returning users to acquire and retain these users' business. These acquisition and retention bonuses reduce the effective prices that users pay to enter contests.

63. DraftKings and FanDuel attempt to match or beat each other's acquisition and retention bonuses with the goal of attracting users (particularly professional users) away from each other. For example:

a. [redacted]

b. [redacted]

c. [redacted]

d. [redacted]

64. While both Respondents reduced their spending on acquisition and retention bonuses in 2016, the aggressive price

competition between Respondents continued. [redacted]

65. [redacted]

Thus, the Merger would eliminate the uniquely intense head-to-head price competition between Respondents, and the post-Merger company—which would be substantially larger than each Respondent is today—likely would not feel the same pressure to compete aggressively on price, including commission rates, discounts, and bonuses. This reduction in competition would likely result in users paying higher prices than they would absent the Merger.

Non-Price Competition

66. DraftKings and FanDuel also compete aggressively on non-price terms, including the size of their GPPs, new product features, and the variety of sports and contest formats they offer. [redacted] No other firm provides—or would provide post-Merger—Respondents with a similar incentive to compete on non-price terms. As a result, the post-Merger firm would have significantly less incentive to maintain and to improve the quality of its contest offerings and user experience.

GPP and Contest Size Competition

67. Contest size is an aspect of quality. All else equal, users generally prefer to play contests with larger prize pools, and Respondents use large GPPs to attract and retain customers. As the size of a GPP increases, however, the DFS provider's risk of incurring overlay also increases. Customers benefit from contests

that incur overlay because the contest's actual commission rate will be lower than the target commission rate; in other words, the contest will have a lower effective price.

68. [redacted]

For example:

a. [redacted]

b. [redacted]

c. On August 24, 2015, [redacted]

d. [redacted]

69. Respondents each engaged in a variety of cost-cutting efforts in 2016, including large reductions in their marketing and promotional expenditures, but Respondents' vigorous head-to-

head competition to offer larger contests continued throughout 2016 and into 2017. Examples include the following:

a. On April 8, 2016, FanDuel's Product Operations Director wrote: [redacted]

b. On October 17, 2016, FanDuel's Chief Financial Officer explained to FanDuel's CEO and others that he expected [redacted]

c. [redacted]

d. [redacted]

70. [redacted] The

Merger would eliminate this intense and pervasive head-to-head competition on contest size.

71. No other DFS provider consistently offers GPP contests that approach the size of either Respondent's largest prize pools, and [redacted] Absent such competition from each other or another meaningful competitor, the combined firm would have less of an incentive to offer larger contests or to offer as many GPP contests given the risk of incurring overlay. This would likely lead to smaller contests or fewer GPPs with little risk of overlay, resulting in a reduction in quality as well as higher effective commission rates.

Product Features Competition

72. DraftKings and FanDuel also compete fiercely to offer a broad variety of products and product features. Respondents develop new products and features to differentiate themselves from each other and to attract and retain customers.

73. Respondents regularly monitor each other's new product features. [redacted] Ultimately, Respondents prioritize developing and improving specific product features to increase and maintain their respective market shares.

74. [redacted] and no other provider offers a comparable range and quality of product features. Thus, the Merger would eliminate important competition on product features among DFS providers that benefits users, and the post-Merger company would have reduced incentive to innovate.

Sports and Contest Format Competition

75. DraftKings and FanDuel also compete to offer a broad variety of sports and contest formats.

76. Respondents consider the breadth of their sports offerings and contest formats as significant competitive differentiators. Offering multiple sports is competitively advantageous because it creates opportunities to increase wallet share and market share, as customers can enter contests in more than one sport on a single platform. Offering contests in new sports also allows Respondents to compete against each other to attract new users, to encourage existing users to spend more time and money on their sites, and to keep users playing after a given sport's season ends.

77. Respondents compete to introduce sports and contest formats as a way to maintain and increase their market share. And, they closely monitor each other's sports and contest format offerings. For example, in 2015, DraftKings introduced contests based on college football as a direct competitive response to FanDuel (although neither company offers contests based on college sports today due to NCAA concerns). Additionally, after learning that FanDuel introduced a new "head-to-head" contest format, [redacted] The merger would eliminate this head-to-head competition between Respondents to offer new sports and contest formats.

VII.

LACK OF COUNTERVAILING FACTORS

A.

Barriers to Entry and Expansion

78. Respondents cannot demonstrate that new entry or expansion by existing firms would be timely, likely, and sufficient to offset the anticompetitive effects of the Merger.

79. A firm seeking to enter or expand in the market for the provision of DFS contests in the United States would face significant barriers. The largest obstacle, among many, is the difficulty and cost of acquiring a critical mass of DFS users on a provider's platform. A would-be entrant, or an existing DFS platform looking to expand, faces significant challenges in convincing DFS users to play on its platform rather than the much larger, more-established platforms offered by Respondents. Entry into the DFS market also requires significant investments in information technology infrastructure and software product development.

80. A firm considering entry into the DFS market would also face concerns about the likely size of the addressable market, regulatory compliance costs, and a considerable degree of regulatory uncertainty.

81. Facing these and other impediments to entry, several large, sophisticated, well-capitalized technology or sports media companies have either considered and rejected plans to enter the DFS market, or attempted to enter with little or no success.

B.

Efficiencies

82. Respondents cannot demonstrate cognizable efficiencies that rebut the strong presumption and evidence that the Merger likely would substantially lessen competition in the relevant market.

C.

Failing Firm

83. Neither Respondent is a failing firm. Respondents are not profitable today, but they are relatively young companies, and each of them is striving toward profitability. [redacted] and will continue to compete in the DFS market indefinitely.

VIII.

VIOLATION

COUNT I—ILLEGAL AGREEMENT

84. The allegations of Paragraphs 1 through 83 above are incorporated by reference as though fully set forth.

85. 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

86. The allegations of Paragraphs 1 through 83 above are incorporated by reference as though fully set forth.

87. The Merger, if consummated, may substantially lessen competition in the relevant market or tend to create a monopoly 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-first day of November, 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 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the 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 market, with the ability to offer such products and services as DraftKings and FanDuel were offering and planning to offer prior to the Merger.

2. A prohibition against any transaction between DraftKings and FanDuel that combines their businesses in the relevant market, except as may be approved by the Commission.

3. A requirement that, for a period of time, DraftKings and FanDuel provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market 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 DraftKings and FanDuel as viable, independent competitors in the relevant market.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this nineteenth day of June, 2017.

By the Commission.

ORDER DISMISSING COMPLAINT

On June 19, 2017, the Commission issued an administrative Complaint alleging that Respondents DraftKings, Inc. and FanDuel Limited had executed a merger agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and that if the merger were consummated, it would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act. Complaint Counsel and Respondents now jointly seek dismissal of the Complaint, on the grounds that the Respondents have terminated the proposed merger of DraftKings and FanDuel and have withdrawn the Hart-Scott-Rodino Notification and Report Forms that they filed for this proposed merger.[1]

The Commission has determined to dismiss the Complaint without prejudice, in light of Respondents' decision to abandon the proposed transaction and their withdrawal of their respective Hart-Scott-Rodino Notification and Report Forms. Respondents would not be able to effectuate the proposed transaction without filing new Hart-Scott-Rodino Notification and Report Forms. The most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint therefore have been accomplished without the need for further administrative litigation.[2]

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

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1 *See* Joint Motion to Dismiss Complaint (filed July 13, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/d09375motiondismisscomplaint.pdf.

2 *See, e.g.*, *In the Matter of Advocate Health Care Network, Advocate Health and Hospitals Corporation, and NorthShore University HealthSystem, Docket No. 9369*, Order Dismissing Complaint (Mar. 20, 2017); *In the Matter of The Penn State Hershey Medical Center and PinnacleHealth System, Docket No. 9368,* Order Dismissing Complaint (Oct. 23, 2016); *In the Matter of Superior Plus Corp. and Canexus Corporation, Docket No. 9371*, Order Dismissing Complaint (Aug. 2, 2016); *In the Matter of Staples Inc. and Office Depot, Inc.*, *Docket No. 9367*, Order Dismissing Complaint (May 18, 2016).

IT IS ORDERED THAT the Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

Complaint

IN THE MATTER OF

THE SHERWIN-WILLIAMS COMPANY
AND
THE VALSPAR CORPORATION

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

Docket No. C-4621; File No. 161 0116
Complaint, July 27, 2017 – Decision, July 27, 2017

This consent order addresses the $11.3 billion acquisition by The Sherwin-Williams Company of The Valspar Corporation. The complaint alleges that the acquisition, if consummated, may substantially lessen competition in the market for the manufacture and sale of industrial wood coatings in North America in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. Under the order, Sherwin-Williams must divest Valspar's North America Industrial Wood Coatings Business to Axalta Coating Systems Ltd. or another buyer approved by the Commission.

Participants

For the *Commission*: *James Abell, Steve Dahm, Amy Dobrzynski, Jessica Drake, Peggy Femenella, Joonsuk Lee,* and *Monica M.C. van Panhuys.*

For the *Respondents*: *Megan Granger* and *Steven Newborn, Weil Gotshal & Manges LLP; Michael Byowitz* and *Christina Ma, Wachtell Lipton & Katz 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 The Sherwin-Williams Company ("Sherwin-Williams"), a corporation subject to the jurisdiction of the Commission, agreed to acquire Respondent The Valspar Corporation ("Valspar"), 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 Sherwin-Williams is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio with its headquarters and principal place of business located at 101 West Prospect Avenue, Cleveland, Ohio.

2. Respondent Valspar 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 1101 South Third Street, Minneapolis, Minnesota.

II. JURISDICTION

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

III. THE PROPOSED ACQUISITION

4. Pursuant to an Agreement and Plan of Merger (the "Merger Agreement") dated as of March 19, 2016, Sherwin-Williams proposes to purchase all issued and outstanding common stock of Valspar in a transaction valued at approximately $11.3 billion ("the Acquisition"), including the assumption of debt.

IV. THE RELEVANT PRODUCT MARKET

5. The relevant line of commerce in which to analyze the effects of the Acquisition is no broader than coatings used in the manufacture of industrial wood products, such as furniture, kitchen cabinets, and building products ("industrial wood coatings").

6. Industrial wood coatings consist of a broad category of stains, topcoats, and sealants used during the manufacture of wood products such as kitchen cabinets, furniture, and building products. Industrial wood coatings are distinguishable from consumer wood coatings by, among other characteristics, their higher resistance to abrasion and water.

7. Furniture, kitchen cabinet, and building products manufacturers ("wood product manufacturers") would not switch from industrial wood coatings to consumer wood coatings in response to a small but significant and non-transitory increase in price in industrial wood coatings. Consumer wood coatings cannot provide the same levels of abrasion and water resistance that wood products manufacturers demand. In addition, industrial wood coatings are often sold with on-site technical assistance to wood products manufacturers. This service is critical to wood products manufacturers as it enables them to resolve any problems with the application of the industrial wood coatings on their finishing lines.

8. Wood product manufacturers would likewise not switch from industrial wood coatings to alternative substrates in response to a small but significant and non-transitory increase in price for industrial wood coatings. Wood product manufacturers rely on finished wood in order to maximize sales and attract certain customers who value the appearance that finished wood gives to cabinets, furniture, and building products. If wood product manufacturers switched away from finished wood in response to higher industrial wood coatings prices, they would face an unacceptably high risk of lost sales.

V. THE RELEVANT GEOGRAPHIC MARKET

9. The relevant geographic market in which to analyze the competitive effects of the Acquisition for industrial wood coatings is no broader than North America. Due to high freight costs and logistical challenges, there are minimal imports of industrial wood coatings from overseas into the North American market.

VI. MARKET STRUCTURE

10. Sherwin-Williams, Valspar, and Akzo Nobel N.V. ("Akzo Nobel") are the three leading suppliers of industrial wood coatings in North America. Post-Acquisition, the combined share of Sherwin-Williams and Valspar would be over 40% for industrial wood coatings sold in North America. The merged firm and Akzo Nobel together would account for over 70% of the North American industrial wood coatings market.

VII. ENTRY CONDITIONS

11. Entry into the relevant market would not be timely, likely, or sufficient to prevent or deter the expected anticompetitive effects of the Acquisition. Considerable entry barriers exist in the manufacture of industrial wood coatings, including significant volume requirements necessary to manufacture efficiently; high capital costs to construct an industrial wood coatings plant; and customer reluctance to switch to unproven new suppliers.

12. Likewise, the threat of vertical integration by wood product manufacturers would not be timely, likely, or sufficient to prevent or deter the expected anticompetitive effects of the Acquisition. Even for the largest wood product manufacturers, vertical integration would not be a credible threat due to the significant capital costs and technical requirements associated with operating an industrial wood coatings plant.

VIII. EFFECTS OF THE ACQUISITION

13. 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 Sherwin-Williams and Valspar;

b. by increasing the likelihood that Sherwin-Williams will unilaterally exercise market power; and

c. by increasing the likelihood of coordinated interaction among the remaining competitors in the relevant market.

14. The ultimate effects of the Acquisition would be to increase the likelihood that prices of industrial wood coatings will rise, and that quality, selection, service, and innovation will be lessened.

IX. VIOLATIONS CHARGED

15. The allegations contained in Paragraphs 1 through 14 above are hereby incorporated by reference as though fully set forth here.

16. 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.

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of July, 2017, issues its complaint against said Respondents.

By the Commission.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent The Sherwin-Williams Company ("SW") of the voting securities of Respondent The Valspar Corporation ("Valspar"), 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 the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent The Sherwin-Williams Company is a corporation organized, existing, and doing business

under, and by virtue of, the laws of the State of Ohio with its executive offices and principal place of business located at 101 Prospect Avenue NW, Cleveland, Ohio 44115.

2. Respondent The Valspar Corporation 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 1101 South Third Street, Minneapolis, Minnesota 55415.

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

ORDER

I.

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

A. "SW" means The Sherwin-Williams Company, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by The Sherwin-Williams Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. SW includes Valspar, after the Acquisition Date.

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

C. "Respondents" means SW and Valspar, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "Acquirer" means:

1. Axalta; or

2. Any other Person approved by the Commission to acquire the Industrial Wood Coatings Business pursuant to this Decision and Order.

F. "Acquisition" means the proposed acquisition by Respondent SW of all the voting securities of Respondent Valspar described in the Agreement and Plan of Merger, dated as of March 19, 2016, among The Sherwin-Williams Company, Viking Merger Sub, Inc., a wholly owned subsidiary of SW, and The Valspar Corporation, and any amendments, exhibits, or schedules attached thereto.

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

H. "Axalta" means Axalta Coating Systems Ltd., an exempted company organized, existing, and doing business under, and by virtue of, the laws of Bermuda with its office and principal executive offices located at 2001 Market Street, Philadelphia, Pennsylvania 19103.

I. "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.

J. "Cornwall Facility" means the industrial wood coatings facility located at 1915 Second Street West, Cornwall, Ontario Canada K6H 5R6.

K. "Confidential Business Information" means information owned by, or in the possession or control of, Respondent Valspar that is not in the public domain and that is directly related to the conduct of the Industrial Wood Coatings Business. The term "Confidential Business Information" *excludes* the following:

1. Information that is contained in documents, records, or books of Respondent Valspar that is provided to an Acquirer that is unrelated to the Industrial Wood Coatings Business acquired by the Acquirer or that is exclusively related to the Retained Business;

2. Information that Respondent Valspar can 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 Valspar;

b. Is necessary to be included in Respondent Valspar's mandatory regulatory filings; *provided, however,* that Respondent Valspar shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;

c. Was available, or becomes available, to Respondent SW on a non-confidential basis, but only if, to the knowledge of Respondent SW, 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. Was independently developed by Respondent without reference to Confidential Business Information;

e. Is information the disclosure of which is consented to by the Acquirer;

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

g. Is disclosed in complying with the Order;

h. 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

i. Is disclosed in obtaining legal advice.

L. "Copyrights" means rights to all original works of authorship of any kind and any registrations and applications for registrations thereof, and all copyrightable works, registered and unregistered copyrights in both published works and unpublished works, and all applications, registrations, and renewals in connection therewith.

M. "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.

N. "Divestiture Agreement" means:

1. the Asset Purchase Agreement by and among The Valspar Corporation, Axalta Coating Systems Ltd., and The Sherwin-Williams Company, dated April 11, 2017, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Order as Non-Public Appendix A; or

2. any agreement that receives the prior approval of the Commission between Respondents (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and an Acquirer to purchase the Industrial Wood Coatings Business, and all amendments, exhibits, attachments, agreements, and schedules thereto that have been approved by the Commission.

O. "Divestiture Date" means the date on which Respondents (or a Divestiture Trustee) close on the divestiture of the Industrial Wood Coatings Business as required by Paragraph II (or Paragraph IV) of this Order.

P. "Employee Access Period" means one (1) year from the Divestiture Date.

Q. "Geographic Territory" means the United States of America, Canada, and Mexico.

R. "Government Entities" 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.

S. "High Point 1647 English Facility" means the industrial wood coatings facility located at 1647 English Road, High Point, North Carolina 27262.

T. "High Point 1717 English Facility" means the industrial wood coatings facility located at 1717 English Road, High Point, North Carolina 27262.

U. "High Point 1908 S Elm Facility" means the industrial wood coatings leased warehouse facility located at 1908 South Elm Street, High Point, North Carolina 27260.

V. "High Point 2137 Brevard Facility" means the industrial wood coatings facility located at 2137 Brevard Road, High Point, North Carolina 27263.

W. "Industrial Wood Coatings Business" means all of Respondent Valspar's rights, title, and interest in and to all assets primarily related to the operation or conduct of Respondent Valspar's business of designing, developing, manufacturing, marketing, servicing, distributing and selling of Industrial Wood Coatings Products in the Geographic Territory, wherever located, and all improvements and additions thereto, as of the Divestiture Date, including, but not limited to:

1. The Industrial Wood Coatings Facilities;

2. The Industrial Wood Coatings Research and Development Assets;

3. The Industrial Wood Coatings Color Studio Assets;

4. The Industrial Wood Coatings Contracts;

5. The Industrial Wood Coatings Intellectual Property;

6. The Tangible Personal Property;

7. All inventories primarily relating to the Industrial Wood Coatings Products, both finished goods and inputs affiliated with an Industrial Wood Coatings Facility, wherever located;

8. All consents, licenses, certificates, registrations, or permits issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement relating to the research, development, manufacture, distribution, marketing, or sale of Industrial Wood Coatings Products, and all pending applications therefor or renewals thereof, to the extent legally transferable; and

9. All Business Records relating to the research, development, manufacture, distribution, marketing, or sale of Industrial Wood Coatings Products; *provided, however,* that where documents or other materials included in the Business Records to be divested contain information: (a) that relates both to the Industrial Wood Coatings Business to be divested and to the Retained Business or other products or businesses and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Industrial Wood Coatings Business to be divested; or (b) for which the relevant party has a legal obligation to retain the original copies, the relevant party shall be required to provide only copies or relevant excerpts of the documents and materials containing this information, and Respondents may keep such

records and provide copies with appropriate redactions to the Acquirer. In instances where such copies are provided to the Acquirer, the relevant party shall provide the Acquirer access to original documents under circumstances where copies of the documents are insufficient for evidentiary or regulatory purposes.

X. "Industrial Wood Coatings Color Studio Assets" means all assets, including, but not limited to, research and development equipment, located at the Los Angeles, California Color Studio of Respondent Valspar and used exclusively or primarily by any Industrial Wood Coatings Employee.

Y. "Industrial Wood Coatings Contracts" means all agreements and contracts with customers, suppliers, vendors, representatives, agents, licensees, and licensors; and all leases, mortgages, notes, bonds, and other binding commitments, whether written or oral, and all rights thereunder and related thereto related primarily to the Industrial Wood Coatings Business.

Z. "Industrial Wood Coatings Employee" means any person employed by Valspar (i) who has spent over fifty percent (50%) of his or her time, from January 2016 to December 2016, working for or on behalf of the Industrial Wood Coatings Business, wherever located; or (ii) identified by agreement between Respondents and an Acquirer and made a part of a Divestiture Agreement.

AA. "Industrial Wood Coatings Facilities" means 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 Valspar, and all Tangible Personal Property, therein, at the High Point 1717 English Facility, High Point 2137 Brevard Facility, Cornwall Facility, High Point 1908 South Elm

Facility, and High Point 1647 English Facility; provided, however, that parts, inventory, designs, or other assets located at or within the Industrial Wood Coatings Facilities and primarily used by or for the Retained Business may be excluded.

BB. "Industrial Wood Coatings Intellectual Property" means all Intellectual Property used exclusively or primarily by or in connection with the Industrial Wood Coatings Products or the Industrial Wood Coatings Business that is owned, licensed, held, or controlled by Respondent Valspar as of the Acquisition Date, and all rights to obtain and file for Patents, Trademarks, and Copyrights and registrations thereof, and to sue and recover damages or to obtain injunctive relief for infringement, dilution, misappropriation, misuse, violation, or breach of any of the foregoing Industrial Wood Coatings Intellectual Property; provided, however, that "Industrial Wood Coatings Intellectual Property" does not include the corporate names or corporate trade dress of Respondent Valspar (e.g., "Valspar," "Val," or "Spar"), or the related corporate logos thereof, or general registered images or symbols by which Respondent Valspar can be identified or defined.

CC. "Industrial Wood Coatings Products" means the paints, primers, varnishes, glazes, sealers, lacquers, stains, colorants, catalysts, reducers, thinners, masks, fillers, pastes, retarders, additives, and other coatings and coating-related products and services that are currently, or have been offered, sold or made available to customers (as well as any related products or services that are currently in development) by Respondent Valspar through its "Valspar Wood" or "Valspar Flooring" business for use in manufacturing cabinets, furniture (and related products including caskets and musical instruments), flooring, and building products (including exterior composites, structural panels, siding and trim, doors and windows, floors, paneling, tileboard, interior composites, and moldings).

DD. "Industrial Wood Coatings Research and Development Assets" means all assets, including, but not limited to, research and development equipment, application engineering equipment, and accelerated exposure equipment, located at the Minneapolis, Minnesota research and development lab of Respondent Valspar and used exclusively or primarily by any Industrial Wood Coatings Employee.

EE. "Input Price" means the internal transfer pricing of inputs, including, but not limited to, resins, colorants, other raw materials, or finished goods, used in the Industrial Wood Coatings Business and obtained from subsidiaries or affiliates of Respondent Valspar that are not part of the Industrial Woods Coatings Business, as calculated in a manner consistent with the internal transfer pricing of Respondent Valspar prior to the Acquisition Date.

FF. "Intellectual Property" means all intellectual property that is owned, licensed, or controlled by Respondent Valspar as of the Acquisition Date, and all associated rights thereto, including all of the following:

1. Patents;

2. Trademarks and Trade Dress;

3. Manufacturing Technology;

4. Copyrights;

5. Trade Secrets; and

6. Software.

GG. "Intellectual Property License" means an irrevocable, fully paid-up and royalty-free license to the Trademarks, corporate names or corporate trade dress of Respondent Valspar (*i.e.,* "Valspar," "Val," or "Spar") with rights to sublicense approved by the Commission and sufficient for an Acquirer to operate

the Industrial Wood Coatings Business for a transitional period in substantially the same manner as Respondent Valspar prior to the Acquisition.

HH. "Manufacturing Technology" means all technology (including process technology, technology for equipment, inspection technology, and research and development of product or process technology), Trade Secrets, formulas, formulations, descriptions of all ingredients, materials, or components, and proprietary information (whether patented, patentable, or otherwise) used in the manufacture of products.

II. "Monitor" means any monitor appointed pursuant to Paragraph III of this Order.

JJ. "Monitor Agreement" means the Monitor Agreement dated May 19, 2017, between Analysis Group, Inc. and The Sherwin-Williams Company. The Monitor Agreement is attached as Appendix D to this Order.

KK. "Patents" means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention, and statutory invention registrations, in each case filed or 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.

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

MM. "Remedial Agreement(s)" means:

1. Any agreement between Respondents 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, and divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final; and/or

2. Any agreement between Respondents and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order.

NN. "Retained Business" means the assets and businesses of Respondents other than the Industrial Wood Coatings Business.

OO. "Software" means computer programs, including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to the foregoing and the content and information contained on any website; *provided, however,* that "Software" does not include software that is readily purchasable or licensable from sources other than the Respondents and which has not been modified in a manner material to the use or function thereof (other than user preference settings).

PP. "Supply Agreement" means any agreement approved by the Commission between Respondents and an Acquirer for the supply of inputs to the manufacture of

Industrial Wood Coatings Products that prior to the Divestiture Date were supplied to the Industrial Wood Coatings Business by subsidiaries or affiliates of Respondent Valspar that are not included in the Industrial Wood Coatings Business.

QQ. "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 Respondent Valspar and primarily related to the operation of the Industrial Wood Coatings Business, 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.

RR. "Third Party(ies)" means any Person other than the Respondents or the Acquirer.

SS. "Toll Manufacturing Agreement" means any agreement approved by the Commission between Respondents and an Acquirer for the supply of Industrial Wood Coating Products.

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

UU. "Trade Secrets" means all trade secrets, know-how, data, practices, methods, and confidential or proprietary information (whether patented, patentable, or otherwise), including, but not limited to: ideas, inventions, and concepts; research and development; plans (including proposed and tentative plans, whether or not adopted or commercialized); formulas; techniques; compositions; technical data and information; designs; drawings; specifications; technology; processes; analytical methods;

manufacturing, engineering, and other manuals and drawings; standard operating procedures; flow diagrams; chemical, safety, and general quality assurance and quality control methods, processes, and history; research records; clinical data; annual product reviews; regulatory communications; current and historical information associated with any Government Entity approvals and compliance; labeling and all other information related to the manufacturing process; and supplier lists.

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

WW. "Transition Services" means any transitional services 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), and technical assistance.

XX. "Transition Services Agreement(s)" means:

1. The agreements between Respondents and Axalta for the provision of Transition Services and attached to this Order as Non-Public Appendix B; or

2. Any agreement approved by the Commission entered into between Respondents and an Acquirer (or the Divestiture Trustee and an Acquirer) for the provision of Transition Services.

II.

IT IS FURTHER ORDERED that:

A. Within ten (10) days of the Acquisition Date, Respondents shall divest the Industrial Wood Coatings Business and grant an Intellectual Property License to Axalta, pursuant to and in accordance with the Divestiture Agreement (which shall not limit or contradict, or be construed to vary from or contradict, the terms of this Order), and such agreement, if it becomes a Remedial Agreement related to the Industrial Wood Coatings Business, is incorporated by reference into this Order and made a part hereof;

Provided, however, if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Axalta is not an acceptable Acquirer of the Industrial Wood Coatings Business then Respondents shall immediately rescind the transaction with Axalta, in whole or in part, as directed by the Commission, and shall divest, license, and/or transfer the Industrial Wood Coatings Business within six (6) months from the date this Order is issued, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission;

Provided further, that if Respondents have complied with the terms of this Paragraph before the date on which this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents or appoint the Divestiture Trustee, to effect such modifications to the manner of the divestiture to Axalta (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Prior to the Divestiture Date, Respondents shall secure all consents and waivers from any Third Parties or Government Entities that are necessary for the divestiture of the Industrial Wood Coatings Business to the Acquirer, or for the continued research, development, manufacture, distribution, marketing, or sale of Industrial Wood Coatings Products by the Acquirer; *provided, however,* that Respondents may satisfy this requirement by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant Third Party(ies) or otherwise obtained all necessary consents and waivers.

C. At the request of the Acquirer, for a period not to exceed two (2) years following the Divestiture Date, Respondents shall enter into a Toll Manufacturing Agreement with the Acquirer to supply the Acquirer with Industrial Wood Coatings Products at no more than Respondents' Input Price.

D. At the request of the Acquirer, for a period not to exceed five (5) years following the Divestiture Date, Respondents shall enter into a Supply Agreement with the Acquirer to supply inputs to the manufacture of Industrial Wood Coatings Products in a manner consistent with the operation of the Industrial Wood Coatings Business prior to the Acquisition Date, at no more than the Input Price;

Provided however, that nothing in this Order shall prohibit Respondents from supplying the Acquirer with inputs to the manufacture of Industrial Wood Coatings Products after the term of the Supply Agreement as mutually agreed between Respondents and the Acquirer.

E. Respondents shall, at the option of the Acquirer provide Transition Services to the Acquirer pursuant to a Transition Services Agreement that receives the prior approval of the Commission. *Provided, however*, that such Agreement shall provide that: (i) the Acquirer

may terminate the Agreement or any portion thereof at any time, without cost or penalty to the Acquirer, upon commercially reasonable notice to Respondents; and (ii) at the Acquirer's request, Respondents shall agree to extend the term as to any Transition Service(s) for an additional period such that the period in which Respondents are obliged to provide any Transition Service(s) in total does not exceed two years. At the Acquirer's request, Respondents shall agree to extend the term of any Transition Service(s) for up to an additional one (1) year, and shall file with the Commission any request for prior approval to extend the term of such Transition Services. The Transition Services provided pursuant to a Transition Services Agreement shall be at no greater than Respondents' Direct Cost, *provided, however,* that Respondents may agree with the Acquirer to use a reasonable estimate of Direct Cost.

F. Within ten (10) days of the Divestiture Date, Respondents shall submit to the Acquirer, at Respondents' expense, all Business Records of the Industrial Wood Coatings Business, in good faith, and in a manner that ensures their completeness and accuracy and that fully preserves their usefulness; *provided, however,* pending complete delivery of all such Business Records of the Industrial Wood Coatings Business to the Acquirer, Respondents shall provide the Acquirer, and the Monitor, with access to all such Business Records of the Industrial Wood Coatings Business 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 Industrial Wood Coatings Business and facilitating their delivery in a manner consistent with this Order.

G. Respondents shall ensure that employees of the Respondents' Retained Business shall not receive, have access to, use or continue to use, or disclose any Confidential Business Information pertaining to the

Industrial Wood Coatings Business except in the course of:

1. Performing their obligations as permitted under this Order;

2. Performing their obligations under any Remedial Agreement; or

3. Complying with financial reporting requirements or environmental, health, and safety policies and standards, ensuring the integrity of the financial and operational controls on the Industrial Wood Coatings Business, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against the Industrial Wood Coatings Business, or as required by law.

H. If the receipt, access to, use, or disclosure of Confidential Business Information pertaining to the Industrial Wood Coatings Business is permitted to Respondents' employees under Paragraph II.G. of this Order, Respondents shall limit such information (i) only to those Persons who require such information for the purposes permitted under Paragraph II.G., (ii) only to the extent such Confidential Business Information is required, and (iii) only after such Persons have signed an appropriate agreement in writing to maintain the confidentiality of such information, including training of Respondents' employees and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

I. Respondents shall enforce the confidentiality terms of this Order as to any Third Parties and take such actions as are necessary to cause each such Person to comply with these terms, including all actions that Respondents would take to protect their own trade secrets and proprietary information.

J. From the date Respondents execute the Divestiture Agreement until the Employee Access Period

terminates, Respondents shall provide a proposed Acquirer with the opportunity to recruit and employ any Industrial Wood Coatings 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 Industrial Wood Coatings Employee, as and 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 Valspar'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 Industrial Wood Coatings Employee(s);

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

A. an opportunity to meet, personally and outside the presence or hearing of any employee or agent of Respondents, with any Industrial Wood Coatings Employee;

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

C. an opportunity to make offers of employment to any Industrial Wood Coatings Employee; and

3. Respondents shall (i) not interfere, directly or indirectly, with the hiring or employing by a proposed Acquirer of any Industrial Wood Coatings Employee, (ii) not offer any incentive to any Industrial Wood Coatings Employee to decline employment with a proposed Acquirer, (iii) not make any counteroffer to any Industrial Wood Coatings Employee who receives a written offer of employment from a proposed Acquirer, and (iv) remove any impediments within the control of Respondents that may deter any Industrial Wood Coatings 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;

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.

K. Respondents shall provide reasonable financial incentives to the senior management of the Industrial Wood Coatings Business, as listed in Non-Public Appendix C to this Order, as needed to facilitate the employment of such employees by the Acquirer.

L. For a period of two (2) years after the Divestiture Date, Respondents shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Industrial Wood Coatings Employee to terminate his or her employment relationship with an Acquirer;

Provided, however, Respondents may: (i) 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 Industrial Wood Coatings Employees; and (ii) hire employees of the Industrial Wood Coatings Business who apply for employment with Respondents, so long as such individuals were not solicited by Respondents in violation of this paragraph;

Provided further, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any employee of the Industrial Wood Coatings Business if an 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 individual's employment has been terminated by an Acquirer.

M. Until Respondents (or the Divestiture Trustee) complete the divestiture and other obligations to transfer the Industrial Wood Coatings Business as required by this Order, Respondents shall take actions as are necessary to:

1. Maintain the full economic viability and marketability of the Industrial Wood Coatings Business;

2. Minimize any risk of loss of competitive potential for the Industrial Wood Coatings Business;

3. Prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Industrial Wood Coatings Business; and

4. Not sell, transfer, encumber, or otherwise impair the Industrial Wood Coatings 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 Industrial Wood Coatings Business.

N. The purpose of this Paragraph II is to ensure the continued use of the relevant 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 Industrial Wood Coatings Business, minimize the risk of disclosure or unauthorized use of Confidential Business Information related to the Industrial Wood Coatings Business, prevent the destruction, removal, wasting, deterioration, or impairment of the Industrial Wood Coatings Business, except for ordinary wear and tear, and remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Monitor") to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Remedial Agreements. The Commission hereby appoints Rebecca Kirk Fair of Analysis Group, Inc. as the Monitor and approves the Monitor Agreement between Analysis Group, Inc. and Respondents.

B. Not later than one (1) day after the appointment of the Monitor, Respondents shall, pursuant to the Monitor Agreement and to this Order, confer on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

C. The Monitor shall serve until the later of (i) five (5) years after the Divestiture Date or (ii) the termination of all Respondents' obligations under the Supply Agreement, the Toll Manufacturing Agreement, and the Transition Services Agreements; *provided, however,* the Commission may extend or modify this period as may be necessary to accomplish the purposes of this Order.

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

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the 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 or its staff, including, but not limited to:

   a. Assuring that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Remedial Agreements;

   b. Monitoring any Transition Services Agreement, any Supply Agreement (including by confirming the Input Prices) and any Toll Manufacturing Agreement (including by confirming any Input Prices); and

c. Assuring that Confidential Business Information is not received or used by Respondents except as allowed in this Order;

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

3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of this Order and the Remedial Agreements;

4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with its obligations under this Order and the Remedial Agreements. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order and the Remedial Agreements;

5. The Monitor shall serve, without bond or other security, at the expense of 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;

6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of

counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph III, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph III.D.5 of this Order;

7. Respondents shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by the Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under this Order and the Remedial Agreements;

8. Within one (1) month from the date the Monitor is appointed pursuant to this Paragraph, every thirty (30) days thereafter until the first anniversary of the Divestiture Date, every sixty (60) days thereafter until Respondents have fully complied with the Transition Services Agreement and the Toll Manufacturing Agreement, and every ninety (90) days thereafter, and as otherwise requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order and the Remedial Agreements, including, but not limited to, pursuant to the Supply Agreement; and

9. Respondents may require the Monitor and each of the Monitors consultants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Monitor from providing any information to the Commission.

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

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

G. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the substitute Monitor all the rights and powers necessary to permit the substitute Monitor to monitor Respondents' compliance with the terms of this Order and the Remedial Agreements in a manner consistent with the purposes of this Order.

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

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II.A. of this Order, the Commission may appoint a Divestiture Trustee to divest the Industrial Wood Coatings Business and grant the Intellectual Property License in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of 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 have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be

deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute 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, license, or other 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 or rights that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, or to enter into a Toll Manufacturing Agreement, a Supply Agreement, or Transition Services 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 or rights 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 Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further*, *however,* that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval;

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

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

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 Agreements 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 agreement.

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

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

D. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

VI.

IT IS FURTHER ORDERED that:

A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

B. Respondents shall submit to the Commission and, if appointed, the Monitor, a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order:

1. Within thirty (30) days after the date this Order becomes final;

2. Every thirty (30) days thereafter until Respondents have fully divested, licensed, transferred and/or granted the Industrial Wood Coatings Business to an Acquirer until the first anniversary of the Divestiture Date;

3. Every sixty (60) days thereafter so long as Respondents have a continuing obligation under a Toll Manufacturing Agreement and/or Transition Services Agreement; and

4. Every ninety (90) days thereafter so long as Respondents have a continuing obligation under this Order and/or the Remedial Agreements to render services to the Acquirer or otherwise to comply with this Order, including, but not limited to, pursuant to a Supply Agreement.

C. At such other times as the Commission may request, Respondents 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 this Order and any Remedial Agreement.

VII.

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

A. Any proposed dissolution of Respondents;

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

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

VIII.

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

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

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

IX.

IT IS FURTHER ORDERED that this Order shall terminate on July 27, 2027.

By the Commission.

NON-PUBLIC APPENDIX A

DIVESTITURE AGREEMENT

[Redacted from the Public Record, but Incorporated by Reference]

NON-PUBLIC APPENDIX B

TRANSITION SERVICES AGREEMENT

[Redacted from the Public Record, but Incorporated by Reference]

NON-PUBLIC APPENDIX C

SENIOR MANAGEMENT

[Redacted from the Public Record, but Incorporated by Reference]

PUBLIC APPENDIX D

MONITOR AGREEMENT

This MONITOR AGREEMENT ("Agreement") entered into by and between The Sherwin-Williams Company ("SW"), The Valspar Corporation ("Valspar") (collectively, "Respondents") and Analysis Group, Inc., including Rebecca Kirk Fair ("Monitor") provides as follows:

PRELIMINARY STATEMENT

WHEREAS, the United States Federal Trade Commission (the "Commission") has accepted or will shortly accept for Public Comment an Agreement Containing Consent Orders ("Consent Agreement") incorporating a Decision and Order ("Decision and Order"), which, among other things, requires Respondents to divest the Industrial Wood Coatings Business and grant a Shared Intellectual Property License, as defined in the Decision and Order, and contemplates the appointment of a Monitor to monitor Respondents' compliance with its obligations under the Decision and Order:

WHEREAS, the Commission has appointed Rebecca Kirk Fair of Analysis Group, Inc. as Monitor pursuant to the Decision and Order, and Rebecca Kirk Fair has consented to such appointment;

WHEREAS, the Decision and Order further provides that Respondents shall execute an agreement, subject to the prior approval of the Commission, that confers all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of the Decision and Order as described in more detail in this Agreement; and

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

NOW, THEREFORE, the parties agree as follows:

All capitalized terms used in this Agreement and not specifically defined herein shall have the respective definitions given to them in the Decision and Order.

ARTICLE I

1.1 Monitor's Areas of Responsibilities. The Monitor shall be responsible for monitoring Respondents' compliance with the Decision and Order and the Divestiture Agreement, as defined in the Decision and Order (together, the "Monitor's Areas of Responsibilities"). The Monitor understands that in carrying out its responsibilities, it shall act in a fiduciary capacity for the benefit of the Commission.

1.2 Access to Relevant Information and Facilities. The Monitor shall have full and complete access to the personnel, facilities, books, and records of Respondents related to Respondents' obligations under the Decision and Order and Divestiture Agreements, as the Monitor may reasonably request. Respondents shall cooperate with any reasonable request of

the Monitor. The Monitor shall give Respondents reasonable notice of any request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondents' operations. At the request of the Monitor, Respondents shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of Respondents who have knowledge relevant to the proper discharge of Monitor's responsibilities under the Decision and Order.

1.3 Compliance Reports. Respondents shall provide the Monitor with copies of all compliance reports filed with the Commission in a timely manner, but in any event, no later than five (5) days after the date on which Respondents file such report with the Commission;

1.4 Monitor's Obligations. The Monitor shall:

a. carry out the Monitor's duties and responsibilities within the Monitor's Areas of Responsibilities, including submission of periodic reports, and such additional written reports as may be requested by the Commission staff, to the Commission staff regarding Respondents' compliance with the Decision and Order;

b. maintain the confidentiality of all confidential information, including Confidential Business Information, and any other information provided to the Monitor by Respondents, the Acquirer of the Industrial Wood Coatings Business, any supplier or customer of Respondents or the Industrial Wood Coatings Business, or the Commission, and shall use such information only for the purpose of discharging its obligations as Monitor and not for any other purpose, including, without limitation, any other business, scientific, technological, or personal purpose. The Monitor may disclose confidential information only to:

    i. persons employed by or working with the Monitor under this Agreement; and

    ii. persons employed at the Commission.

c. require any consultants, accountants, attorneys, and any other representatives and/or assistants retained by the Monitor to assist in carrying out the duties and responsibilities of the Monitor to execute a confidentiality agreement, which Respondents will provide if requested, that requires such third parties to treat confidential or proprietary information, including Confidential Business Information, with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Agreement;

d. maintain the confidentiality, for a period of five (5) years after the termination of this Agreement, of all other aspects of the performance of its duties under this Agreement and shall not disclose any confidential or proprietary

information, including Confidential Business Information, relating thereto; and

e. upon the termination of the Monitor's duties under this Agreement, promptly destroy all written and electronic materials (both originals and copies) that relate to the performance of the Monitor's responsibilities under this Agreement.

1.5 Monitor Payment. SW will pay the Monitor its standard hourly fee ("Hourly Fee") for all reasonable time spent in performance of the Monitor's duties under this Agreement. Rebecca Kirk Fair's current hourly fee is [redacted]. In addition, SW will pay: (a) out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's duties; and (b) fees and disbursements reasonably incurred by such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities hereunder; however, all such out-of-pocket expenses and fees and disbursements shall be pre-approved by SW, which shall not withhold approval unreasonably. The Monitor shall invoice SW on a monthly basis, within seven (7) days of the conclusion of the month, including details and an explanation of all matters for which the Monitor submits an invoice to SW. SW shall pay such invoices within 30 days of receipt. Any consultants, accountants, attorneys, and other representatives and assistants retained by the Monitor shall invoice their services to the Monitor who will review and approve such invoices and submit to SW for payment. At its own expense, SW may retain an independent auditor to verify such invoices. The Monitor and SW shall submit any disputes about invoices to the Commission for assistance in resolving such disputes.

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

1.7 Disputes. In the event of a disagreement or dispute between Respondents and the Monitor concerning Respondents' obligations under the Decision and Order, 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.

1.8 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 her duties under this Agreement, the Monitor shall promptly inform Respondents and the Commission of any such conflict.

ARTICLE II

2.1 Termination. This Agreement shall terminate upon the later of: (i) five years after the Divestiture date; or (ii) the termination of all Respondents' obligations under the Supply Agreement, the Toll Manufacturing Agreement, and the Transition Services Agreements; *provided however*, the Commission may extend or modify this period as may be necessary. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute monitor. Respondents' receipt of written notice from the Commission that the Commission has determined that Rebecca Kirk Fair has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor, shall constitute termination under this Agreement. If this Agreement is terminated for any reason, the confidentiality obligations set forth in Section 1.4 above will remain in force.

2.2 Governing Law. This Agreement and the rights and obligations of the parties hereunder shall in all respects be governed by the substantive laws of the State of Ohio, including all matters of construction, validity and performance. The Decision and Order shall govern this Agreement and any provisions herein which conflict or are inconsistent with it may be declared null and void by the Commission and any provision not in conflict shall survive and remain a part of this Agreement.

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

2.4 Assignment. This Agreement may not be assigned or otherwise transferred by Respondents or the Monitor without the consent of Respondents and the Monitor and the approval of the Commission. Any such assignment or transfer shall be consistent with the terms of the Decision and Order.

2.5 Modification. No amendment, modification, termination, or waiver of any provision of this Agreement shall be effective unless made in writing, signed by all parties, and approved by the Commission. Any such amendment, modification, termination, or waiver shall be consistent with the terms of the Decision and Order.

2.6 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission.

2.7 Entire Agreement. This Agreement, and those portions of the Decision and Order incorporated herein by reference, constitute the entire agreement of the parties and supersede any and all prior agreements and understandings between the parties, written or oral, with respect to the subject matter hereof.

2.8 Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

2.9 Section Headings. Any heading of the sections is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

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

MONITOR

BY: Rebecca Kirk Fair

NAME: ANALYSIS GROUP, INC.
REBECCA KIRK FAIR

RESPONDENT

THE SHERWIN-WILLIAMS COMPANY

BY: Jane M Cronin

NAME: Jane M. CRONIN

TITLE: SrVP Corp. Controller

RESPONDENT

THE VALSPAR CORPORATION

BY: _____

NAME: _____

TITLE: _____

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

MONITOR

BY: _____

NAME: ANALYSIS GROUP, INC.
REBECCA KIRK FAIR

RESPONDENT

THE SHERWIN-WILLIAMS COMPANY

BY: _____

NAME: _____

TITLE: _____

RESPONDENT

THE VALSPAR CORPORATION

BY: _____

NAME: Tyler N. Trask

TITLE: Vice President and Treasurer

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") with the Sherwin-Williams Company ("Sherwin-Williams"). The purpose of the Consent Agreement is to remedy the anticompetitive effects that would result from Sherwin-Williams's proposed acquisition of The Valspar Corporation ("Valspar"). Under the terms of the Consent Agreement, Sherwin-Williams must divest Valspar's North America Industrial Wood Coatings Business to Axalta Coating Systems Ltd. ("Axalta") or another buyer approved by the Commission. The Consent Agreement provides the acquirer with the manufacturing plants and other tangible and intangible assets it needs to effectively compete in the market for the manufacture and sale of industrial wood coatings in North America. Sherwin-Williams must complete the divestiture within ten days of the closing of the acquisition.

On March 19, 2016, Sherwin-Williams agreed to acquire Valspar for approximately $11.3 billion, including the assumption of debt. This acquisition would concentrate most of the nearly $1 billion North American industrial wood coatings industry in two major competitors –the combined Sherwin-Williams/Valspar and Akzo Nobel N.V. ("Akzo Nobel"). On May 26, 2017, the Commission issued an administrative complaint alleging that the acquisition, if consummated, may substantially lessen competition in the market for the manufacture and sale of industrial wood coatings in North America in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

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 a part of the public record. After 30 days, the Commission will review the Consent Agreement and comments received, and decide whether it should withdraw, modify, or make the Consent Agreement final.

Analysis to Aid Public Comment

II. The Parties

Sherwin-Williams, headquartered in Cleveland, Ohio, is one of the top three manufacturers of industrial wood coatings in North America. Sherwin-Williams supplies industrial wood coatings to a wide variety of customers, including manufacturers of kitchen cabinets, building products, and furniture ("wood products manufacturers"). Sherwin-Williams operates three dedicated industrial wood coatings plants in North America.

Valspar is one of the top three manufactuers of industrial wood coatings in North America. Like Sherwin-Williams, Valspar supplies industrial wood coatings to some of the largest wood product manufacturers. Valspar operates two dedicated industrial wood coatings plants located in North America.

III. The Manufacture and Sale of Industrial Wood Coatings in North America

Absent the remedy, Sherwin-Williams's acquisition would harm competition in the manufacture and sale of industrial wood coatings in North America. Industrial wood coatings consist of a broad category of stains, topcoats, and sealants used during the manufacture of wood products such as kitchen cabinets, furniture, and building products.

The relevant product market does not include off-the-shelf interior and exterior wood stains sold to retail consumers or other substrates such as laminates, decorative foils, films, or veneers. Industrial wood coatings are designed for application on high-speed manufacturing lines in a factory setting and are tailored to meet wood products manufacturers' specifications. These specifications are demanding; wood product manufacturers require industrial wood coatings that perform well along a variety of dimensions, such as resistance to abrasion and moisture. Wood coatings sold to retail consumers are not formulated to meet these specifications and are thus not economically viable substitutes. Since wood product manufacturers rely on finished wood for its appearance and to meet the demand and preferences of their own customers, they likewise cannot easily or quickly substitute other finishing materials or technologies for their finished wood

products. Attempting to do so would result in a high risk of significant sales losses for these manufacturers.

North America is the appropriate geographic market in which to evaluate the likely competitive effects of the proposed acquisition. Sherwin-Williams and Valspar sell industrial wood coatings to customers throughout North America. The relevant geographic market is no broader than North America because freight costs and logistical challenges limit wood product manufacturers' ability to purchase significant volumes of industrial wood coatings from overseas.

Currently, three firms – Sherwin-Williams, Valspar, and Akzo Nobel – manufacture and sell most industrial wood coatings in North America. Collectively, these three firms control over 70 percent of the North American market for industrial wood coatings. The Commission often calculates the Herfindahl-Hirschman Index ("HHI") to assess market concentration. Under the Federal Trade Commission and Department of Justice Horizontal Merger Guidelines, markets with an HHI above 2,500 are generally classified as "highly concentrated," and acquisitions "resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." Absent the proposed remedy, the acquisition would increase the HHI by at least 900 points to over 2,700 for industrial wood coatings, resulting in a highly concentrated market.

IV. Effects of the Acquisition

Absent relief, the acquisition would combine two of the three leading industrial wood coatings suppliers and pose a significant risk of competitive harm. The industrial wood coatings industry is a mature, stable industry, with relatively low growth rates and high barriers to entry. The acquisition would eliminate substantial direct competition between Sherwin-Williams and Valspar. The acquisition also would increase the ease and likelihood of anticompetitive coordination between the only two remaining major suppliers. Thus, the acquisition likely would result in higher prices and a reduction in services and innovation to customers.

V. Entry

Entry into the market for the manufacture and sale of industrial wood coatings would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the likely competitive harm from the acquisition. The industrial wood coatings industry in North America enjoys significant barriers to entry and expansion including the high cost of building industrial wood coatings plants, the need for substantial technological and manufacturing expertise, and the significant on-site technical support requirements of large customers. For these reasons, entry by a new market participant or expansion by an existing one, would not deter the likely anticompetitive effects from the acquisition.

VI. The Consent Agreement

The proposed Consent Agreement remedies the competitive concerns raised by the acquisition by requiring Sherwin-Williams to divest Valspar's North America Industrial Wood Coatings Business to Axalta or another buyer approved by the Commission. In addition, the Consent Agreement requires Sherwin-Williams to transfer the customer contracts currently serviced by Valspar's Industrial Wood Coatings Business to the buyer.

Under the proposed Consent Agreement, Sherwin-Williams will divest Valspar's industrial wood coatings plants located at High Point, North Carolina and Cornwall, Ontario. In addition, Sherwin-Williams will divest the research and development facilities, warehouses, and testing facilities of Valspar's Industrial Wood Coatings Business. Sherwin-Williams will also divest intellectual property, inventory, accounts receivable, government licenses and permits, and business records. The Consent Agreement limits Sherwin-Williams's use of, and access to, confidential business information pertaining to the divestiture assets.

Axalta is one of the leading suppliers of industrial coatings to large OEMs in the automotive and general industrial markets and is well positioned to operate these assets as an effective competitor. Through the proposed Consent Agreement, Axalta will become one of the leading North American manufacturers of

industrial wood coatings. With the divested assets, Axalta will be able to replicate Valspar's position in the market today. It will own plants capable of manufacturing a broad range of industrial wood coatings as well as the other assets necessary to compete successfully in this market. Axalta's presence will preserve the three-way competition that currently exists in the relevant markets and moderate the potential for unilateral or coordinated effects.

Sherwin-Williams must complete the divestiture within ten days of the closing of the acquisition. A Monitor will monitor Sherwin-Williams' compliance with the obligations set forth in the Order. If Sherwin-Williams does not fully comply with the divestiture and requirements of the Order, the Commission may appoint a Divestiture Trustee to divest Valspar's North America Industrial Wood Coatings Business and perform Sherwin-Williams' other obligations consistent with the Order.

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

Complaint

IN THE MATTER OF

ALIMENTATION COUCHE-TARD INC.
AND
CST BRANDS, INC.

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

Docket No. C-4618; File No. 161 0207
Complaint, June 23, 2017 – Decision, August 4, 2017

This consent order addresses the $4.4 billion acquisition by Alimentation Couche-Tard Inc. of certain assets of CST Brands, Inc. The complaint alleges that the transaction, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition for the retail sale of gasoline and diesel in 71 local markets across 16 metropolitan statistical areas. Under the order, Alimentation Couche-Tard ("ACT") must divest to a Commission-approved buyer certain CST retail fuel outlets and related assets in 70 local markets in 16 metropolitan statistical areas, and at the buyer's option, an ACT site in one local market.

Participants

For the *Commission*: *Nicholas Bush, Mary Casale, Eric Olson, Marc Schneider* and *Julia Zhang.*

For the *Respondents*: *Brian Byrne* and *David Gelfand, Cleary Gottlieb Steen & Hamilton LLP; Craig Coleman* and *Richard Duncan, Faegre Baker Daniels LLP; Nelson Fitts* and *Christina Ma, Wachtell, Lipton, Rosen & Katz.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Alimentation Couche-Tard Inc. has entered into an agreement to acquire Respondent CST Brands, Inc., 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public

interest, hereby issues this complaint, stating its charges as follows.

I. RESPONDENTS

ACT

1. Respondent Alimentation Couche-Tard Inc. ("ACT") is a corporation organized, existing, and doing business under, and by virtue of, the laws of Quebec, Canada, with its office and principal place of business located at 4204 Industriel Boulevard, Laval, Quebec H7L OE3, Canada.

2. Respondent ACT is, and at all times relevant herein has been, engaged in, among other things, the retail sale of gasoline and diesel fuel in the United States.

3. Respondent ACT and the corporate entities under its control are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

CST

4. Respondent CST Brands, Inc. ("CST") 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 19500 Bulverde Road, San Antonio, Texas.

5. Respondent CST is, and at all times relevant herein has been, engaged in, among other things, the retail sale of gasoline and diesel fuel in the United States.

6. Respondent CST and the corporate entities under its control are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

7. Pursuant to an Agreement and Plan of Merger dated August 21, 2016, ACT, through its wholly-owned subsidiary Circle K Stores Inc., proposes to acquire all issued and outstanding shares of CST, with CST surviving post-acquisition as a wholly-owned subsidiary of Circle K Stores Inc. (the "Acquisition"), for approximately $4.4 billion.

8. The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKET

9. Relevant product markets in which to analyze the effects of the Acquisition are the retail sale of gasoline and the retail sale of diesel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Consumers require diesel for their diesel-powered vehicles and can purchase diesel only at retail fuel outlets. No economic or practical alternative to the retail sale of gasoline or diesel at retail fuel outlets exists.

10. Relevant geographic markets in which to analyze the effects of the Acquisition include 71 local markets within the following metropolitan statistical areas: Phoenix, Arizona; Sierra Vista, Arizona; Tucson, Arizona; Colorado Springs, Colorado; Denver, Colorado; Jacksonville, Florida; Albany, Georgia; Savannah, Georgia; Warner Robins, Georgia; Shreveport, Louisiana; Albuquerque, New Mexico; Las Cruces, New Mexico; Cleveland, Ohio; Austin, Texas; Corpus Christi, Texas; and El Paso, Texas.

11. The relevant geographic markets for retail gasoline and retail diesel are highly localized, ranging from a few blocks to a few miles. None of the relevant geographic markets exceeds three driving miles from an overlapping retail fuel outlet. Each relevant market is distinct and reflects the commuting patterns, traffic flows, and outlet characteristics unique to each market. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes.

IV. MARKET STRUCTURE

12. The Acquisition, if consummated, would create a monopoly in ten local markets. In 20 local markets, the Acquisition, if consummated, would reduce the number of independent market participants from three to two. In 41 local markets, the Acquisition, if consummated, would reduce the number of independent market participants from four to three. The Acquisition would result in a highly concentrated market in each of these 71 markets.

V. BARRIERS TO ENTRY

13. Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Significant entry barriers include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time associated with obtaining necessary permits and approvals.

VI. EFFECTS OF THE ACQUISITION

14. The effects of the Acquisition, if consummated, may be substantially to 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:

a. increasing the likelihood that Respondent ACT would unilaterally exercise market power in the relevant markets; and

b. increasing the likelihood of collusive or coordinated interaction between any remaining competitors in the relevant markets.

VII. VIOLATIONS CHARGED

15. 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.

16. The Merger Agreement entered into by Respondents ACT and CST constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Secretary and its official seal affixed, at Washington, D.C., this twenty-third day of June, 2017, issues its Complaint against Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Alimentation Couche-Tard Inc. ("ACT"), through its wholly-owned subsidiary, Circle K Stores Inc., of Respondent CST Brands, Inc. ("CST")," and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of the Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts 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 ACT is a corporation organized, existing, and doing business under and by virtue of the laws of Canada, with its headquarters and principal place of business located at 4204 Industriel Blvd., Laval, Quebec H7L 0E3, Canada, and its United States address for service of process and of the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Corporate Secretary, Circle K Stores Inc., 1130 W. Warner Road, Tempe, Arizona 85284.

2. Respondent CST 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 19500 Bulverde Road, San Antonio, Texas 78259.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over 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, and Schedule A and Schedule B, which are attached to the Decision and Order and identify the Assets To Be Divested, are incorporated herein by reference and made a part hereof, and shall apply:

A. "ACT" means Alimentation Couche-Tard Inc., its directors, officers, employees, agents, representatives,

successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Alimentation Couche-Tard Inc., including Circle K Stores and Ultra, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, ACT shall include CST.

B. "Circle K Stores" means Circle K Stores Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, and its directors, officers, employees, agents, representatives, successors, and assigns. Circle K Stores is a wholly-owned subsidiary of ACT.

C. "CST" means CST Brands, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates (including, but not limited to, CrossAmerica Partners, LP), in each case controlled by CST Brands, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" means ACT and CST, individually and collectively.

E. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondents that is not in the public domain and to the extent that it is related to or used in connection with the Assets To Be Divested or the conduct of the Retail Fuel Outlet Business at the Retail Fuel Outlets To Be Divested. The term "Confidential Business Information" excludes the following:

1. Information that is contained in documents, books, or records of Respondents that is provided to an Acquirer that is unrelated to the Assets To Be Divested or that is exclusively related to the Respondents' retained businesses; and

2. Information that: (a) is or becomes generally available to the public other than as a result of disclosure in breach of the prohibitions of this Order; (b) is or was developed independently of, and without reference to, any Confidential Business Information; (c) is necessary to be included in Respondents' mandatory regulatory filings; (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 transactions pursuant to the Divestiture Agreement or any 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 Governmental Entities; or (h) is disclosed in obtaining legal advice.

F. "Decision and Order" means the:

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

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

G. "Monitor" means any Person appointed by the Commission to serve as a Monitor pursuant to Paragraph IV. of this Order to Maintain Assets.

H. "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 and until the Divestiture Date:

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 the business of the Assets To Be Divested to be conducted 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, and 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.

D. 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. Among other actions as may be necessary to comply with these obligations, Respondents shall, without limitation:

Order to Maintain Assets

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 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;

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 Assets To Be Divested;

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; and

15. Maintain, and not terminate or permit the lapse of, any Governmental Permits necessary for the operation of any Asset To Be Divested;

Provided, however, that it shall not be a violation of this Paragraph II.D. if Respondents take actions that have been requested or agreed to by the Acquirer, in writing, and approved in advance by the Monitor (in consultation with Commission staff), in all cases to facilitate the Acquirer's acquisition of the Assets To Be Divested and consistent with the purposes of the Orders.

E. 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 disclosed to or received, accessed, or used by Respondents or Respondents' employees except in accordance with the provisions of the Orders; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that, pending divestiture of the Assets To Be Divested,

A. Respondents shall not, and shall assure that its employees, agents, and representatives shall not:

1. Receive, access, have access to, or use, directly or indirectly, any Confidential Business Information, other than as is necessary to:

a. Comply with the requirements of the Orders;

b. Perform their obligations to the Acquirer under the terms of any Remedial Agreement, including providing Transition Services pursuant to a Transition Services Agreement; or

c. Comply with financial reporting requirements, defend legal claims, or as otherwise required by applicable law;

2. Disclose or convey any 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); or

3. Use, disclose, or convey, directly or indirectly, any Confidential Business Information that is related to the Fuel Products supply, marketing, promotional activities, or sales of the Assets To Be Divested or of the Acquirer to employees, agents, and representatives with responsibilities relating to the Fuel Products supply, marketing, promotional activities, or sales of Respondents' retained businesses.

B. Respondents shall institute appropriate procedures and requirements to ensure that the above-described employees, agents, and representatives do not (1) use, disclose, or convey, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets, or (2) solicit, access, or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.

C. As part of the procedures and requirements that Respondents are required to implement to comply with Paragraphs III.A. and B., not later than (i) thirty (30)

days after the date Respondents execute the Consent Agreement or (ii) fifteen (15) days after the date this Order to Maintain Assets is issued by the Commission, whichever is earlier, Respondents shall:

1. Implement and maintain a process and procedures pursuant to which Confidential Business Information may be disclosed and used only by Respondents' employees, agents, and representatives who (i) require access to such Confidential Business Information in order to provide Transition Services or as otherwise required by the Remedial Agreement or permitted by the Orders, (ii) only to the extent such Confidential Business Information is required; and (iii) only after such employees, agents, and representatives have signed an appropriate agreement in writing to maintain the confidentiality of such Confidential Business Information; and

2. Monitor the implementation and enforce the terms of this Paragraph III. as to any of Respondents' employees, agents, and representatives, and take such actions as are necessary to cause each such Person to comply with the terms of this Paragraph III, including training of Respondents' employees, and all other corrective actions that Respondents would take for the failure of their employees and other personnel to comply with such restrictions, and to protect their own confidential and proprietary information.

IV.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a Monitor to assure 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. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

C. Not later than ten (10) days after the appointment of the Monitor, Respondents shall execute an agreement ("Monitor Agreement") that, subject to the prior approval of the Commission, confers on the Monitor all rights, powers, and authority necessary to permit the Monitor to monitor Respondents' compliance with the Orders and the Remedial Agreements, and perform his duties and responsibilities in a manner consistent with the purposes of the Orders, in a fiduciary capacity for the benefit of the Commission, and in consultation with Commission staff. Respondents shall assure, 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 Transition Services by Respondents' employees, agents and representatives pursuant to the Transition Services Agreement; 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 its 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. Subject to any demonstrated legally recognized privilege, 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; and

8. Respondents shall report to the Monitor in accordance with the requirements of the Orders, and as otherwise provided in any Monitor 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.

D. 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.

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

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

G. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of the Orders and the Remedial Agreement, including for as long as Respondents are providing Transition Services to the Acquirer pursuant to the Transition Services Agreement; *provided, however*, that the Commission may extend or modify this period

as may be necessary or appropriate to accomplish the purposes of the Orders.

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

I. 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 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; *provided, however,* that after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with and submitted to the Commission on the same timing as the reports required to be submitted by the Respondents pursuant to the Decision and Order. 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 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 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 Respondents (or a Divestiture Trustee) complete the divestiture of all of the Assets To Be Divested, 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) complete the divestiture(s) of the relevant Assets To Be Divested, as described in and required by the Decision and Order; or

C. The day after Respondents, with the concurrence of the Acquirer, certify in writing to the Commission as to the completion of all Transition Services provided by the Respondents to the Acquirer pursuant to any Transition Services Agreement approved by the Commission; or

D. The day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

Order to Maintain Assets

APPENDIX A

MONITOR AGREEMENT
[Redacted Public Version]

MONITOR AGREEMENT

This Monitor Agreement ("Monitor Agreement" or "Agreement") entered into this 13th day of June 2017, among Anthony P. Bartys ("Monitor"), who has been chosen to act as Monitor, and Alimentation Couche-Tard Inc. ("Respondent") (Monitor and Respondent are each individually referred to herein as a "Party" and collectively referred to herein as the "Parties"), provides as follows:

WHEREAS, CST Brands, Inc. ("CST"), and Respondent have entered into an Agreement and Plan of Merger, by and among CST, Circle K Stores Inc., a wholly-owned subsidiary of Respondent, and Ultra Acquisition Corp., an indirect, wholly-owned subsidiary of Respondent ("Ultra"), dated as of August 21, 2016, (the "CST Merger Agreement"), pursuant to which, among other things, Ultra will merge with and into CST, with CST as the surviving corporation and an indirect, 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;

WHEREAS, the Consent Order provides for the appointment of a Monitor to assure that Respondent complies with all of its obligations and performs all of its responsibilities required by the Decision and Order, the Order to Maintain Assets, and the Remedial Agreement;

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 Monitor to perform its duties and responsibilities pursuant to the Consent Order;

WHEREAS, this Monitor Agreement, although executed by the Monitor and Respondent, is not effective for any purpose, including but not limited to, imposing rights and responsibilities on Respondent or the Monitor, until this Monitor Agreement has been approved by the Commission and after the Acquisition has been consummated;

WHEREAS, the Monitor is well versed in the operation of the Assets To Be Divested and wishes to accept such appointment upon the terms and conditions stated herein; 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 Order.

2. The Monitor shall have all of the powers, authority, and responsibilities conferred upon the 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 Agreement. The Monitor shall have

the authority to employ, in its sole discretion, 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.

3. In the performance of its functions and duties under this Agreement, the 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 Monitor shall act in a fiduciary capacity for the benefit of the Commission.

5. 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 Respondent and the Commission of any such conflict.

6. The 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 Assets To Be Divested and to Respondent's compliance with its obligations under the Consent Order, including its obligations related to the Assets To Be Divested, as the 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 Monitor, including but not limited to complying with Monitor's requests for onsite visits and interviews with employees of Respondent. Respondent shall take no action to interfere with or impede the Monitor's ability to monitor Respondent's compliance with the Consent Order and the Remedial Agreement.

7. Respondent shall designate a senior employee(s) of Respondent to be a primary contact for the Monitor and to notify the Monitor regarding any changes in the contact personnel. Respondent shall notify the Monitor of meetings and other critical events relating to the Assets To Be Divested, the Consent Order, or the Remedial Agreement, and provide any available minutes of such meetings to the Monitor.

8. Respondent shall provide and the Monitor shall evaluate the reports submitted by Respondent pursuant to the Consent Order, and within 30 days from the date the Monitor receives the first such report, and every 30 days thereafter until the end of the Monitor's term, the Monitor shall report in writing to the Commission concerning performance by Respondent of their obligations under the Consent Order.

9. In response to a request by the Commission or its staff, the Monitor shall further report in writing to the Commission concerning Respondent's compliance with its obligations under the Consent Order.

10. The 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 Monitor

under this 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 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 Monitor shall label such information "Confidential." The 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 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 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 Monitor to disclose any material or information that is subject to a legally recognized privilege or that Respondent or the Monitor is prohibited from disclosing by reason of law.

12. Respondent will pay the Monitor fees for time spent in the performance of its duties in the amount of [redacted] per hour, subject, for the time period described below, to a floor set by a monthly retainer. Respondent will provide the Monitor with a [redacted] retainer on the date on which the Acquisition is consummated, and, for each subsequent month until the end of any Transition Services Agreement in effect with any Acquirer, a [redacted] retainer. In the event that hourly fees for a particular month exceed the applicable monthly retainer amount, Respondent shall pay the hourly fees in excess of the retainer. In the event that hourly fees for a particular month are below the applicable retainer amount, Respondents shall nonetheless pay the entire retainer. In addition, Respondent will pay all documented out-of-pocket expenses reasonably incurred by the Monitor in the performance of the 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 Monitor's duties and responsibilities. Payments under this Paragraph 12 shall be made on a monthly basis until the Monitor ceases its activities under this Agreement. The Monitor shall provide Respondent with monthly invoices for time and expenses that include details and an explanation of all matters for which the Monitor submits an invoice to Respondent. Respondent shall pay such invoices within 30 days of receipt. The 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 IV of the Decision and Order and the 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 Monitor (and all Persons retained by the Monitor) and hold the Monitor harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the 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 gross negligence, willful or wanton acts, or bad faith by the Monitor.

14. In the event of a disagreement or dispute between Respondent and the Monitor that does not involve the Monitor's performance of his duties and responsibilities under the Consent Order, 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 later 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 Monitor is no longer able to perform the duties described in this Agreement, Monitor may terminate this Agreement by providing Respondent 30 days written notice. In the event of such termination, 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 Monitor terminate this Agreement pursuant to Paragraph 15, the 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 Monitor and any personnel hired by the Monitor for interviews by Respondent and/or the substitute monitor for purposes of gathering relevant information relating the performance by the 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 or e-mail 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 Monitor, to:

Anthony P. Bartys
23107 Summers Dream
San Antonio, TX 78258
Cellular Phone: (210) 862-0813 (preferred)
Home Phone: (210) 497-1680
Email: tbartys@att.net

If to Respondent, to:

Sylvain Aubry
Senior Director, Legal Affairs and Corporate Secretary at Alimentation Couche-Tard Inc.
4204 Industriel Boulevard
Laval, Québec H7L 0E3, Canada
Phone: +1 (450) 662-6632, ext. 4619
Email: sylvain.aubry@couche-tard.com

19. The Monitor Agreement may not be assigned by Respondent or the Monitor without the prior written consent of the other Party and the Commission.

20. It is understood and agreed that the Monitor shall act as an independent contractor in the undertaking of this Agreement and the 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.

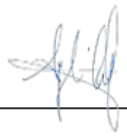
22. This Monitor Agreement contains the entire agreement between the Parties relating to the subject matter hereof and supersedes all previous negotiations, agreements, undertakings and representations, documents, minutes of meetings, letters or notices (whether oral or written) between the Parties and/or their respective affiliates with respect to the subject matter.

23. This Monitor Agreement shall not become binding until it has been approved by the Commission and the Consent Order has been accepted for public comment, and the Acquisition has been consummated. The Consent Order shall govern this Monitor Agreement and any provisions herein that conflict or are inconsistent with such orders may be declared void by the Commission and any provision not in conflict shall survive and remain a part of this 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 Delaware.

Order to Maintain Assets

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

Alimentation Couche-Tard Inc.	Monitor:
By: 	_____
Name: Sylvain Aubry	Name:
Title: Senior Director, Legal Affairs and Corporate Secretary	

Order to Maintain Assets

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

Alimentation Couche-Tard Inc.

By:_____

Name: Sylvain Aubry

Title: Senior Director, Legal Affairs and Corporate Secretary

Monitor:

Name: Anthony P. Bartys

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Alimentation Couche-Tard Inc. ("ACT"), through its wholly-owned subsidiary, Circle K Stores Inc., of Respondent CST Brands, Inc. ("CST"), 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 Orders ("Consent Agreement"), containing an admission 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 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, 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 ACT is a corporation organized, existing, and doing business under and by virtue of the laws of Canada, with its headquarters and principal place of

business located at 4204 Industriel Blvd., Laval, Quebec H7L 0E3, Canada, and its United States address for service of process and of the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Corporate Secretary, Circle K Stores Inc., 1130 W. Warner Road, Tempe, Arizona 85284.

2. Respondent CST 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 19500 Bulverde Road, San Antonio, Texas 78259.

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

ORDER

I.

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

A. "ACT" means Alimentation Couche-Tard Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Alimentation Couche-Tard Inc., including Circle K Stores and Ultra, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, ACT shall include CST.

B. "Circle K Stores" means Circle K Stores Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, and its directors, officers, employees, agents, representatives, successors, and assigns. Circle K Stores is a wholly-owned subsidiary of ACT.

C. "Ultra" means Ultra Acquisition Corp., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, and its directors, officers, employees, agents, representatives, successors, and assigns. Ultra is an indirect wholly-owned subsidiary of Circle K Stores.

D. "CST" means CST Brands, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates (including, but not limited to, CrossAmerica Partners, LP), in each case controlled by CST Brands, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Respondents" means ACT and CST, individually and collectively.

F. "Acquirer" means Empire or any other Person approved by the Commission to acquire the Assets To Be Divested pursuant to this Order.

G. "Acquisition" means the proposed acquisition of CST by Circle K Stores and Ultra pursuant to the Acquisition Agreement.

H. "Acquisition Agreement" means the Agreement and Plan of Merger by and among Circle K Stores Inc., Ultra Acquisition Corp., and CST Brands, Inc., dated as of August 21, 2016, that was submitted by ACT and CST to the Commission in this matter.

I. "ACT Outlet" means a Retail Fuel Outlet that was owned or operated by ACT at the time the Consent Agreement was signed by Respondents.

J. "Actual Fuel Products Costs" means costs not to exceed the actual costs charged to Respondents by (1) Valero Marketing and Supply Company ("Valero") for Fuel Products pursuant to the Master Agreement effective May 1, 2013, between Valero and CST

Marketing and Supply Company, LLC, (together with the Branded Distributor Marketing Agreement referred to therein and all other related agreements and documents, as amended) less any reductions resulting from any applicable Valero temporary voluntary allowances, and (2) any common carriers transporting such Fuel Products from terminals to Retail Fuel Outlets To Be Divested, but excluding any Retail Fuel Outlets not currently supplied by Valero. Actual Fuel Products Costs shall not include any mark-ups, profit, overhead, minimum volume penalties, or other price adjustments by Respondents.

K. "Assets To Be Divested" means the Retail Fuel Outlets To Be Divested and all of Respondents' rights, title, and interests in and to all assets, tangible and intangible, relating to, used in, and/or reserved for use in, the Retail Fuel Outlet Business operated at each of those locations, including, but not limited to:

1. All real property interests (including fee simple interests and real property leases and leasehold interests), including all easements and rights-of-way, together with all buildings and other structures, facilities, appurtenances, and improvements located thereon or affixed thereto (including all attached machinery, fixtures, and heating, plumbing, electrical, lighting, ventilating and air-conditioning equipment), whether owned, leased, or otherwise held;

2. All Equipment;

3. All Inventories;

4. All Contracts and all outstanding offers or solicitations to enter into any Contract (and all rights thereunder and related thereto), to the extent transferable, and at the Acquirer's option;

5. All Governmental Permits, and all pending applications thereof or renewals thereof (to the extent transferable);

6. Goodwill;

7. Telephone and fax numbers; and

8. Books and Records;

Provided, however, that in cases in which Books and Records included in the Assets To Be Divested contain information: (a) that relates both to the Assets To Be Divested and to other retained businesses of Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Assets To Be Divested, or (b) where 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 with appropriate redactions to the Acquirer. 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;

9. *Provided, however*, that the Assets To Be Divested shall not include:

    a. Any of the CST Outlets listed on Schedule B for which the corresponding Substitute Retail Fuel Outlets are instead divested;

    b. Respondents' Brands, except with respect to any purchased Inventory (including private label inventory); *provided further, however,* that, at the Acquirer's option, Respondents shall grant a worldwide, royalty-free, fully paid-up license to the Acquirer to use any of Respondents' Brands as are applicable to the Assets To Be Divested as part of any

Transition Services Agreement that Respondents may enter into with the Acquirer, or as may otherwise be allowed pursuant to any Remedial Agreement(s);

c. Assets used in the distribution of Inventories that are not located at the Retail Fuel Outlets identified on Schedule A of this Order;

d. All cash or cash equivalents (except change funds or cash on hand), rebates and accounts receivable relating to the operation of the Retail Fuel Outlets immediately prior to the actual date and time that possession of the respective Retail Fuel Outlets are conveyed to the Acquirer; or

e. If Empire is the Acquirer, Books and Records, Contracts, and Equipment that will not be conveyed to Empire pursuant to the Empire Divestiture Agreement.

L. "Books and Records" means all originals and all copies of any operating, financial, environmental, governmental compliance, regulatory, or other information, documents, data, databases, printouts, 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, relating to the Assets To Be Divested, including, but not limited to, real estate files; environmental reports; environmental liability claims and reimbursement data, information, and materials; underground storage tank (UST) System registrations and reports; registrations, licenses, and permits (to the extent transferable); regulatory compliance records, data, and files; applications, filings, submissions, communications, and correspondence with Governmental Entities;

inventory data, records, and information; purchase order information and records; supplier, vendor, and procurement files, lists, and related data and information; credit records and information; account information; marketing analyses and research data; service and warranty records; warranties and guarantees; equipment logs, operating guides and manuals; employee lists and contracts, salary and benefits information, and personnel files and records (to the extent permitted by law); financial statements and records; accounting records and documents; telephone numbers and fax numbers; and all other documents, information, and files of any kind that are necessary for the Acquirer to operate the Assets To Be Divested in a manner consistent with the purposes of this Order.

M. "Closing Date" means the closing date for the Acquisition as defined in Section 1.2 of the Acquisition Agreement.

N. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondents that is not in the public domain and to the extent that it is related to or used in connection with the Assets To Be Divested or the conduct of the Retail Fuel Outlet Business at the Retail Fuel Outlets To Be Divested. The term "Confidential Business Information" excludes the following:

1. Information that is contained in documents, books, or records of Respondents that is provided to an Acquirer that is unrelated to the Assets To Be Divested or that is exclusively related to the Respondents' retained businesses; and

2. Information that: (a) is or becomes generally available to the public other than as a result of disclosure in breach of the prohibitions of this Order; (b) is or was developed independently of, and without reference to, any Confidential Business Information; (c) is necessary to be

included in Respondents' mandatory regulatory filings; (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 transactions pursuant to the Divestiture Agreement or any 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 Governmental Entities; or (h) is disclosed in obtaining legal advice.

O. "Contract(s)" means all agreements, contracts, licenses, leases (including, but not limited to, ground leases and subleases), consensual obligations, binding commitments, promises and undertakings (whether written or oral and whether express or implied), whether or not legally binding.

P. "CST Outlet" means a Retail Fuel Outlet that was owned or operated by CST at the time the Consent Agreement was signed by Respondents.

Q. "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.

R. "Divestiture Agreement" means any agreement between Respondents and an Acquirer (or between a Divestiture Trustee and an Acquirer), and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested that have been proposed for approval by the Commission to accomplish the requirements of this Order.

S. "Divestiture Date" means the date on which Respondents (or a Divestiture Trustee) close on the divestiture of the Assets To Be Divested as required by Paragraph II. (or Paragraph IV.) of this Order.

T. "Divestiture Trustee" means any Person appointed by the Commission to serve as a Divestiture Trustee pursuant to Paragraph IV. of this Order.

U. "Empire" means Empire Petroleum Partners, LLC, a limited liability company organized, existing, and doing business under and by virtue of the laws of Delaware, with its offices and principal place of business located at 8350 North Central Expressway, Suite M2185, Dallas, Texas 75206; its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Empire Petroleum Partners, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

V. "Empire Divestiture Agreement" means the Asset Purchase Agreement among Empire Petroleum Partners, LLC, Circle K Stores, Inc., and CST Brands, Inc., dated as of June 3, 2017; the Transition Services Agreement among Empire Petroleum Partners, LLC, Circle K Stores, Inc., and CST Brands, Inc., dated as of June 3, 2017; and all amendments, exhibits, attachments, agreements, and schedules submitted to the Commission with the foregoing to accomplish the divestiture of the Assets To Be Divested. The Empire Divestiture Agreement is attached to this Order as Non-Public Appendix E.

W. "Equipment" means all tangible personal property (other than Inventory(ies)) of every kind owned or leased by Respondents in connection with the operation of the Retail Fuel Outlets To Be Divested, including, but not limited to all: fixtures, furniture, computer equipment and third-party software, office equipment, telephone systems, security systems,

registers, credit card systems, credit card invoice printers and electronic point of sale devices, money order machines and money order stock, shelving, display racks, walk-in boxes, furnishings, signage, canopies, fuel dispensing equipment, UST Systems (including all fuel storage tanks, fill holes and fill hole covers and tops, pipelines, vapor lines, pumps, hoses, Stage I and Stage II vapor recovery equipment, containment devices, monitoring equipment, cathodic protection systems, and other elements associated with any of the foregoing), parts, tools, supplies, and all other items of equipment or tangible personal property of any nature or other systems used in the operation of and located at the Retail Fuel Outlets To Be Divested, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof, to the extent such warranty is transferrable, and all maintenance records and other documents relating thereto.

X. "Fuel Products" means refined petroleum gasoline and diesel products.

Y. "Governmental Entity" means any federal, state, local, or non-U.S. government, or any court, legislature, governmental agency or commission, or any judicial or regulatory authority of any government.

Z. "Governmental Permit(s)" means all licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any Governmental Entity(ies) necessary to effect the complete transfer and divestiture of the Assets To Be Divested to the Acquirer and for the Acquirer to operate any aspect of a Retail Fuel Outlet Business.

AA. "Inventory(ies)" means all inventories of every kind and nature for retail sale located at the Retail Fuel Outlets To Be Divested, including: (1) all gasoline, diesel fuel, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public ("Fuel Inventory"); and (2) all usable, non-damaged

and non-out of date products and items held for sale to the public, including, without limitation, all food-related items requiring further processing, packaging, or preparation and ingredients from which prepared foods are made to be sold ("Merchandise Inventory").

BB. "Monitor" means any Person appointed by the Commission to serve as a Monitor pursuant to Paragraph IV. of the Order to Maintain Assets.

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

DD. "Person" means any individual, or any partnership, firm, corporation, limited liability company, limited liability partnership, association, trust, unincorporated organization, or other business entity.

EE. "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 Empire.

FF. "Relevant Notice Outlets" means the Retail Fuel Outlets To Be Divested and the Retail Fuel Outlets identified on Non-Public Schedule D of this Order.

GG. "Remedial Agreement" means the Empire Divestiture Agreement if approved by the Commission, or

1. Any other Divestiture Agreement that is approved by the Commission; 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.

HH. "Respondents' Brands" means all of Respondents' trademarks, trade dress, logos, service marks, trade names, brand names, and all associated intellectual property rights, including rights to the names "Circle K," "Corner Store," and "Flash Foods."

II. "Retail Fuel Outlet" means: (1) any existing retail facility engaged in the activities of a Retail Fuel Outlet Business; and (2) any property site where construction of a retail facility to be engaged in the activities of a Retail Fuel Outlet Business is planned or underway.

JJ. "Retail Fuel Outlet Business" means all business activities relating to: (1) the retail sale, promotion, marketing, and provision of motor fuels, including gasoline, diesel fuel, and other fuels, automotive products, and related services; and (2) the operation of associated convenience stores and related businesses and services, including but not limited to the retail sale, promotion, marketing and provision of food and grocery products (including dairy and bakery items, snacks, gum, and candy), foodservice and quick-serve restaurant items, beverages (including alcoholic beverages), tobacco products, general merchandise, ATM services, gaming and lottery tickets and services, money order services, car wash services, and all other businesses and services associated with the business operated or to be operated at each Retail Fuel Outlets To Be Divested.

KK. "Retail Fuel Outlets To Be Divested" means: (1) the Retail Fuel Outlets identified on Schedule A of this Order, (2) any Substitute Retail Fuel Outlet if substituted for the corresponding CST Outlet identified on Schedule B of this Order, provided, however, that Retail Outlets To Be Divested shall not include any CST Outlet identified in Schedule B of this Order for which the corresponding Substitute Retail Fuel Outlet

is divested, and (3) the Schedule C Site if included at the Acquirer's option.

LL. "Schedule C Site" means the property site identified on Schedule C of this Order, which shall be included as part of the Assets To Be Divested only at the Acquirer's sole option.

MM. "Substitute Retail Fuel Outlet" means each of the ACT Outlets that is identified in Schedule B, corresponding to an identified CST Outlet.

NN. "Third Party(ies)" means any Person other than the Respondents or the Acquirer.

OO. "Third Party Consents" means all consents, approvals, permissions, waivers, ratifications, or other authorizations from any Third Party(ies) that are necessary to effect the complete transfer and divestiture of the Assets To Be Divested to the Acquirer and for the Acquirer to operate any aspect of a Retail Fuel Outlet Business.

PP. "Transition Services" means technical services, personnel, assistance, training, product supply, and other logistical, administrative, and transitional support as required by the Acquirer and approved by the Commission to facilitate the transfer of the Assets To Be Divested from the Respondents to the Acquirer, including, but not limited to, services, training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, information technology and systems, maintenance and repair of facilities and equipment, Fuel Products supply, purchasing, quality control, R&D support, technology transfer, use of Respondents' Brands for transitional purposes, operating permits and licenses, regulatory compliance, sales and marketing, customer service, and supply chain management and customer transfer logistics.

QQ. "Transition Services Agreement" means an agreement that receives the prior approval of the Commission between 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 and to operate the Assets To Be Divested in a manner consistent with the purposes of this Order.

II.

IT IS FURTHER ORDERED that:

A. No later than (i) seventy five (75) days after the Closing Date, or (ii) fourteen (14) days after the date this Order is issued as final, whichever is later, Respondents shall divest the Assets To Be Divested, absolutely and in good faith, as ongoing Retail Fuel Outlet Businesses, to Empire pursuant to and in accordance with the Empire Divestiture Agreement.

B. *Provided, however,* that if Respondents have divested the Assets To Be Divested to Empire pursuant to Paragraph II.A. of this Order prior to the date this Order becomes final, and at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. Empire is not an acceptable Acquirer, then Respondents shall, within five (5) days of notification by the Commission, rescind such transaction with Empire and shall divest the Assets To Be Divested as ongoing Retail Fuel Outlet 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 Empire 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 Empire (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:

1. Prior to the Divestiture Date, obtain, at their sole expense, all required Third Party Consents relating to the divestiture of all Assets To Be Divested;

Provided, however, that:

a. for each of the CST Outlets identified in Schedule B that require landlord consent in order to effectuate the required divestiture, in the event that Respondents are unable to obtain the necessary landlord consent for divestiture of any one or more of such CST Outlets, Respondents may, in consultation with the Monitor and Commission staff, substitute the corresponding Substitute Retail Fuel Outlet subject to the proviso that the divestiture of any Substitute Retail Fuel Outlet(s) shall not include Respondents' Brands except, at the Acquirer's option, pursuant to a worldwide, royalty-free, fully paid-up license granted by the Respondents to the Acquirer to use any of Respondents' Brands as applicable to the Substitute Retail Fuel Outlet(s) as part of any Transition Services Agreement that Respondents may enter into with the Acquirer, or as may otherwise be allowed pursuant to any Remedial Agreement(s); *provided further* that Respondents shall divest such Substitute Retail Fuel Outlet(s) to the Acquirer no later than fifteen (15) days after receipt of written

notification from the Commission or its staff directing such divestiture if it has not already occurred; and

b. Respondents may satisfy this requirement by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant Third Party(ies) or has otherwise obtained all necessary consents and waivers; and

2. With respect to any Governmental Permits relating to the Assets To Be Divested that are not transferable, allow the Acquirer to operate the Assets To Be Divested under Respondents' Governmental Permits pending the Acquirer's receipt of its own Governmental Permits, and provide such assistance as the Acquirer may reasonably request in connection with its efforts to obtain such Governmental Permits.

D. If the Acquirer declines to acquire the Schedule C Site, it shall not become part of the Assets To Be Divested; *provided, however,* that if Respondents subsequently sell, transfer, or otherwise convey the Schedule C Site in whole or in part (including any real property interest or leasehold interest) to a Third Party, then Respondents shall: (1) neither enter into nor enforce any agreement (including, but not limited to, any deed restriction) that restricts in any way the ability of such Third Party to operate or use the Schedule C Site as a Retail Fuel Outlet, and (2) include a copy of any transaction documents regarding such sale, transfer, or conveyance in their compliance report(s) pursuant to Paragraph VII. of this Order.

E. 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 one (1) year following the Divestiture Date, with an opportunity to extend for up to one (1) year at the option of the

Acquirer; *provided, however,* that any transitional supply of Fuel Products from Respondent to the Acquirer pursuant to a Transition Services Agreement shall terminate on or before 270 days following the Divestiture Date. Such Transition Services Agreement shall provide that: (1) the Acquirer may terminate the Transition Services Agreement at any time upon commercially reasonable notice to the Respondents, and without cost or penalty to the Acquirer; and (2) at the Acquirer's request, Respondents shall agree to extend the term of any Transition Service(s), except for any transitional supply of Fuel Products, for an additional period of up to one (1) year (*i.e.,* in addition to the initial term plus any extension), and shall file with the Commission any request for prior approval to extend the term of the Transition Services Agreement for such Transition Service(s). The Transition Services provided pursuant to the Transition Services Agreement shall be provided at no more than Respondents' Direct Costs, except that any transitional supply of Fuel Products shall be provided at no more than Respondents' Actual Fuel Products Costs, and shall enable the Acquirer to operate Retail Fuel Outlets at least at the same level of quality and service as they were operated prior to the divestiture.

F. Respondents shall:

1. Keep confidential (including as to Respondents' employees) and not use for any purpose any Confidential Business Information received or maintained by Respondents relating to the Assets To Be Divested or the Retail Fuel Outlets identified on Schedule A of this Order; *provided, however,* that Respondents may disclose or use such Confidential Business Information in the course of: (a) performing their Order obligations or as otherwise permitted under this Order, the Order to Maintain Assets, or any Remedial Agreement; or (b) complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or

enforcing actions threatened or brought against the Assets To Be Divested, or as required by law; and

2. Enforce the terms of Paragraph II.F.1 of this Order as to its employees or any other Person, and take such actions as are necessary to cause each of its employees and any other Person to comply with the terms of Paragraph II.F.1, including implementation of access and data controls, training of its employees, and all other actions that Respondents would take to protect their own confidential and proprietary information.

G. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person pursuant to Paragraph II.F. of this Order, Respondents shall limit such disclosure or use (1) only to the extent such information is required, (2) only to those employees or Persons who require such information for the purposes permitted under Paragraph II.F., and (3) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

H. The purpose of the divestiture is to ensure the continuation of the Assets To Be Divested as ongoing, viable enterprises engaged in the Retail Fuel Outlet 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, or from Commission staff, 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 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. For a period of ten (10) years from the date this Order is issued, Respondents shall not, without providing advance written notification to the Commission in the manner described in this paragraph, acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any Relevant Notice Outlets.

B. With respect to the notification:

1. The prior notification required by this Paragraph V. shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of the Respondents and not of any other party to the transaction.

2. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material.

3. Early termination of the waiting periods in this Paragraph V. 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.

VI.

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 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 Remedial 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.

D. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. §2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

VII.

IT IS FURTHER ORDERED that:

A. Within 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. and III. 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 August 4, 2027.

By the Commission.

Decision and Order

SCHEDULE A

Divested Outlet	Address	City	State	Zip Code
CAPL - OH0072	7510 Broadview Rd	Cleveland	Ohio	44134
CST - 1105	7799 E Arapahoe Rd	Englewood	Colorado	80112
CST - 1117	15303 E Quincy Ave	Aurora	Colorado	80115
CST - 1133	1004 Us Highway 287	Broomfield	Colorado	80020
CST - 1142	1765 Briargate Blvd	Colorado Springs	Colorado	80920
CST - 1148	7396 W 92Nd Ave	Broomfield	Colorado	80021
CST - 1160	715 Cheyenne Meadows Rd	Colorado Springs	Colorado	80906
CST - 1170	205 W Rockrimmon Blvd	Colorado Springs	Colorado	80919
CST - 1216	5600 Edith Blvd Ne	Albuquerque	New Mexico	87107
CST - 1219	2721 Coors Blvd Nw	Albuquerque	New Mexico	87120
CST - 1240	12521 Menaul Blvd Ne	Albuquerque	New Mexico	87112
CST - 1242	4221 Osuna Rd Ne	Albuquerque	New Mexico	87109
CST - 1248	2695 W Picacho Ave	Las Cruces	New Mexico	88007
CST - 1258	230 S Americas Ave	El Paso	Texas	79907
CST - 1273	11680 Montwood Dr	El Paso	Texas	79936
CST - 1276	1500 N Zaragoza Rd	El Paso	Texas	79936
CST - 1277	850 E Redd Rd	El Paso	Texas	79912

CST - 1354	201 S Americas Ave	El Paso	Texas	79907
CST - 1355	840 N Zaragoza Rd	El Paso	Texas	79907
CST - 1357	6920 Delta Dr	El Paso	Texas	79905
CST - 1363	629 S Yarbrough Dr	El Paso	Texas	79915
CST - 1369	3815 Pershing Dr	El Paso	Texas	79903
CST - 1445	110 Slaughter Ln W	Austin	Texas	78748
CST - 1500	102 S Sunset Strip St	Kenedy	Texas	78119
CST - 1503	5646 Kostoryz Rd	Corpus Christi	Texas	78415
CST - 1597	2300 N Zaragoza Rd	El Paso	Texas	79938
CST - 1602	7542 E Southern Ave	Mesa	Arizona	85208
CST - 1606	7060 E Baseline Rd	Mesa	Arizona	85209
CST - 1611	20205 N Cave Creek Rd	Phoenix	Arizona	85204
CST - 1613	2160 W Drexel Rd	Tucson	Arizona	85746
CST - 1617	1810 W Prince Rd	Tucson	Arizona	85705
CST - 1618	2409 W Union Hills Dr	Phoenix	Arizona	85207
CST - 1625	6701 W Olive Ave	Peoria	Arizona	85345
CST - 1627	1895 E Valencia Rd	Tucson	Arizona	85706
CST - 1636	5005 N La Canada Dr	Tucson	Arizona	85704
CST - 1638	5905 W Cactus Rd	Glendale	Arizona	85304

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CST - 1640	9520 E 22Nd St	Tucson	Arizona	85748
CST - 1645	2367 S Val Vista Dr	Gilbert	Arizona	85295
CST - 1651	719 E Thunderbird Rd	Phoenix	Arizona	85022
CST - 1654	4305 E Ray Rd	Phoenix	Arizona	85044
CST - 1658	15240 N Oracle Rd	Tucson	Arizona	85739
CST - 1659	9151 E Guadalupe Rd	Mesa	Arizona	85212
CST - 1670	3999 E Fry Blvd	Sierra Vista	Arizona	85635
CST - 1672	3171 E Pecos Rd	Gilbert	Arizona	85295
CST - 1674	1520 N Verrado Way	Buckeye	Arizona	85396
CST - 1677	1636 S Higley Rd	Gilbert	Arizona	85295
CST - 1678	39657 N Gantzel Rd	Queen Creek	Arizona	85140
CST - 1679	21198 E Ocotillo Rd	Queen Creek	Arizona	85142
CST - 1681	Gilbert, Queen Creek Rd & Val Vista Dr, Sec	Gilbert	Arizona	85296
CST - 1701	4020 W Ray Rd	Chandler	Arizona	85226
CST - 1704	8424 S Power Rd	Gilbert	Arizona	85297
CST - 1746	3100 N Mesa Sy	El Paso	Texas	79902
CST - 1828	Nec Staples St & Wooldridge	Corpus Christi	Texas	78411
CST - 238	2001 Highway 71 E	Del Valle	Texas	78617
CST - 380	4910 Barksdale Blvd	Bossier City	Louisiana	71112

CST - 384	5454 W 70Th St	Shreveport	Louisiana	71129
CST - 4065	8105 N Academy Blvd	Colorado Springs	Colorado	80920
CST - 4136	1310 W Baptist Rd	Colorado Springs	Colorado	80921
CST - 4146	505 W 120Th Ave	Denver	Colorado	80234
CST - 428	3958 Saratoga Blvd	Corpus Christi	Texas	78415
CST - 43	701 S State Highway 359	Mathis	Texas	78368
CST - 865	3001 N Yarbrough Dr	El Paso	Texas	79925
CST-5044 (FF – 115)	4409 Timuquana Rd	Jacksonville	Florida	32210
CST-5190 (FF – 128)	850850 Us Hwy 17	Yulee	Florida	32097
CST-5060 (FF – 140)	1145 Airport Rd	Jacksonville	Florida	32218
CST-5062 (FF – 142)	201 N Kings Rd	Hilliard	Florida	32046
CST-5066 (FF – 146)	7308 Ga Highway 21	Savannah	Georgia	31407
CST-5081 (FF – 171)	1412 Gerbing Rd	Fernandina Beach	Florida	32034
CST-5082 (FF – 172)	1884 S Kings Rd	Callahan	Florida	32011
CST-5140 (FF – 267)	1417 Sam Nunn Blvd	Perry	Georgia	31069

Schedule B

If landlord consent to assignment of the lease for any of the CST Outlets listed below cannot be obtained, for each and every CST Outlet for which assignment has not been obtained, Respondents shall substitute the corresponding ACT Outlet listed below, in consultation with the Monitor and staff of the Commission.

CST Outlet	Address	Corresponding ACT Outlet to be divested	Address
CST - 1170	205 W Rockrimmon Blvd Colorado Springs, Colorado 80919	ACT - 2709840	7055 Commerce Center Dr Colorado Springs, Colorado 80919
CST - 1369	3815 Pershing Dr El Paso, Texas 79903	ACT - 2701418	3910 A Dyer St El Paso, Texas 79930
CST - 1500	102 S Sunset Strip St Kenedy, Texas 78119	ACT - 2704059	101 S Sunset Strip St Kenedy, Texas 78119
CST - 1651	719 E Thunderbird Rd Phoenix, Arizona 85022	ACT - 2701855	15400 N 7th St Phoenix, Arizona 85022

Schedule C

Site	Address	City	State	Zip Code
ACT - 2723891	1541 S Mock Rd	Albany	Georgia	31705

NON-PUBLIC SCHEDULE D:

RELEVANT NOTICE RETAIL FUEL OUTLETS

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

NON-PUBLIC APPENDIX E:

EMPIRE DIVESTITURE AGREEMENT

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Alimentation Couche-Tard Inc. ("ACT") and CST Brands, Inc. ("CST") (collectively, the "Respondents"). The Consent Agreement is designed to remedy the anticompetitive effects that likely would result from ACT's proposed acquisition of CST.

Under the terms of the proposed Consent Agreement, ACT must divest to a Commission-approved buyer certain CST retail fuel outlets and related assets in 70 local markets in 16 metropolitan statistical areas ("MSAs"), and at the buyer's option, an ACT site in one local market. The divestiture must be

completed no later than 75 days after the closing of ACT's acquisition of CST or 14 days after the Consent Agreement is issued as final. The Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain each divestiture outlet in the normal course of business through the date the Commission-approved buyer acquires the outlet.

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

II. The Respondents

Respondent ACT, a publicly traded company headquartered in Laval, Quebec, Canada, operates convenience stores and retail fuel outlets throughout the United States and the world. ACT's current U.S. network consists of over 6,050 stores located in 41 states. Nearly 4,700 locations are company-operated, making ACT the largest convenience store operator in terms of company-owned stores and the second-largest chain overall in the country. Approximately 88 percent of ACT's company-operated locations also sell fuel. ACT convenience store locations operate primarily under the Circle K and Kangaroo Express banners, while its retail fuel outlets operate under a variety of company and third-party brands.

Respondent CST operates convenience stores and retail fuel outlets in the United States and Canada. With 1,146 convenience stores and retail fuel outlets in the United States, CST is one of the largest chains in the country. CST's U.S. convenience stores operate primarily under the Corner Store banner, while its retail fuel outlets operate primarily under the Valero brand. CST also is the general partner and operator of CrossAmerica Partners LP, a publicly traded master limited partnership that offers wholesale fuels marketing, and owns and operates convenience stores and retail fuel outlets.

III. The Proposed Acquisition

On August 21, 2016, ACT, through its wholly-owned subsidiary Circle K Stores, Inc., entered into an agreement to acquire all outstanding shares of CST for $4.4 billion, with CST surviving post-acquisition as a wholly-owned subsidiary of Circle K Stores, Inc. (the "Transaction"). The Transaction would cement ACT's position as one of the largest operators of retail fuel outlets in the United States.

The Commission's Complaint alleges that the Transaction, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition for the retail sale of gasoline and diesel in 71 local markets across 16 MSAs.

IV. The Retail Sale of Gasoline and Diesel

The Commission's Complaint alleges that relevant product markets in which to analyze the Transaction are the retail sale of gasoline and the retail sale of diesel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Likewise, consumers require diesel for their diesel-powered vehicles and can purchase diesel only at retail fuel outlets. The retail sale of gasoline and the retail sale of diesel constitute separate relevant markets because the two are not interchangeable – vehicles that run on gasoline cannot run on diesel and vehicles that run on diesel cannot run on gasoline.

The Commission's Complaint alleges the relevant geographic markets in which to assess the competitive effects of the Transaction are 71 local markets within the following MSAs: Phoenix, Arizona; El Paso, Texas; Tucson, Arizona; Colorado Springs, Colorado; Denver, Colorado; Jacksonville, Florida; Albuquerque, New Mexico; Corpus Christi, Texas; Austin, Texas; Shreveport, Louisiana; Albany, Georgia; Cleveland, Ohio; Las Cruces, New Mexico; Savannah, Georgia; Sierra Vista, Arizona; and Warner Robins, Georgia.

The geographic markets for the retail sale of gasoline are highly localized, generally ranging from a few blocks to a few

miles. None of the relevant geographic markets exceeds three driving miles from an overlapping retail fuel outlet. Fueling up on gasoline is rarely a destination trip for a consumer and therefore consumers are likely to frequent retail fuel outlets close to their planned routes. Each particular geographic market is unique, with factors such as commuting patterns, traffic flows, and outlet characteristics playing important roles in determining the scope of the geographic market. The geographic markets for the retail sale of diesel are similar to the corresponding geographic markets for retail gasoline as diesel consumers exhibit the same preferences and behaviors as gasoline consumers.

The Transaction would substantially increase the market concentration in each of the 71 local markets, resulting in highly concentrated markets. In ten local markets, the Transaction would result in a monopoly. In 20 local markets, the Transaction would reduce the number of independent market participants from three to two. In 41 local markets, the Transaction would reduce the number of independent market participants from four to three.

The Transaction would substantially lessen competition for the retail sale of gasoline and the retail sale of diesel in these local markets. Retail fuel outlets compete on price, store format, product offerings, and location, and pay close attention to competitors in close proximity, on similar traffic flows, and with similar store characteristics. The combined entity would be able to raise prices unilaterally in markets where CST is ACT's only or closest competitor. Absent the Transaction, CST and ACT would continue to compete head to head in these local markets.

Moreover, the Transaction would increase the likelihood of coordination in local markets where only three or two independent market participants would remain. Two aspects of the retail fuel industry make it vulnerable to coordination. First, retail fuel outlets post their fuel prices on price signs that are visible from the street, allowing competitors to observe each other's fuel prices without difficulty. Second, retail fuel outlets regularly track their competitors' fuel prices and change their own prices in response. These repeated interactions give retail fuel outlets familiarity with how their competitors price and how their competitors respond to their own prices.

Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Significant entry barriers include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time associated with obtaining necessary permits and approvals.

V. The Proposed Consent Agreement

The proposed Consent Agreement remedies the Transaction's anticompetitive effects by requiring ACT to divest certain CST retail fuel outlets and related assets in 70 local markets, and an ACT site in one local market at the buyer's option, to Empire Petroleum Partners ("Empire"). Empire is a retail operator and wholesale fuel distributor doing business in 26 states; its executive team has decades of experience with some of the industry's largest players. The Commission is satisfied that Empire is a qualified acquirer of the divested assets.

The proposed Consent Agreement requires ACT to divest to Empire CST's retail fuel outlets in 70 local markets. In the remaining local market, located in Albany, Georgia, the ACT outlet was damaged by a tornado in early 2017. To remedy potential competitive concerns in this local market, the Consent Agreement requires ACT to give Empire the option of acquiring the overlapping ACT site. If Empire declines the option, the Consent Agreement prohibits ACT, for ten years, from restricting the use of the property as a retail fuel outlet in any future sale. The proposed Consent Agreement requires ACT to divest the assets to Empire no later than 75 days after the Transaction closes or 14 days after the Commission issues the Consent Agreement as final.

The proposed Consent Agreement also requires that ACT provide transitional assistance to Empire for one year, with an option for Empire to extend the period for an additional year. Empire may extend the period for a third year, but only with Commission approval. ACT and Empire have entered into a Transition Services Agreement, whereby ACT has agreed to allow Empire to continue using the CST brand names and the store-specific licenses and permits during the transitional assistance period. In addition, ACT has agreed to provide temporary

wholesale fuel supply to Empire on the same terms CST was receiving, giving Empire time to negotiate its own wholesale supply contracts.

In addition to requiring outlet divestitures, the proposed Consent Agreement also requires ACT to provide the Commission notice, for a period of ten years, of certain acquisitions in the 71 local markets at issue. Specifically, the Consent Agreement requires ACT to give the Commission notice of future acquisitions of Commission-identified retail fuel outlets located in the same local markets as the divested assets.

The proposed Consent Agreement 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 Agreement is accepted for public comment. The Order to Maintain Assets requires Respondents to operate and maintain each divestiture outlet in the normal course of business, through the date the store is ultimately divested to a buyer. During this period, and until such time as Empire no longer requires transitional assistance, the Order the Maintain Assets authorizes the Commission to appoint an independent third party as a Monitor to oversee the Respondents' compliance with the requirements of the proposed Consent Agreement.

The Commission does not intend this analysis to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

BROADCOM LIMITED
AND
BROCADE COMMUNICATIONS SYSTEMS, INC.

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

Docket No. C-4622; File No. 171 0027
Complaint, August 17, 2017 – Decision, August 17, 2017

This consent order addresses the $5.9 billion acquisition by Broadcom Limited of certain assets of Brocade Communications Systems, Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the worldwide market for fibre channel switches. The complaint further alleges that Broadcom's access to Cisco's competitively sensitive confidential information, provided in furtherance of its ongoing supply relationship for application specific integrated circuits with Broadcom, may substantially lessen competition by increasing the likelihood that Broadcom may unilaterally exercise market power or by increasing the likelihood of coordinated interaction between the two competitors in the fibre channel switch market. Under the order, Broadcom is required to implement firewalls preventing the flow of Cisco's confidential business information outside of an identified group of relevant Broadcom employees, and requires a monitor to oversee compliance with the firewall provisions.

Participants

For the *Commission*: *Stephen Antonio, Michael Blevins* and *Michael Lovinger.*

For the *Respondents*: *Joshua Holian* and *Dan Wall, Latham & Watkins LLP; Scott Sher* and *Christopher Williams, Wilson Sonsini Goodrich & Rosati.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Broadcom Limited ("Broadcom"), a corporation subject to the jurisdiction of the Commission, has agreed to

acquire Respondent Brocade Communications Systems, Inc. ("Brocade"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Broadcom Limited is a limited company organized, existing, and doing business under and by virtue of the laws of the Republic of Singapore, with a principal place of business located at 1320 Ridder Park Drive, San Jose, CA 95131.

2. Respondent Brocade Communications Systems, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 130 Holger Way, San Jose, CA 95134.

3. Respondent Broadcom is engaged in, among other activities, the design, manufacture, and sale of application specific integrated circuits ("ASICs") for fibre channel switches.

4. Respondent Brocade is engaged in, among other activities, the design, manufacture, and sale of fibre channel switches.

5. Respondents are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THIRD PARTY CISCO SYSTEMS, INC.

6. Cisco Systems, Inc. ("Cisco") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its executive office and principal place of business located at 170 West Tasman Drive, San Jose, CA 95134.

7. Cisco is engaged in, among other activities, the design, manufacture, and sale of fibre channel switches.

III. THE PROPOSED ACQUISITION

8. Pursuant to an Agreement and Plan of Merger dated November 1, 2016, the Respondents agreed that Broadcom would acquire Brocade for approximately $5.9 billion ("the Acquisition"), including $400 million in debt. The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

IV. THE RELEVANT MARKET

9. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is fibre channel switches. The fibre channel switch is part of a fibre channel storage area network, which employs the fibre channel interconnect protocol to enable stable, high-throughput data transfers between servers and storage arrays in data centers. Fibre channel switches provide quick and secure access to large amounts of data and are often used for mission-critical applications. Fibre channel switch customers would not turn to alternative switching technologies in response to a small but significant price increase because doing so would be risky and expensive.

10. Each fibre channel switch contains an ASIC, which is an integrated circuit that is custom-tailored to carry out the functions of the fibre channel switch. It is the most costly and technically complex component of the switch. The ASIC is designed through collaboration between the switch manufacturer and an ASIC provider. Switch manufacturers typically develop proprietary intellectual property, and ASIC providers, like Respondent Broadcom, add intellectual property libraries, design oversight capabilities, and oversee the production of the ASICs at a third-party foundry in order to create a commercial ASIC for a switch manufacturer.

11. For the purposes of this Complaint, the relevant geographic market in which to analyze the effects of the Acquisition on the fibre channel switch market is worldwide. The

size and weight of fibre channel switches generally make it economical to ship them long distances.

V. STRUCTURE OF THE MARKET

12. The worldwide market for fibre channel switches is highly concentrated, consisting of a duopoly between Brocade and Cisco.

VI. EFFECTS OF THE ACQUISITION

13. Broadcom's access to Cisco's competitively sensitive confidential information, provided in furtherance of its ongoing ASIC supply relationship with Broadcom, may substantially lessen competition by increasing the likelihood that Broadcom may unilaterally exercise market power or by increasing the likelihood of coordinated interaction among the two competitors in the fibre channel switch market, resulting in the increased probability that customers would pay higher prices for fibre channel switches and that innovation will be lessened.

VII. ENTRY CONDITIONS

14. Entry into the worldwide fibre channel switch market is not likely to occur in a timely, likely, or sufficient magnitude, character and scope to deter or counteract any anticompetitive effects created by the proposed Acquisition. Entry is unlikely in light of slowly declining demand for fibre channel switches in a mature market, customers that tend to stay with one fibre channel switch manufacturer for extended periods of time, and the significant capital costs required for entry.

VIII. VIOLATIONS CHARGED

15. The allegations contained in Paragraphs 1 through 14 above are hereby incorporated by reference as though fully set forth here.

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

17. The Acquisition described in Paragraph 8, 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 seventeenth day of August, 2017, issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Broadcom Limited (hereinafter referred to as "Broadcom") of Respondent Brocade Communications Systems, Inc. (hereinafter referred to as "Brocade"), and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it 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 accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent Broadcom Limited is a limited company organized, existing, and doing business under and by virtue of the laws of the Republic of Singapore, with a principal place of business located at 1320 Ridder Park Drive, San Jose, CA 95131.

2. Respondent Brocade Communications Systems, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 130 Holger Way San Jose, CA 95134.

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

ORDER

I.

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

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

successors, and assigns of each; after the Acquisition, "Broadcom," also includes Brocade.

B. "Brocade" means Brocade Communications System, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Brocade, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Brocade shall be included with Broadcom.

C. "Respondents" means Broadcom and Brocade, individually and collectively.

D. "Cisco" means Cisco Systems, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its executive office and principal place of business located at 170 West Tasman Drive, San Jose, CA 95134.

E. "Commission" means the Federal Trade Commission.

F. "Acquisition" means the proposed acquisition of Respondent Brocade by Respondent Broadcom as contemplated by and described in the Acquisition Agreement.

G. "Acquisition Agreement" means the Agreement and Plan of Merger between Broadcom and Brocade, dated November 2, 2016, and any amendments, exhibits, or schedules attached thereto.

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

I. "ASIC" means application specific integrated circuit.

J. "Authorized Individual(s)" means (1) all officers and employees having pricing, sales and marketing, or research and development authority for the Firewall Entity; and (2) employees within the Firewall Entity

responsible for providing Fibre Channel ASIC-Related Functions for Cisco. Authorized Individuals shall include, but not be limited to, as of the date the Agreement Containing Consent Order is executed, the names, functions, or positions described in Confidential Appendix A to this Order. All changes to Authorized Individuals shall be in accordance with the procedures described in Paragraph III.C. of this Order.

K. "Confidentiality Agreements" means the confidentiality and non-disclosure provisions contained in the agreements in place between Broadcom and/or its affiliated undertakings and Cisco, with respect to Cisco FC ASICs. These agreements are attached as Confidential Appendix B.

L. "Confidential Business Information" means any information relating to Fibre Channel ASICs or Fibre Channel Switches. The term "Confidential Business Information" includes, but is not limited to:

1. all information that is a trade secret under applicable trade secret or other law;

2. all information regarding product specifications, including those referenced in product schedules; data; know-how; formulae; compositions; processes; register- transfer level ("RTL"); netlists; designs, sketches, photographs, graphs, drawings, and blue prints; creative materials samples; inventions and ideas; past, current and planned research and development; current and planned manufacturing or distribution methods; product and technology roadmaps and processes; customer lists; current and anticipated customer requirements; personnel; forecasts, product release dates, including pre-release products; time to market information; price lists; market studies; business plans; software, whether embedded or bundled with products, and computer software and database technologies; and systems, structures, and architectures;

3. all information concerning bid proposals and all related documents, data, and materials, including initial bid terms, final bid terms, and documents that support cost structures underlying the bids;

4. all notes, analyses, compilations, studies, summaries, and other material to the extent containing or based in whole or in part, upon any of the information described above;

Provided, however, that Confidential Business Information shall not include information that (i) was, is, or becomes generally available to the public other than as a result of a breach of this Order; (ii) was or is developed independently of and without reference to any Confidential Business Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary, or other obligation restricting disclosure.

M. "Fibre Channel ASIC" means an ASIC used in a Fibre Channel Switch. For the avoidance of doubt, "Fibre Channel ASIC" does not include common components (or "blocks") Broadcom uses across ASIC programs generally (i.e., blocks that are not developed solely for the purpose of implementing a Fibre Channel ASIC design).

N. "Fibre Channel ASIC-Related Functions" means the activities of providing access to IP Libraries, design oversight, and manufacturing capabilities to create a Fibre Channel ASIC, including, but not limited to, working on the physical design, timing, overall chip definition and floor plans, packing, and product bring up, responding to requests for information and requests for quotes, engineering, and product sales and marketing. For avoidance of doubt, "Fibre Channel ASIC-Related Functions" does not include the activities of developing or implementing common components (or "blocks") Broadcom uses across ASIC programs generally (i.e., blocks that are not developed

solely for the purpose of implementing a Fibre Channel ASIC design).

O. "Fibre Channel Switch" means a fibre channel protocol networking device designed for use in a storage area network, including modular directors and fixed switches.

P. "Firewall Entity" means Respondents' business group responsible for the development, production, sale, and marketing of Fibre Channel ASIC for Cisco ("Cisco FC ASIC Group").

Q. "IP Library(ies)" means any intellectual property library used by the Cisco FC ASIC Group for the purpose of producing Fibre Channel ASICs.

R. "Monitor" means any Person appointed pursuant to Paragraph IV. of this Order.

S. "Monitor Agreement" means any agreement entered into by Respondents and a Monitor pursuant to Paragraph IV. of this Order.

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

II.

IT IS FURTHER ORDERED that:

A. The Confidentiality Agreements shall be incorporated by reference into this Order and made a part hereof.

B. Respondents shall comply with the Confidentiality Agreements, and any breach by Respondents of any of the Confidentiality Agreements shall constitute a failure to comply with this Order. If any term of the Confidentiality Agreements varies from the terms of this Order ("Order Term"), then to the extent that

Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order.

C. The Confidentiality Agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, and nothing in this Order shall be construed to reduce any obligations of Respondents under the Confidentiality Agreements.

D. Respondents shall not modify the terms of the Confidentiality Agreements without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

III.

IT IS FURTHER ORDERED that:

A. Respondents shall establish a Firewall Entity that meets the following conditions:

1. The Firewall Entity shall maintain facilities in a physically separate building from the group responsible for the development, production, sale, and marketing of Fibre Channel ASICs or Fibre Channel Switches for Respondents' Brocade business group. The Firewall Entity's facilities shall include a room with restricted security access to protect Cisco proprietary hardware; *provided, however*, that if a separate building is not available, the Firewall Entity and the separate room for Cisco proprietary hardware must be located in a separate and secure section of Respondents' building;

2. Only Authorized Individuals shall have access to the Firewall Entity facilities; *provided, however*, that access to the Firewall Entity by personnel whose regular duties require such access (e.g., IT services, secretarial, janitorial, security personnel) shall not violate this provision so long as those

personnel do not also have responsibility for the development, production, sale, or marketing of Fibre Channel ASICs or Fibre Channel Switches for Respondents' Brocade business unit; and

3. Respondents shall provide the Firewall Entity with an information technology ("IT") system with security protocols assuring access only by Authorized Individuals.

B. Respondents shall require from each Authorized Individual:

1. No later than twenty (20) days after Respondents execute the Agreement Containing Consent Order, a signed non-disclosure agreement and a statement attesting that he or she has received a copy of this Order, will comply with its terms, and will take all reasonable steps to assure that employees that report to him or her will comply with its terms;

2. No later than ten (10) days after becoming an Authorized Individual by replacing, pursuant to Paragraph III.D., someone specifically identified in Appendix A, a signed non-disclosure agreement and statement in the same form and substance as that required by Paragraph III.B.1.; and

3. That any Authorized Individual who accessed Cisco Confidential Business Information that leaves his or her position in the Firewall Entity shall not, for twelve (12) months, work in the development, production, sale, or marketing of Fibre Channel ASICs for Respondents' Brocade business unit or in the development, production, sales, and marketing of Fibre Channel Switches; *provided, however*, that this provision shall not prohibit Broadcom's Senior Vice President and General Manager of the ASIC Product Division or its corporate officers with contemporaneous responsibility for supervising the development, production, sale, and marketing of other Broadcom

ASICs from performing their duties, subject to their obligations under Paragraphs III.D. and III.E.

C. Respondents shall change Authorized Individuals only pursuant to the following procedures:

1. Respondents shall replace individuals who report (directly or indirectly) to the people, functions, or positions specifically identified in Confidential Appendix A only in accordance with the usual and customary business practices of Respondents;

2. Respondents shall replace any of the people specifically identified in Confidential Appendix A or re-organizing functions, or positions specifically identified in Confidential Appendix A only in accordance with the usual and customary business practices of Respondents, and only after notification to the Monitor;

3. Respondents shall not add new functions or positions that are not specifically identified in Confidential Appendix A without providing prior notification to the Monitor and staff of the Federal Trade Commission in accordance with the following:

   a. The staff shall have ten (10) days from notification to consider the proposed change; and

   b. If the staff does not object to the change with ten (10) days of its notification, Respondents shall be permitted to make the change.

D. Respondents shall use Cisco Confidential Business Information only in furtherance of the design, manufacturing, and sale of Fibre Channel ASICs to Cisco.

E. Respondents shall: (1) take all actions as are necessary and appropriate to prevent access to, or the disclosure

or use of Cisco Confidential Business Information by or to any Person(s) not authorized to access, receive, or use such Cisco Confidential Business Information pursuant to the terms of this Order; and (2) with the advice and assistance of the Monitor, develop and implement procedures and requirements with respect to such Confidential Business Information to ensure compliance with the requirements of this Order.

F. No later than twenty (20) days after the Acquisition Date, Respondents shall submit to the Commission and to the Monitor a copy of written procedures and guidelines that will be instituted by Respondents pursuant to Paragraph III. of this Order.

IV.

IT IS FURTHER ORDERED that:

A. At any time after the Commission accepts the Agreement Containing Consent Order, the Commission may appoint a Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of the their responsibilities as required by Paragraphs II. and III. of this Order.

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

C. No later than one (1) week after the Monitor is appointed by the Commission, Respondents shall enter into the Monitor Agreement that, subject to the prior approval of the Commission, confers upon the Monitor all the rights and powers necessary to permit the

Monitor to monitor Respondents' compliance with the terms of this Order. If Respondents enter into the Monitor Agreement and that agreement is approved by the Commission prior to the Acquisition Date, the Monitor Agreement shall become effective no later than the Acquisition Date. Respondents shall transfer to and confer upon the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his or her duties and responsibilities in a manner consistent with the purposes of the Orders.

D. The Monitor shall serve for a period of five (5) years after the Acquisition Date; *provided, however,* (a) the Commission may extend or modify this period, and direct that the Monitor be reinstated, as may be necessary to accomplish the purposes of this Order, and (b) the Commission may shorten this period upon a determination that Respondents no longer have access to Cisco Confidential Business Information (e.g., if Cisco ceases developing Fibre Channel ASICs with Respondent Broadcom).

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

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

   a. Assuring that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order; and

   b. Assuring that Confidential Business Information is not obtained, disclosed, or used

by Respondents, except as permitted by this Order.

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

3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of this Order.

4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with its obligations under this Order. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order.

5. The Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in

connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph IV. the term "Monitor" shall include all Persons retained by the Monitor pursuant to Paragraph IV.D.5. of this Order.

7. Respondents shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents' obligations under this Order.

8. The Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order:

   a. Within thirty (30) days from the date the Monitor is appointed pursuant to this Paragraph;

   b. Every six (6) months from the date this Order is entered for two (2) years from the date this Order is entered; and

   c. annually thereafter for the duration of the Monitor's appointment, or as otherwise requested by the Commission.

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

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

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

H. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the substitute Monitor all the rights and powers necessary to permit the substitute Monitor to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order.

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

V.

IT IS FURTHER ORDERED that:

A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

B. Respondents shall submit to the Commission and the Monitor, a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order:

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

2. One (1) year from the date this Order is issued and annually thereafter until this Order terminates; and

3. At such other times as the Commission may request.

VI.

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

A. Any proposed dissolution of Respondents;

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

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

VII.

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

reasonable notice to Respondents, with respect to any matter contained in this Order, Respondents shall permit any duly authorized representative of the Commission:

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

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on August 17, 2027.

By the Commission.

CONFIDENTIAL APPENDIX A

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

CONFIDENTIAL APPENDIX B

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

INTRODUCTION

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Broadcom Limited ("Broadcom") and Brocade Communications Systems, Inc. ("Brocade"), designed to remedy the anticompetitive effects resulting from Broadcom's proposed acquisition of Brocade.

Pursuant to an Agreement and Plan of Merger dated November 1, 2016, the parties agreed that Broadcom would acquire Brocade for $5.9 billion, including assuming $400 million in debt ("the Acquisition"). The Commission's Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the worldwide market for fibre channel switches. The Complaint alleges that Broadcom's access to Cisco's competitively sensitive confidential information, provided in furtherance of its ongoing supply relationship for application specific integrated circuits ("ASICs") with Broadcom, may substantially lessen competition by increasing the likelihood that Broadcom may unilaterally exercise market power or by increasing the likelihood of coordinated interaction between the two competitors in the fibre channel switch market.

Under the terms of the proposed Decision and Order ("Order") contained in the Consent Agreement, Broadcom is required to implement firewalls preventing the flow of Cisco's confidential

business information outside of an identified group of relevant Broadcom employees, and requires a monitor to oversee compliance with the firewall provisions. The proposed remedy effectively addresses the potential for competitive harm resulting from Broadcom misusing Cisco's competitively sensitive confidential information.

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

THE PARTIES

Headquartered in both Singapore and San Jose, California, Broadcom is a publically traded global developer and supplier of semiconductor products. Broadcom's enterprise storage group specializes in designing, producing, and selling a broad array of integrated circuits used in fibre channel and Ethernet network environments, including ASICs for fibre channel switches.

Headquartered in San Jose, California, Brocade is a data storage and networking company. Brocade is the leading manufacturer of fibre channel switches, and also sells wireless networking equipment, Ethernet switches, and software solutions for networks.

THE RELEVANT MARKET AND MARKET STRUCTURE

The relevant line of commerce in which to analyze the effects of the Acquisition is fibre channel switches. The fibre channel switch is part of a fibre channel storage area network, which employs the fibre channel interconnect protocol to enable stable, high-throughput data transfers between servers and storage arrays in data centers. Fibre channel switches provide quick and secure access to large amounts of data and are often used for mission-critical applications. Fibre channel switch customers would not turn to alternative switching technologies in response to a small

but significant price increase because doing so would involve significant business risk and expense.

Each fibre channel switch contains an ASIC, which is an integrated circuit that is custom-tailored to carry out the functions of the fibre channel switch. It is the most costly and technically complex component of the switch. The ASIC is designed through a collaboration between the switch manufacturer and an ASIC provider. Switch manufacturers typically develop proprietary intellectual property, and ASIC providers, add intellectual property libraries, design oversight capabilities, and oversee the production of the ASICs at a third-party foundry in order to create a commercial ASIC for a switch manufacturer.

The relevant geographic market in which to analyze the effects of the Acquisition on the fibre channel switch market is worldwide. Fibre channel switches are produced in facilities worldwide. The size and weight of fibre channel switches generally allow for economical shipping to downstream customers located throughout the world.

The worldwide market for fibre channel switches is highly concentrated, consisting of a duopoly between Brocade and Cisco. The fibre channel market has been flat to slowly declining over the past several years.

EFFECTS OF THE ACQUISITION

The Complaint alleges that as a result of its ongoing ASIC supply relationship with Cisco, Broadcom will continue to have extensive access to Cisco's competitively sensitive confidential information. Without proper safeguards, Broadcom could misuse that information, leading to anticompetitive conduct that could make Cisco a less effective competitor, or increase the likelihood of coordinated interaction between the two remaining fibre channel switch competitors, in turn increasing the probability that customers would pay higher prices for fibre channel switches and that innovation would be lessened.

Analysis to Aid Public Comment

ENTRY

Entry into the worldwide fibre channel switch market is not likely to occur in a timely, likely, or sufficient magnitude, character and scope to deter or counteract any anticompetitive effects created by the proposed Acquisition. Entry is unlikely in light of slowly declining demand for fibre channel switches in a mature market, customers that tend to stay with one fibre channel switch manufacturer for extended periods of time, and the significant capital costs required for entry.

THE CONSENT AGREEMENT

To remedy the alleged competitive concern stemming from Broadcom's access to Cisco's competitively sensitive confidential information, the consent decree prevents the Cisco information from being shared among Broadcom employees who could use such information to raise prices or lessen innovation.

Pursuant to the proposed Order, only authorized individuals will have access to Cisco's competitively sensitive confidential information that is given to the firewalled entity, which is defined as Broadcom's business group responsible for the development, production, sale, and marketing of fibre channel ASICs for Cisco. The firewalled entity will have separate facilities and a separate information technology system with security protocols assuring access only to the authorized individuals. Furthermore, Broadcom shall require all authorized individuals to sign a non-disclosure agreement, requiring compliance with the terms of the proposed Order. Additionally, the proposed Order provides for a cooling off period whereby any authorized individual who leaves his or her position at the firewalled entity will not work in the development, production, sale, or marketing of fibre channel ASICs for Brocade's business unit or in the development, production, sales, and marketing of fibre channel switches for twelve months.

The proposed Order also requires Broadcom to use Cisco's competitively sensitive confidential information only in furtherance of the design, manufacturing, and sale of fibre channel ASICs for Cisco. Moreover, Broadcom will be required to take all actions necessary to prevent access to, or the disclosure or use

of Cisco's competitively sensitive confidential information by or to anyone who is not an authorized individual. The proposed Order also incorporates by reference non-disclosure provisions contained in four prior private Confidentiality Agreements that Broadcom, or its predecessor, signed with Cisco.

To ensure compliance with the proposed Order, the Commission will appoint a Monitor to oversee Broadcom's and Brocade's performance of their obligations pursuant to the Consent Agreement. The Monitor will be appointed to a five-year term, but the Commission may extend or modify the term as appropriate up to a ten-year period. Further, the Consent Agreement contains appropriate reporting requirements.

OPPORTUNITY FOR PUBLIC COMMENT

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement to aid the Commission in determining whether it should make the proposed Consent Agreement final. This analysis is not an official interpretation of the proposed Consent Agreement and does not modify its terms in any way.

Complaint

IN THE MATTER OF

BAXTER INTERNATIONAL INC., CLARIS LIFESCIENCES LIMITED, AND ARJUN HANDA

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

Docket No. C-4620; File No. 171 0052
Complaint, July 20, 2017 – Decision, August 25, 2017

This consent order addresses the $625 million acquisition by Baxter International Inc. of voting securities of certain entities and related assets from Claris Lifesciences Limited. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening current competition in the market for fluconazole in saline intravenous bags and future competition in the market for milrinone in dextrose intravenous bags in the United States. Under the order, the parties are required to divest all of Claris's rights and assets related to fluconazole in saline intravenous bags and milrinone in dextrose intravenous bags to Renaissance Lakewood LLC.

Participants

For the *Commission*: *David von Nirschl* and *Kari A. Wallace.*

For the *Respondents*: *Michael Sennett* and *Pamela L. Taylor, Jones Day; John A. Dunn* and *William Kolasky, Hughes Hubbard & Reed 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 Baxter International Inc. ("Baxter"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire voting securities of certain entities and related assets from Respondents Claris Lifesciences Limited ("Claris") and its ultimate parent entity Mr. Arjun Handa, 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 Baxter is 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 One Baxter Parkway, Deerfield, Illinois 60015.

2. Respondent Claris is a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of India with its principal executive offices located at 1 Corporate Towers Nr. Parimal Crossing, Ellisbridge, Ahmedabad, 380006, India, and its United States address for service of process and the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Chief Legal Officer, Claris Lifesciences Ltd., c/o Claris Life Sciences Inc., 1445 US Highway 130, North Brunswick, New Jersey 08902.

3. Respondent Arjun Handa is an individual with an address of Sharanya, Judges Banglow Road, Bodakdev, Ahmedadbad, Gujarat, India 380054.

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

THE PROPOSED ACQUISITION

5. Pursuant to agreements dated December 15, 2016, Baxter proposes to acquire voting securities of certain entities and related assets from Claris in two related transactions valued at approximately $625 million (the "Acquisition"). The Acquisition

is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

THE RELEVANT MARKETS

6. 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. fluconazole in saline intravenous bags; and

b. milrinone in dextrose intravenous bags.

7. The United States is the relevant geographic area in which to assess the competitive effects of the Acquisition in the relevant lines of commerce.

THE STRUCTURE OF THE MARKETS

8. Fluconazole is an antifungal agent used to treat a variety of fungal and yeast infections. Only five companies currently sell generic intravenous fluconazole bags in the United States: Baxter, Claris, Pfizer Inc. ("Pfizer"), Sagent Pharmaceuticals, and Hikma Pharmaceuticals PLC ("Hikma"). Only four of the companies are significant competitors.

9. Intravenous milrinone is a vasodilator that dilates the blood vessels, lowering blood pressure and allowing blood to flow more easily through the cardiovascular system. The product is used as a short-term treatment for life-threatening heart failure. Three companies—Baxter, Hikma, and Pfizer—currently sell the product in the United States. Claris is one of a limited number of suppliers capable of entering the milrinone in dextrose intravenous bags market in the near future.

ENTRY CONDITIONS

10. Entry into the relevant markets described in Paragraphs 6 and 7 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. De novo entry would not take place in

a timely manner because the combination of drug development times and FDA approval requirements would be lengthy. In addition, no other entry is likely to occur such that it would be timely and sufficient to deter or counteract the competitive harm likely to result from the Acquisition.

EFFECTS OF THE ACQUISITION

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

a. by eliminating actual, direct, and substantial competition between Baxter and Claris and reducing the number of independent significant competitors in the market for fluconazole in saline intravenous bags, thereby likely increasing consumer prices through either Baxter's unilateral exercise of market power, or coordinated interaction among the remaining competitors; and

b. by eliminating future competition between Baxter and Claris in the market for milrinone in dextrose intravenous bags, thereby: (1) increasing the likelihood that the combined entity would forego or delay the launch of Claris's milrinone in dextrose intravenous bags in development; 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.

VIOLATIONS CHARGED

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

13. The Acquisition described in Paragraph 5, if consummated, would constitute a violation of Section 7 of the

Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of July, 2017 issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Baxter International Inc. ("Baxter") of the voting securities of certain subsidiaries of Claris Lifesciences Limited ("Claris"), defined herein as "Claris Generic Pharmaceutical Entities," and related assets from their ultimate parent entity Mr. Arjun Handa (Baxter, Claris and Mr. Handa hereinafter collectively referred to as "Respondents"), and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Baxter is 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 One Baxter Parkway, Deerfield, Illinois 60015.

2. Respondent Claris is a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of India with its principal executive offices located at 1 Corporate Towers Nr. Parimal Crossing, Ellisbridge, Ahmedabad, 380006, India, and its United States address for service of process and the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Compliance Officer, Company Secretary, Claris Lifesciences Ltd., c/o Claris Life Sciences Inc., 1445 US Highway 130, North Brunswick, New Jersey 08902.

3. Respondent Arjun Handa is an individual with an address of Sharanya, Judges Banglow Road, Bodakdev, Ahmedadbad, Gujarat, India 380054.

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

ORDER

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final and effective, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

A. "Baxter" means: Baxter International Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Baxter International Inc. (including, without limitation, Baxter Pacific Investments Pte Ltd and Baxter Healthcare (Asia) Pte. Ltd), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Baxter shall include the Claris Generic Pharmaceutical Entities.

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

C. "Arjun Handa" means: (i) Arjun S. Handa, a natural person; (ii) all employees, agents, representatives, successors, and assigns of Arjun S. Handa; and (iii) all partnerships, joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Arjun S. Handa, and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Commission" means the Federal Trade Commission.

E. "Respondent(s)" means Baxter, Claris, and Arjun Handa, individually and collectively.

F. "Decision and Order" means the:

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

2. Final Decision and Order following its issuance and service by the Commission in this matter.

G. "Divestiture Product Business(es)" means the Business of Respondent (as that Respondent is specified in the definition of each Divestiture Product) within the Geographic Territory specified in the Decision and Order related to each of the Divestiture Products to the extent that such Business is owned, controlled, or managed by 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.

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

I. "Transition Period" means, for each Divestiture Product that is marketed or sold in the United States before the Closing Date, 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(s) to cease the marketing, distribution, and sale of such Divestiture Product(s); (ii) the date on which the Acquirer commences the marketing, distribution, and sale of such Divestiture Product(s); or (iii) the date four (4) months after the Closing Date for such Divestiture Product(s).

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

II.

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

A. Until Respondents fully transfer and deliver 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 viability, marketability, and competitiveness of such Divestiture Product Businesses and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; 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 the Respondents, including, but not limited to, all research, Development, manufacturing, distribution, marketing, and sales expenditures;

3. providing such resources as may be necessary to respond to competition against each of the Divestiture 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 the date the Respondents entered the agreement to effect the Acquisition (as such agreement is identified in the definition of Acquisition), 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. Not later than one (1) day after the date this Order to Maintain Assets is issued by the Commission, for each Divestiture Product that has been marketed or sold prior to the Closing Date, Respondents shall provide to the Proposed Acquirer of that Divestiture Product, for each High Volume Account, a list by either SKU or NDC Number containing the current net price per SKU or NDC Number, *i.e.*, the final price per SKU or NDC Number, charged by the relevant Respondent (as that Respondent is identified in the definition of each Divestiture Product) net of all customer-level discounts, rebates, or promotions, for that Divestiture Product, as of five (5) business days or less prior to the date this Order to Maintain Assets is issued.

E. 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, 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 the relevant Respondent to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by that 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, (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, and (iii) restrict access to the information to such of the Acquirer's or Proposed Acquirer's employees who need such access in connection with the specified and permitted use;

3. during the 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 Divestiture Product 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 a Respondent that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, a 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 a Respondent from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with a Respondent prior to the date of the written offer of employment from the Acquirer 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 a 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: (i) 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 (ii) hire any Divestiture Product Employee;

provided, however, a 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 that Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided further, however, that this Paragraph does not require nor shall be construed to require a Respondent to terminate the employment of any employee or to prevent a Respondent from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition;

provided further, *however*, that a Respondent may do the following: (i) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Divestiture Product Employees; or (ii) hire a Divestiture Product Employee who contacts a Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from that Respondent.

F. During the Transition Period, with respect to each Divestiture Product that is marketed or sold in the United States before the Closing Date for that Divestiture Product, 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 such Divestiture 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 Divestiture Products who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer to the Acquirer of the Business related to the Divestiture Products;

3. maintain and manage inventory levels of the Divestiture Products in consideration of the marketing and distribution transition to the Acquirer;

4. continue to market, distribute, and sell the Divestiture Products;

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

6. to the extent known or available to the specified Respondent, provide the Acquirer with a list of the inventory levels (weeks of supply) in the possession of each customer (*i.e.*, healthcare provider, hospital, group purchasing organization, wholesaler, or distributor) by stock keeping unit or NDA Number on a regular basis and in a timely manner;

7. to the extent known by the specified Respondent, provide the Acquirer with anticipated reorder dates

for each customer by stock keeping unit or NDC Number on a regular basis and in a timely manner; and

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

G. Pending divestiture of the 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 that Acquirer or staff of the Commission to receive such information (*e.g.*, employees of the Respondents responsible for the Contract Manufacture or continued Development of a Divestiture Product on behalf of an Acquirer), (iii) the Commission, or (iv) the Monitor (if any has been appointed) and *except* to the extent necessary to comply with applicable Law;

3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing, sales or Development of the Divestiture Products

to the employees associated with the Business related to those Retained Products that are the Therapeutic Equivalent of the Divestiture Products;

4. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the research and Development of the Development Divestiture Products to any employees associated with the Business related to those Retained Products that are the Therapeutic Equivalent of the Divestiture Products *unless* authorized by the Acquirer of the particular Divestiture Product to do so; and

5. 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.

H. Not later than thirty (30) days from the earlier of (i) the Closing Date or (ii) the date this Order to Maintain Assets is issued by the Commission, each Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by that Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information.

I. Each Respondent shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Closing Date. Each

Respondent shall provide a copy of the notification to the Acquirer. Each Respondent shall maintain complete records of all such notifications at that Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgment program. Each Respondent shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.

J. Each Respondent shall monitor the implementation by its employees and other personnel of all applicable restrictions with respect to Confidential Business Information, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets.

K. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the 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 ("Monitor") to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.

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

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

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

1. The Monitor shall have the power and authority to monitor each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

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

3. The Monitor shall serve until the divestiture of all Divestiture Product Assets has been completed, and the transfer and delivery of the related Product Manufacturing Technology has been completed, in a manner that fully satisfies the requirements of

this Order, and, with respect to each Divestiture Product that is a Contract Manufacture Product, until the earliest of:

a. the date the Acquirer of that Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture that Divestiture Product and able to manufacture the final finished Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent Baxter;

b. 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; or

c. the date of written notification from staff of the Commission that the Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture such Divestiture Product;

provided, however, that, with respect to each Divestiture Product, the Monitor's service shall not extend more than five (5) years after the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

E. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably request, related to that Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Each Respondent shall cooperate

with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor that Respondent's compliance with the Orders.

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

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

H. Each Respondent shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by each Acquirer with respect to the performance of a Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by each Respondent of its obligations under the Orders; *provided, however*, beginning ninety (90) days after Respondent Baxter has filed its final report pursuant to Paragraph VII.C. of the Decision and Order, and

ninety (90) days thereafter, the 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 Baxter.

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

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

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

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

M. The Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as the Monitor pursuant to the Decision and Order.

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

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every sixty (60) days thereafter until Respondents have fully complied with this Order to Maintain Assets, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Orders. Each Respondent shall submit at the same time a copy of its report concerning compliance with the Orders to the Monitor, if any Monitor has been appointed. Each Respondent shall include in its reports, among other things that are required from time to time, a detailed description of its efforts to comply with the relevant paragraphs of the Orders, including:

A. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, (ii) transitional services being provided by the relevant Respondent to the Acquirer, and (iii) the agreement(s) to Contract Manufacture; and

B. a detailed description of the timing for the completion of such obligations,

provided, however, that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the reports of compliance required to be submitted by Respondents pursuant to the Decision and Order.

V.

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

A. any proposed dissolution of a Respondent;

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

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

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that each Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

VII.

IT IS FURTHER ORDERED that Respondent Claris's and Respondent Arjun Handa's obligations under this Order to Maintain Assets, shall terminate on the date on which all of the following have occurred:

A. Respondent Baxter has acquired over fifty (50) percent of the voting securities or equity interests of each of the Claris Generic Pharmaceutical Entities;

B. the Divestiture Assets are completely owned and controlled either by Respondent Baxter or an Acquirer;

C. with respect to any Divestiture Product or related Product Intellectual Property or Manufacturing Technology, that is owned or controlled by Respondent Claris prior to the Acquisition, Respondent Claris has:

1. transferred all rights and assets that were owned or controlled by Respondent Claris prior to the Acquisition and necessary to effect the related divestitures to either Respondent Baxter or the Acquirer;

2. transferred or otherwise provided all rights, assets or other resources that were owned or controlled by Respondent Claris prior to the Acquisition and necessary for Respondent Baxter to provide the services and assistance to the Acquirer described in this Order to Respondent Baxter; and

3. secured all consents and waivers from all Third Parties that are necessary to divest the Divestiture Assets to an Acquirer or certified that the Acquirer has executed all such agreements directly with each of the relevant Third Parties;

D. with respect to any Product Licensed Intellectual Property, Respondent Claris has granted or otherwise provided the rights to use such intellectual property either directly to the Acquirer, or to Respondent Baxter for the purposes of providing such rights to the Acquirer; and

E. Both Respondent Claris and Respondent Arjun Handa certify to the Commission that all of the above-described acquisitions and transfers have occurred and all of the above-described consents and waivers from Third Parties have been provided to the Acquirer.

VIII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate as to Respondent Baxter 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 a Contract Manufacture Product or a Pipeline Product has been provided to the Acquirer in a manner consistent with the Technology Transfer Standards and the 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
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Baxter International Inc. ("Baxter") of the voting

securities of certain subsidiaries of Respondent Claris Lifesciences Limited ("Claris"), defined herein as "Claris Generic Pharmaceutical Entities," and related assets from their ultimate parent entity, Respondent Mr. Arjun Handa (Baxter, Claris and Mr. Handa hereinafter collectively referred to as "Respondents"), and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Baxter is 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 One Baxter Parkway, Deerfield, Illinois 60015.

2. Respondent Claris is a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of India with its principal executive offices located at 1 Corporate Towers Nr. Parimal Crossing, Ellisbridge, Ahmedabad, 380006, India, and its United States address for service of process and the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Compliance Officer, Company Secretary, Claris Lifesciences Ltd., c/o Claris Life Sciences Inc., 1445, US Highway 130, North Brunswick, New Jersey 08902.

3. Respondent Arjun Handa is an individual with an address of Sharanya, Judges Banglow Road, Bodakdev, Ahmedadbad, Gujarat, India 380054.

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

ORDER

I.

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

A. "Baxter" means: Baxter International Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Baxter International Inc. (including, without limitation, Baxter Pacific Investments Pte Ltd and Baxter Healthcare (Asia) Pte. Ltd), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Baxter shall include the Claris Generic Pharmaceutical Entities.

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

C. "Arjun Handa" means: (i) Arjun S. Handa, a natural person; (ii) all employees, agents, representatives, successors, and assigns of Arjun S. Handa; and (iii) all partnerships, joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Arjun S. Handa, and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Commission" means the Federal Trade Commission.

E. "Respondent(s)" means Baxter, Claris and Arjun Handa, individually and collectively.

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

1. a Person specified by name in this Order to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective; or

2. a Person approved by the Commission to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

G. "Acquisition" means Respondent Baxter's acquisition of the Claris Generic Pharmaceutical Business pursuant to the Acquisition Agreements.

H. "Acquisition Agreements" means the following:

1. *Sale and Purchase Agreement Elda International DMCC, Claris Pharmaservices* between Claris Middle East FZ-LCC, Catalys Venture Cap Limited, Baxter Pacific Investments Pte Ltd and Baxter International Inc., dated 15 December 2016; and

2. *Sale and Purchase Agreement Claris Injectables Limited* between Claris Lifesciences Limited and Baxter Healthcare (Asia) Pte. Ltd, dated 15 December 2016;

that were submitted by Baxter to the Commission in this matter. The Acquisition Agreements are contained in Non-Public Appendix I.

I. "Acquisition Date" means the earlier of the following dates: (i) the date on which Respondent Baxter acquires fifty percent (50%) or more of the voting securities of any of the Claris Generic Pharmaceutical Entities; or (ii) the date on which Respondent Baxter acquires any of the assets related to such entities.

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

K. "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 holder and the FDA related thereto. "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 holder and the FDA related thereto.

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

M. "Categorized Assets" means the following assets and rights of the specified Respondent (as that Respondent is identified in the definition of the Divestiture Product), as such assets and rights are in existence as of the date the specified Respondent signs the Consent Agreement in this matter and to be maintained by the Respondents in accordance with the Order to Maintain Assets until the Closing Date for each Divestiture Product:

1. all rights to all of the Applications related to the specified Divestiture Product;

2. all rights to all of the Clinical Trials related to the specified Divestiture Product;

3. all Product Intellectual Property related to the specified Divestiture Product that is not Product Licensed Intellectual Property;

4. all Product Approvals related to the specified Divestiture Product;

5. all Product Manufacturing Technology related to the specified Divestiture Product that is not Product Licensed Intellectual Property;

6. all Product Marketing Materials related to the specified Divestiture Product;

7. all Product Scientific and Regulatory Material related to the specified Divestiture Product;

8. all Website(s) related exclusively to the specified Divestiture Product;

9. 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;

10. for each specified Divestiture Product that has been marketed or sold by the specified 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 specified 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 Respondents' discontinued use of those NDC Numbers in the sale or marketing of such Divestiture Product *except* for returns, rebates, allowances, and adjustments for such Divestiture Product sold prior to the Closing Date and *except* as may be required by applicable Law and *except* as is necessary to give effect to the transactions contemplated under any applicable Remedial Agreement; and

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

11. all Product Development Reports related to the specified Divestiture Product;

12. at the option of the Acquirer of the specified Divestiture Product, all Product Contracts related to the specified Divestiture Product;

13. 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);

14. for each specified Divestiture Product that has been marketed or sold by a Respondent prior to the Closing Date:

    a. a list of all 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 during the one (1) year period immediately prior to the Closing Date, stated on either an annual, quarterly, or monthly basis, including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of the specified Divestiture Product on behalf of the High Volume Account and his or her business contact information;

    b. for each High Volume Account, a list by either SKU or NDC Number containing the following: (i) the net price per SKU or NDC Number as of the Closing Date, *i.e.*, the final price per SKU or NDC Number, charged by the specified Respondent net of all customer-level discounts, rebates, or promotions; (ii) the net price per SKU or NDC Number charged by the specified Respondent at the end of each quarter during the one (1) year immediately prior to the Closing Date; (iii) any supply outages by SKU or NDC Number during the one (1) year period immediately prior to the Closing Date the result of which caused the specified Respondent to make a financial payment to the customer or to incur a penalty for a failure to supply; and (iv) to the extent known by the specified Respondent, the status of the Divestiture

Product on the customer's respective formulary (*i.e.*, primary, secondary, or backup);

c. for each month for the one (1) year period immediately prior to the Closing Date, a list containing the following historical information for the specified Divestiture Product: wholesale acquisition cost; and

d. backorders by SKU or NDC Number as of the Closing Date;

15. for each specified Divestiture Product, a list of all suppliers that are listed as a qualified source of the active pharmaceutical ingredient on any Application of a Retained Product that is the Therapeutic Equivalent of that Divestiture Product, but only in those instances wherein a Respondent is (i) the holder of the Application for that Retained Product and (ii) the Application is not subject to an exclusive license to a Third Party;

16. a list of each specified Divestiture Product that has had any finished product batch or lot determined to be out-of-specification during the three (3) year period immediately preceding the Closing Date, and, for each such Divesture Product: (i) a detailed description of the deficiencies or defects (*e.g.*, impurity content, incorrect levels of the active pharmaceutical ingredient, stability failure) with respect to any out-of-specification batch or lot; (ii) the corrective actions taken to remediate the cGMP deficiencies in the Divestiture Product; and (iii) to the extent known by the specified Respondent, the employees (whether current or former) responsible for taking such corrective actions;

17. for each specified Divestiture Product that is a Contract Manufacture Product:

a. to the extent known or available to the specified Respondent, a list of the inventory

levels (weeks of supply) in the possession of each customer (*i.e.*, healthcare provider, hospital, group purchasing organization, wholesaler, or distributor) as of the date prior to and closest to the Closing Date as is available; and

b. to the extent known by the specified Respondent, any pending reorder dates for a customer as of the Closing Date;

18. 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;

19. the quantity and delivery terms in 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;

20. at the option of the Acquirer of the specified Divestiture Product, the right to fill any or all unfilled customer purchase orders for the specified Divestiture Product as of the Closing Date; and

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

provided, however, that "Categorized Assets" shall not include: (i) documents relating to a 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 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 specified 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, that Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer of the specified Divestiture Product, the Respondents shall provide that Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the Respondents provide the Acquirer with the above-described information without requiring a Respondent completely to divest itself of information that, in content, also relates to Retained Product(s).

N. "cGMP" means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.

O. "Claris Generic Pharmaceutical Entities" means the following entities: Claris Injectables Limited (India); Elda International DMCC (United Arab Emirates); and Claris Pharmaservices (Mauritius).

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

Q. "Closing Date" means, as to each Divestiture Product, the date on which a Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets related to such Divestiture Product to an Acquirer pursuant to this Order.

R. "Confidential Business Information" means all information owned by, or in the possession or control of, a Respondent that is not in the public domain and that is directly related to the conduct of the Business related to a Divestiture Product(s). The term "Confidential Business Information" *excludes*, and Respondents are not required to submit the following information to an Acquirer:

1. information relating to a 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 a Respondent that is provided to an Acquirer by a Respondent that is unrelated to the Divestiture Products acquired by that Acquirer or that is exclusively related to Retained Product(s); and

4. information that is protected by the attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the

Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

S. "Contract Manufacture" means the following:

1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer (including, without limitation, for the purposes of Clinical Trials and/or commercial sales);

2. to manufacture, or to cause to be manufactured, a Product that is the Therapeutic Equivalent of, and in the identical dosage strength, formulation, and presentation as, a Contract Manufacture Product on behalf of an Acquirer; 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.

T. "Contract Manufacture Product(s)" means the Divestiture Products, individually and collectively and any ingredient, material, or component used in the manufacture of the foregoing Products including the active pharmaceutical ingredient(s), excipient(s), or packaging materials (including, without limitation, drug vials, plastic containers, or sterile bags);

provided, however, that with the consent of the Acquirer of the specified Product, a Respondent may substitute a Therapeutic Equivalent form of such Product in performance of that Respondent's agreement to Contract Manufacture.

U. "Development" means all preclinical and clinical drug development activities, including 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.

V. "Direct Cost" means a cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "Direct Cost" to the Acquirer for its use of any of a Respondent's employees' labor shall not exceed the average hourly wage rate for such employee;

provided, however, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, "Direct Cost" means such cost as is provided in such Remedial Agreement for that Divestiture Product.

W. "Divestiture Agreements" means the following:

1. *Amended and Restated Asset Purchase Agreement* between Baxter International Inc., Renaissance Lakewood, LLC, and sole for certain purposes set forth therein, Renaissance Acquisition Holdings, LLC, dated as of June 29, 2017;

2. *Supply Agreement* among Baxter International Inc., Claris Injectables Limited and Renaissance Lakewood, LLC to be executed on or before the Closing Date;

3. *Technology Sublicense Agreement* between Claris Pharmaservices and Renaissance Lakewood, LLC to be executed on or before the Closing Date (which agreement shall provide, *inter alia*, that, in the event this *Technology Sublicense Agreement* terminates, Respondents shall not retain any reversionary rights or interests in the Milrinone Assets); and

4. all amendments, exhibits, attachments, agreements, and schedules attached to and submitted to the Commission with the foregoing listed agreements.

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

X. "Divestiture Product(s)" means the following, individually and collectively:

1. "Fluconazole Product(s)" means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Claris pursuant to the following Application: ANDA No. 077909, and any supplements, amendments, or revisions to this ANDA. These Products are administered by injection (packaged in plastic containers) containing, as an active pharmaceutical ingredient, fluconazole (in sodium chloride 0.9%), at the following strengths: 200 MG/100ML (2MG/ML); 400MG/200ML (2MG/ML); and 100MG/50ML (2MG/ML).

2. "Milrinone Product(s)" means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Claris pursuant to the following Application: ANDA No. 077151, and any supplements, amendments, or revisions to this

ANDA. These Products are administered by injection (packaged in plastic containers) containing, as an active pharmaceutical ingredient, milrinone lactate (in dextrose 5%), at the following strengths: EQ 20 MG BASE/100ML (EQ 0.2MG BASE/ML); and EQ 40MG BASE/200ML (EQ 0.2MG BASE/ML).

Y. "Divestiture Product Assets" means the following, individually and collectively:

1. "Fluconazole Product Assets" means all rights, title, and interest in and to all assets related to the Business of Claris within the United States of America related to each of the Fluconazole Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Fluconazole Products.

2. "Milrinone Product Assets" means all rights, title, and interest in and to all assets related to the Business of Claris within the United States of America related to each of the Milrinone Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Milrinone Products.

Z. "Divestiture Product Core Employees" means the Product Research and Development Employees and the Product Manufacturing Employees related to each Contract Manufacture Product.

AA. "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, held, or controlled by a Respondent:

1. to research and Develop the specified Divestiture Product(s) for marketing, distribution, or sale within the United States of America;

2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the specified Divestiture Product(s) within the United States of America;

3. to import or export the specified Divestiture Product(s) to or from the United States of America to the extent related to the marketing, distribution, or sale of the specified Divestiture Products in the United States of America; and

4. to have the specified Divestiture Product(s) made anywhere in the world for distribution or sale within, or import into the United States of America;

provided, however, that for any Product Licensed Intellectual Property or 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.

BB. "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 Designee(s), licensees, sublicensees, manufacturers, suppliers, distributors, and customers of that Acquirer, or of such Acquirer-affiliated entities.

CC. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

DD. "Domain Name" means the domain name(s) (uniform resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration; *provided, however*, "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

EE. "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.

FF. "Government Entity" means any Federal, state, local, or non-U.S. government; any court, legislature, government agency, or government commission; or any judicial or regulatory authority of any government.

GG. "High Volume Account(s)" means any retailer, wholesaler, or distributor whose annual or projected annual purchase amounts, in units or in dollars, of a Divestiture Product in the United States of America from a Respondent, was or was forecasted (prior to the public announcement of the Acquisition and subsequent divestiture) to be among the top twenty (20) highest such purchase amounts of that Respondent's total sales of that Divestiture Product to U.S. customers on any of the following dates: (i) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (ii) the end of the last quarter that immediately preceded the Acquisition Date; (iii) the end of the last quarter that immediately preceded the Closing Date for the relevant assets; or (iv) for forecasts of purchases of the Divestiture Product, the quarter immediately following the Closing Date.

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 a Respondent that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer.

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

KK. "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.

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

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

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

OO. "Patent(s)" means all patents and patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

PP. "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.

QQ. "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.

RR. "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.

SS. "Product Contracts" means all contracts or agreements:

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 a Respondent unless such contract applies generally to a Respondent's sales of Products to that Third Party;

2. pursuant to which a 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 specific 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 dosage form Product on behalf of a 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 a Respondent;

8. pursuant to which a Third Party provides the Product Manufacturing Technology related to the specified Divestiture Product to a Respondent;

9. pursuant to which a Third Party is licensed by a Respondent to use the Product Manufacturing Technology related to the specified Divestiture Product;

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 a Respondent including, but not limited to, consultation arrangements; and/or

13. pursuant to which any Third Party collaborates with a 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), a Respondent shall, at the Acquirer's option, assign or otherwise make available to the Acquirer all such rights under the contract or agreement as are related to the specified Divestiture Product, but concurrently may retain similar rights for the purposes of the Retained Product(s).

TT. "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 United States of America, 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 all 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.

UU. "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, and 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 or clinicians 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 or defects 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 or defects;

15. reports of vendors of the component(s), active pharmaceutical ingredient(s), excipient(s), packaging component(s), and detergent(s) 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 or lot 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.

VV. "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 a Respondent within ninety (90) days of the execution date of any Remedial Agreement); and

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

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

   b. the date of hire and effective service date;

   c. job title or position held;

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

e. the base salary or current wages;

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

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

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

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

WW. "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, held, or controlled by a 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 violation of any of the foregoing;

provided, however, that "Product Intellectual Property" does not include the corporate names or corporate trade dress of "Baxter", "Claris", or the related corporate logos thereof; or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by a Respondent or the related corporate logos thereof; or general registered images or symbols by which Baxter or Claris can be identified or defined.

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

1. all of the following intellectual property related to a Divestiture Product that is owned, licensed, held, or controlled by a Respondent as of the Closing Date, as follows:

   a. Patents that are related to a Divestiture Product that a Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product that is the subject of an active (not discontinued or withdrawn) NDA or ANDA as of the Acquisition Date; and

   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 United States of America to limit the use or disclosure thereof, that are related to a Divestiture Product and that a Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product that is the subject of an active (not

discontinued or withdrawn) NDA or ANDA as of the Acquisition Date; and

2. in those instances in which (i) a Respondent is the holder of an ANDA or NDA for a Product that is the Therapeutic Equivalent of any Divestiture Product (ii) the ANDA or NDA is not subject to an exclusive license to a Third Party, and (iii) the Product subject to such ANDA or NDA is a Retained Product, a full, complete, and unlimited Right of Reference or Use to the Drug Master File related to the ANDA or NDA for this Retained Product to reference or use in any Application related to that Divestiture Product.

YY. "Product Manufacturing Employees" means all salaried employees of a Respondent who have directly participated in any of the following: (i) defining the commercial manufacturing process, (ii) confirming that the manufacturing process is capable of reproducible commercial manufacturing, (iii) formulating the manufacturing process performance qualification protocol, (iv) controlling the manufacturing process to assure performance Product quality, (iv) assuring that during routine manufacturing the process remains in a state of control, (v) collecting and evaluating data for the purposes of providing scientific evidence that the manufacturing process is capable of consistently delivering quality Products, (vi) managing the operation of the manufacturing process, or (vii) managing the technological transfer of the manufacturing process to a different facility, of the 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.

ZZ. "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, 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(s), bag(s), excipient(s), or packaging material(s); 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.

AAA. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of the specified Divestiture Product in the United States of America as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of dollars and/or units for each month, quarter or year),

sales forecasting models, educational materials, advertising and display materials, speaker lists, promotional and marketing materials, Website content, artwork for the production of packaging components, television masters, and other similar materials related to the specified Divestiture Product.

BBB. "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 Trials 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.

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

DDD. "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.

EEE. "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.

FFF. "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.

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

1. any agreement between a Respondent and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including, without limitation, any agreement to supply specified Products or components thereof, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

2. any agreement between a Respondent and a Third Party to effect the assignment of assets or rights of that Respondent related to a 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 and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including, without limitation, any agreement by that Respondent to supply specified Products or

components thereof, and that has been approved by the Commission to accomplish the requirements of this Order; and/or

4. any agreement between a Respondent and a Third Party to effect the assignment of assets or rights of that Respondent related to a 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.

HHH. "Renaissance" means Renaissance Lakewood, LLC, a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its principal executive offices located at 411 South State Street, Suite E-100, Newtown, Pennsylvania 18940.

III. "Retained Product(s)" means any Product(s) other than a Divestiture Product.

JJJ. "Right of Reference or Use" means the authority to rely upon, and otherwise use all of the following:

1. 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);

2. Product Development Reports; or

3. 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. "SKU" means stock keeping unit.

LLL. "Supply Cost" means a cost not to exceed any of the following: (i) a Respondent's average direct cost per SKU or NDC Number in United States dollars of manufacturing the specified Divestiture Product for the twelve (12) month period immediately preceding the Acquisition Date, or (ii) a Respondent's lowest net price (*i.e.*, the final price per SKU or NDC Number charged by a Respondent net of all discounts, rebates, or promotions) of the relevant Divestiture Product to any of a Respondent's top 5 High Volume Accounts (as measured in units of the Divestiture Product purchased by those customers) for the relevant 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, but only if the "Supply Cost" specified in such Remedial Agreement during the first twelve (12) month period of a Respondent supplying the Contract Manufacture Product does not exceed a Respondent's lowest net price (*i.e.*, the final price per SKU or NDC Number charged by a Respondent net of all discounts, rebates, or promotions) of the relevant Divestiture Product to any of a Respondent's top 5 High Volume Accounts (as measured in units of the Divestiture Product purchased by those customers) for the relevant Divestiture Product for the twelve (12) month period immediately preceding the Acquisition Date.

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 a 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 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;

4. permitting employees of the Acquirer to visit the Respondent's facility from which the Divestiture Product will be transferred for the purposes of evaluating and learning the manufacturing process of such Divestiture Product and/or discussing the process with employees of Respondent involved in the manufacturing process (including, without limitation, use of equipment and components, manufacturing steps, time constraints for completion of steps, methods to ensure batch or lot consistency), pharmaceutical development, and validation of the manufacturing of the Divestiture Product at the Respondent's facility; and

5. 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 a 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. "Therapeutic Equivalent" means a drug product that is classified by the FDA as being therapeutically equivalent to another drug product.

OOO. "Third Party(ies)" means any non-governmental Person other than the following: a Respondent; or an Acquirer of particular assets or rights pursuant to this Order.

PPP. "United States of America" means the United States of America, and its territories, districts, commonwealths and possessions.

QQQ. "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 Divestiture Product Licenses, absolutely and in good faith, to Renaissance 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 Renaissance 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 Renaissance 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 Renaissance is not an acceptable purchaser of any of the Divestiture Product Assets, then Respondents shall immediately rescind the transaction with Renaissance, in whole or in part, as directed by the Commission, and shall divest the relevant Divestiture Product Assets within one hundred eighty (180) days after the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, that if Respondents have divested the Divestiture Product Assets to Renaissance 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 Renaissance (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Prior to the Closing Date for each respective Divestiture Product, Respondents shall provide the Acquirer with the opportunity to review all contracts or agreements that are Product Contracts related to the Divestiture Products being acquired by that Acquirer for the purposes of the Acquirer's determination whether to assume such contracts or agreements.

C. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the Divestiture Product Assets to an Acquirer, and to permit the 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 Acquirer for the Divestiture Product Assets has executed all such agreements directly with each of the relevant Third Parties.

D. Respondents shall:

1. submit to the Acquirer, at Respondents' expense, all Confidential Business Information 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 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 or staff of the Commission to receive such information (*e.g.*, employees of a Respondent responsible for the Contract Manufacture or continued Development of a Divestiture Product on behalf of an Acquirer), (iii) the Commission, or (iv) the Monitor (if any has been appointed) and *except* to the extent necessary to comply with applicable Law;

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 of the Divestiture Products; and

7. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the research and Development of the Development Divestiture Products to any employees associated with the Business related to those Retained Products that are the Therapeutic Equivalent of the Divestiture Products or in Development to become the Therapeutic Equivalent of a Divestiture Product *unless* authorized by the Acquirer of the particular Divestiture Product to do so.

E. Respondents shall provide, or cause to be provided, to the Acquirer in a manner consistent with the Technology Transfer Standards the following:

1. all 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 a

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. Respondents shall not enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of that Acquirer to use or to acquire from the Third Party the 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. Respondent Baxter shall employ a staff of sufficient size, training, and expertise as is necessary to complete all of the transfers of the Product Manufacturing Technology to each of the Acquirers in a timely manner and to ensure that the Acquirer has sufficient assistance from Respondent Baxter to validate the manufacture of the Contract Manufacture Products being acquired by that Acquirer in commercial quantities, and in a manner consistent with cGMP at a facility chosen by the Acquirer.

G. Respondent Baxter shall:

1. upon reasonable written notice and request from the Acquirer to Respondent Baxter, 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 dosage form drug product independently of Respondent Baxter, and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and necessary components listed in Application(s) of a Respondent from Persons other than Respondent Baxter;

2. make representations and warranties to the Acquirer that the Contract Manufacture Product(s) supplied by Respondent Baxter pursuant to a Remedial Agreement meet the relevant Agency-approved specifications;

3. for the Contract Manufacture Product(s) to be marketed or sold in the United States of America, 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 Respondent Baxter prompt written notice of such claim and cooperating fully in the defense of such claim;

provided, however, that the supplying 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 supplying 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 such 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 supplying Respondent to the Acquirer in an agreement to Contract Manufacture;

4. give priority to supplying a Contract Manufacture Product to the Acquirer over manufacturing and supplying of Products for Respondent Baxter's own use or sale;

5. agree to 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 *unless* (i) Respondent Baxter can demonstrate that the failure was beyond the control of Respondent Baxter and in no part the result of negligence or willful misconduct by Respondent Baxter, and (ii) Respondent Baxter is able to cure the supply failure not later than thirty (30) days after the receipt of notice from the Acquirer of a supply failure; *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, each such agreement may contain limits on Respondent Baxter's aggregate liability for any penalty incurred by an Acquirer from a customer directly related to that Acquirer's inability to supply the Divestiture Product to that customer that was the result of Respondent Baxter's failure to supply the Divestiture Product to the Acquirer;

6. during the term of any agreement to Contract Manufacture, upon written request of that Acquirer or the Monitor (if any has been appointed), make available to the Acquirer and the 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;

7. for each Contract Manufacturer Product for which Baxter purchases the active pharmaceutical ingredient(s), components(s), or excipient(s) from a Third Party, provide that Acquirer with the actual price paid by Respondent Baxter for each active pharmaceutical ingredient(s), component(s), and excipient(s), respectively, used to manufacture that Contract Manufacture Product;

8. for each Contract Manufacturer Product for which Baxter is the source of the active pharmaceutical ingredient(s), component(s), or excipient(s), not charge the Acquirer any intracompany transfer profit for such active pharmaceutical ingredient(s), component(s) or excipient(s) in calculating the total price for the final finished Contract Manufacture Product to the Acquirer, but such charges shall only reflect Respondent Baxter's actual cost;

9. during the term of any agreement to Contract Manufacture, take all actions as are reasonably necessary to ensure an uninterrupted supply of the Contract Manufacture Product(s);

10. in the event Respondent Baxter 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: provide Product that is the Therapeutic Equivalent of such Contract Manufacture Product from the facility(ies) that Respondent Baxter uses or has used to source its own supply of the Product that is the Therapeutic Equivalent of the Contract Manufacture Product, where such facility(ies) is still suitable for use for such manufacturing;

11. provide access to all information and facilities, and make such arrangements with Third Parties, as are necessary to allow the Monitor to monitor

compliance with the obligations to Contract Manufacture;

12. not be entitled to terminate any agreement to Contract Manufacture due to an Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency Law;

13. shall notify the Commission at least sixty (60) days prior to terminating any agreement with an Acquirer to Contract Manufacture for any reason, and shall submit at the same time a copy of such notice to the Monitor; and

14. during the term of any agreement to Contract Manufacture, provide consultation with knowledgeable employees of Respondent Baxter 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, a Respondent and in commercial quantities, and in a manner consistent with cGMP, independently of Respondent Baxter 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 requirements to Contract Manufacture 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 such

Contract Manufacture Product for sale in the United States and able to manufacture such Contract Manufacture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent Baxter; (ii) the date the Acquirer notifies the Commission and Respondent Baxter 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 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) five (5) years after the Closing Date.

H. Respondent Baxter shall designate employees of Respondent Baxter knowledgeable about the marketing, distribution, warehousing, and sale (including administrative logistics of sales to the respective High Volume Accounts) related to each of the Divestiture Products to assist the Acquirer, in the transfer and integration of the Business related to the Divestiture Products into the Acquirer's business.

I. Respondents shall require, as a condition of continued employment post-divestiture of the Divestiture Product Assets, 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 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 the

Respondents (other than as necessary to comply with the requirements of this Order).

J. Not later than thirty (30) days after the Closing Date, each Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by that Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. Each Respondent shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Closing Date. Each Respondent shall provide a copy of the notification to the Acquirer. Each Respondent shall maintain complete records of all such notifications at that Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Each Respondent shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.

K. Respondents shall:

1. for a period of twelve (12) months after the Closing Date, 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 Divestiture Product 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 the relevant Respondent to provide the Product Employee Information; or (ii) ten (10)

days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by that 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, (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, and (iii) restrict access to the information to such of the Acquirer's or Proposed Acquirer's employees who need such access in connection with the specified and permitted use;

3. during the 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 a 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 a Respondent that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, a Respondent shall not make any counteroffer to any 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 a Respondent from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with a Respondent prior to the date of the written offer of employment from the Acquirer 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 Business related to 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 a Respondent until the Closing Date(s) for the divestiture of the Divestiture Product Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

   provided, however, that this Paragraph does not require nor shall be construed to require a Respondent to terminate the employment of any employee or to prevent a Respondent from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year after the Closing Date, not: (i) directly or indirectly solicit or otherwise attempt to induce any employee of the Acquirer 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 (ii) hire any Divestiture Product Employee;

provided, however, a 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 that Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided further, *however*, that a Respondent may do the following: (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the Divestiture Product Employees; or (ii) hire a Divestiture Product Employee who contacts a Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from that Respondent.

L. Until Respondents complete the divestitures required by this Order and fully provide, or cause to be provided, the Product Manufacturing Technology related to a particular Divestiture Product to the 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 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 Divestiture Product Assets (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Businesses related to that Divestiture Product.

M. Respondents shall not, in the United States of America:

1. use any of the Product Trademarks related to Divestiture Products or any mark confusingly similar to the Product Trademarks as a trademark, tradename, or service mark *except* as may be necessary to sell inventory of Divestiture Products in existence as of the Acquisition Date;

2. attempt to register the Product Trademarks;

3. attempt to register any mark confusingly similar to the Product Trademarks;

4. challenge or interfere with an Acquirer's use and registration of the Product Trademarks acquired by that Acquirer; or

5. challenge or interfere with an Acquirer's efforts to enforce its trademark registrations for and trademark rights in the relevant Product Trademarks against Third Parties.

N. 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:

1. under 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; or

2. under any Patent that was filed or in existence on or before the Acquisition Date that is acquired by or licensed to a Respondent at any time after the Acquisition Date that claims 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 import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) acquired by that Acquirer, into, from, or within the United States of America. Respondents shall also covenant to that Acquirer that as a condition of any assignment or license from Respondents to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue that Acquirer or the related 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 import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) acquired by that Acquirer, into, from, or within the United States of America. The provisions of this Paragraph do not apply to any Patent owned by, acquired by, or licensed to or from a Respondent that claims inventions conceived by and reduced to practice after the Acquisition Date;

O. 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 import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) acquired by that Acquirer, into, from, or within the United States of America.

P. For any patent infringement suit filed prior to the Closing Date in which a Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that a Respondent has prepared or is preparing to defend against as of the Closing Date, and where such a suit would have the potential directly to limit or interfere with the 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 import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) acquired by that Acquirer, into, from, or within the United States of America, that Respondent shall:

1. cooperate with that Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses from that Respondent in connection with obtaining resolution of any pending patent litigation related to that 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.

Q. 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 United States of America;

2. to create a viable and effective competitor that is independent of Respondent Baxter in the Business of each Divestiture Product within the United States of America; and

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

Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

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

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

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

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

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

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

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

3. The Monitor shall serve until divestiture of all Divestiture Product Assets has been completed, and the transfer and delivery of the related Product Manufacturing Technology has been completed, in a manner that fully satisfies the requirements of this Order, and, with respect to each Divestiture Product that is Contract Manufacture Product, until the earliest of:

   a. the date the Acquirer of that Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture and sell that Divestiture Product and is able to manufacture the finished dosage form Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent Baxter;

   b. the date the Acquirer of that Divestiture Product notifies the Commission and Respondent Baxter of its intention to abandon its efforts to manufacture that Divestiture Product; or

   c. the date of written notification from staff of the Commission that the 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 Monitor's service shall not extend more than five (5) years after the Order Date

unless the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

E. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably request, related to that Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Each Respondent shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor that Respondent's compliance with the Orders.

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

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

H. Each Respondent shall report to the Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days after the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by a Respondent of its obligations under the Order; *provided, however*, beginning ninety (90) days after Respondent Baxter has filed its final report pursuant to Paragraph VII.C., and ninety (90) days thereafter, the Monitor shall report in writing to the Commission concerning progress by the 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 Baxter.

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

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

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

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

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

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

IV.

IT IS FURTHER ORDERED that:

A. If the Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the 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 a Respondent to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

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

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

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) can be

achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by a Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

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

(5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

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

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

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

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

V.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer 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, a Respondent needing such access to original documents shall: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the 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 Respondent Baxter, 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 Date, Respondent Baxter shall submit to the Commission a letter certifying the date on which the Acquisition Date occurred.

B. Within five (5) days of each Closing Date, Respondent Baxter shall submit to the Commission a letter certifying the date on which that particular divestiture occurred.

C. Within thirty (30) days after the Order Date, and every ninety (90) days thereafter until Respondent Baxter has (i) completed its obligations to Contract Manufacture the Contract Manufacture Products for an Acquirer, and (ii) fully provided the Product Manufacturing Technology related to the Divestiture Products to each Acquirer, Respondent Baxter shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with these requirements of this Order. Respondent Baxter shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor, if any Monitor has been appointed. Respondent Baxter shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant paragraphs of the Orders, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, (ii) transitional services being provided by Respondent Baxter to the Acquirer, and (iii) the agreement(s) to Contract Manufacture; and

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

D. 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 they have complied and are complying with the Order. In addition to the foregoing, Respondent Baxter shall include in these reports a list containing (i) all of the Retained Products that are the Therapeutic Equivalent of a Divestiture Product and (ii) total sales in units and dollars in the United States of each of these Retained Products by Respondent Baxter for either the one-year period immediately preceding the report or the full calendar or fiscal year that immediately precedes the report.

VIII.

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

A. any proposed dissolution of a Respondent;

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

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

IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to a Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that each Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

X.

IT IS FURTHER ORDERED that Respondent Claris's and Respondent Arjun Handa's obligations under this Decision and Order, other than (i) the covenant not to sue an Acquirer under certain Patents contained in Paragraph I.N. of this Order and (ii) the provisions regarding employment contained in Paragraph I.K., shall terminate on the date on which all of the following have occurred:

A. Respondent Baxter has acquired over fifty (50) percent of the voting securities or equity interests of each of the Claris Generic Pharmaceutical Entities;

B. the Divestiture Assets are completely owned and controlled either by Respondent Baxter or an Acquirer;

C. with respect to any Divestiture Product or related Product Intellectual Property or Manufacturing Technology, that is owned or controlled by Respondent Claris prior to the Acquisition, Respondent Claris has:

1. transferred all rights and assets that were owned or controlled by Respondent Claris prior to the Acquisition and necessary to effect the related divestitures to either Respondent Baxter or the Acquirer;

2. transferred or otherwise provided all rights, assets or other resources that were owned or controlled by Respondent Claris prior to the Acquisition and necessary for Respondent Baxter to provide the services and assistance to the Acquirer described in this Order to Respondent Baxter; and

3. secured all consents and waivers from all Third Parties that are necessary to divest the Divestiture Assets to an Acquirer or certified that the Acquirer has executed all such agreements directly with each of the relevant Third Parties;

D. with respect to any Product Licensed Intellectual Property, Respondent Claris has granted or otherwise provided the rights to use such intellectual property either directly to the Acquirer, or to Respondent Baxter for the purposes of providing such rights to the Acquirer; and

E. both Respondent Claris and Respondent Arjun Handa certify to the Commission that all of the above-described acquisitions and transfers have occurred and all of the above-described consents and waivers from Third Parties have been provided to the Acquirer.

XI.

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

By the Commission.

NON-PUBLIC APPENDIX I
ACQUISITION AGREEMENTS

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

NON-PUBLIC APPENDIX II.A
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 Baxter International Inc. ("Baxter") and Claris Lifesciences Limited and Arjun Handa (collectively "Claris") that is designed to remedy the

anticompetitive effects resulting from Baxter's acquisition of voting securities of certain entities and related assets from Claris. Under the terms of the proposed Consent Agreement, the parties are required to divest all of Claris's rights and assets related to fluconazole in saline intravenous bags and milrinone in dextrose intravenous bags to Renaissance Lakewood LLC ("Renaissance").

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 any 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 agreements dated December 15, 2016, Baxter proposes to acquire voting securities of certain entities and related assets from Claris in two related transactions valued at approximately $625 million (the "Proposed Acquisition"). The Commission alleges in its Complaint that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening current competition in the market for fluconazole in saline intravenous bags and future competition in the market for milrinone in dextrose intravenous bags 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 current competition in the market for fluconazole in saline intravenous bags, and reduce future competition in the market for milrinone in dextrose intravenous bags.

Fluconazole is an antifungal agent used to treat a variety of fungal and yeast infections. Five companies currently sell generic intravenous fluconazole bags in the United States: Baxter, Claris,

Pfizer Inc. ("Pfizer"), Sagent Pharmaceuticals, and Hikma Pharmaceuticals PLC ("Hikma"), but only four of these companies are significant competitors. Baxter and Claris have a combined estimated market share of nearly 60%.

Intravenous milrinone is a vasodilator that dilates the blood vessels, lowering blood pressure and allowing blood to flow more easily through the cardiovascular system. The product is used as a short-term treatment for life-threatening heart failure. Three companies—Baxter, Hikma, and Pfizer—currently sell the product in the United States. Claris is expected to enter this market shortly, once its pending application at the FDA is approved, a development expected to occur in the very near future.

II. Entry

Entry into the two markets at issue 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 Baxter and Claris in the market for fluconazole in saline intravenous bags. Fluconazole in saline intravenous bags is a commodity product, and prices typically 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 generally decreases due to the direct competition between the existing suppliers and each additional supplier. The Proposed Acquisition would combine two of only four significant companies selling the product, likely leading consumers to pay higher prices. Customers also have indicated that the presence of an independent Claris has allowed them to negotiate lower prices for fluconazole bags.

In addition, the Proposed Acquisition likely would cause significant anticompetitive harm to consumers by eliminating future competition that would otherwise have occurred if Baxter and Claris remained independent in the market for milrinone in dextrose intravenous bags. The evidence shows that the Proposed Acquisition, absent a remedy, would eliminate an additional independent entrant in the currently concentrated market for milrinone in dextrose intravenous bags, 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 likely will cause U.S. consumers to pay significantly higher prices for milrinone in dextrose intravenous bags in the future.

IV. The Consent Agreement

The proposed Consent Agreement effectively remedies the competitive concerns raised by the acquisition in both markets at issue by requiring Claris to divest all its rights to fluconazole in saline intravenous bags and milrinone in dextrose intravenous bags to Renaissance. Renaissance is a pharmaceutical corporation that develops, manufacturers, sells, and distributes injectable pharmaceutical products in the United States. The parties must accomplish these divestitures no later than ten days after they consummate the Proposed Acquisition.

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 Renaissance 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 Renaissance 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.

Analysis to Aid Public Comment

Baxter will supply Renaissance with fluconazole in saline intravenous bags and milrinone in dextrose intravenous bags for up to five years while the company transfers the manufacturing technology to Renaissance or its contract manufacturing designee. The proposed Order also requires Baxter to provide transitional services to Renaissance to assist it in establishing its manufacturing capabilities and securing all of the necessary FDA approvals. These transitional services include technical assistance to manufacture fluconazole in saline intravenous bags and milrinone in dextrose intravenous bags in substantially the same manner and quality employed or achieved by Claris. It also includes advice and training from knowledgeable employees of the parties. Under the proposed Consent Agreement, the Commission also will appoint an Interim Monitor.

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

Complaint

IN THE MATTER OF

NATIONAL ASSOCIATION OF ANIMAL BREEDERS, INC.

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

Docket No. C-4623; File No. 151 0138
Complaint, September 26, 2017 – Decision, September 26, 2017

This consent order addresses the National Association of Animal Breeders, Inc.'s ("NAAB") resolution that regulated its members' access to new genomic testing technology during the exclusivity period granted by the Cooperative Research and Development Agreement with the U.S. Department of Agriculture. The complaint alleges that NAAB violated Section 5 of the Federal Trade Commission Act by restraining competition among its regular members in the use of this new technology, which dampened competition in the market for dairy bulls used for semen production. The consent order requires NAAB to cease and desist from restraining the ability of its members to obtain, disclose, provide, use or sell any technology or information resulting from research projects conducted by, or pursuant to, an agreement to which NAAB is a party. The Order also prohibits NAAB from restraining price-related competition among its members relating to the sale or acquisition of bulls or bull semen.

Participants

For the *Commission*: *Annando Irizarry*.

For the *Respondent*: *Gregory J. Commins Jr*. and *Danyll Foix, 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 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:

NATURE OF THE CASE

1. NAAB is a trade association of cattle artificial insemination firms. NAAB entered into a Cooperative Research and Development Agreement ("CRADA") with the United States Department of Agriculture ("USDA") to cooperate with a USDA laboratory project that was developing a new technology for evaluating the genetic merit of dairy bulls. The CRADA granted NAAB exclusive access to the new technology for five years.

2. Over two years after entering into the CRADA, and after the USDA laboratory developed the new technology, NAAB approved a resolution that regulated the ability of its regular members ("Members") to use or sell access to the new technology. The resolution impeded the development of a market in which NAAB Members could sell access to the new technology to non-members of NAAB, and dampened competition among NAAB Members when buying dairy bulls for semen production.

RESPONDENT

3. 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 in Madison, Wisconsin.

4. Respondent is a trade association with about twenty-four Members that are in the business of collecting, processing, freezing, marketing or selling dairy cattle semen for artificial insemination. 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 artificial insemination organizations.

5. Respondent's Members buy dairy bulls from dairy farmers and breeders that are not members of NAAB (collectively "Non-Members") to produce semen for artificial insemination.

6. Respondent's Members account for over ninety percent of dairy cattle semen sales in the United States.

JURISDICTION

7. 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.

8. 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.

NAAB ENTERS INTO A CRADA WITH USDA TO COOPERATE WITH A PROJECT TO DEVELOP TECHNOLOGY THAT PREDICTS THE GENETIC MERIT OF DAIRY BULLS

9. In September 2006, NAAB entered into a CRADA with USDA. NAAB agreed therein to contribute funds and certain logistical support to a USDA laboratory project that would develop technology to determine the genomic predicted transmitting ability ("GPTA") of a dairy bull.

10. The GPTA of a dairy bull is determined by analyzing the genetic makeup of the bull. It consists of information about the commercially relevant traits, such as milk yield, that the bull is expected to transmit to its daughters.

11. The USDA laboratory substantially developed the technology that generates GPTAs for dairy bulls by April 2008.

12. The new GPTA technology became the best indicator of a dairy bull's commercial value for transmitting genetic traits.

13. The traditional method to predict the ability of a dairy bull to transmit commercially desirable traits, such as milk yield, to its daughters involves observing the traits of several dozen daughters of the bull when they start producing milk. This method is costly and takes about four to five years to complete.

14. The CRADA, as amended, granted NAAB exclusive access to the resulting GPTA technology from March 1, 2008, to February 28, 2013 (the "Five-Year Period").

15. The CRADA did not restrain in any way the ability of NAAB or its Members to use the new technology or to sell access to it, nor did it authorize NAAB or its Members to adopt rules that restrain in any way the ability of its Members to use the new technology or to sell access to it.

16. During the Five-Year Period, the USDA laboratory was the only source of GPTAs and pursuant to the exclusive access that USDA granted to NAAB in the CRADA, the USDA laboratory could provide GPTAs only in response to requests submitted through NAAB.

THE CHALLENGED CONDUCT

17. On October 14, 2008, NAAB approved a resolution that regulated the access to GPTAs during the Five-Year Period (the "Resolution"). In so doing, NAAB acted as a combination of its Members.

18. The Resolution specifies that a NAAB Member must have one of the following interests in a dairy bull to obtain the GPTA of the bull: (a) own the bull, (b) have an agreement to purchase at least a 30% interest in the bull, (c) have a lease on the bull, or (d) have an exclusive marketing agreement for the bull (any one of these four interests is henceforth referred to as an "Interest" in the bull).

19. The Resolution requirement that NAAB Members have an Interest in a dairy bull to obtain the GPTA of the bull impeded NAAB Members from selling GPTAs to Non-Members for the Non-Members' bulls in which the NAAB Members did not have an Interest.

20. The Resolution impeded the development of a market in which NAAB Members sell to Non-Members GPTAs for the Non-Members' bulls without having an Interest in the Non-Member's bull.

21. The Resolution caused NAAB Members to obtain the GPTA of dairy bulls for semen production only after acquiring an Interest in the bull, and Non-Members to sell bulls without first knowing the GPTA.

22. Selling dairy bulls for semen production in this environment – without the NAAB Member or the Non-Member knowing the GPTA – dampened competition among NAAB Members when buying dairy bulls for semen production. Access to GPTA information would tend to drive the price of the bull toward its true value.

23. The Resolution expired on February 28, 2013. After the Resolution expired, GPTAs became available to Non-Members for a fee through an industry organization.

VIOLATION CHARGED

24. The purpose, effect, tendency, or capacity of the combination, agreement, acts and practices alleged in Paragraphs 17 through 23 was to restrain competition unreasonably among Respondent's Members. These restraints injured Non-Members by depriving them of the benefits of free and open competition among Respondent's Members.

25. The combination, agreement, acts and practices alleged in Paragraphs 17 through 23 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, will recur in the absence of the relief requested herein.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-sixth day of September, 2017, issues its Complaint against Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission, ("Commission"), having initiated an investigation of certain acts and practices of 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 ("Consent Agreement") containing a consent order, an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following Decision and 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 8413 Excelsior Drive, Suite 140, Madison, WI 53717.

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. "NAAB" or "Respondent" means National Association of Animal Breeders, Inc., its directors, boards, officers, employees, agents, representatives, committees, divisions, successors, and assigns.

B. "Antitrust Laws" means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, the Sherman Act, 15 U.S.C. § 1 *et seq.*, and the Clayton Act, 15 U.S.C. § 12 *et seq.*

C. "Artificial Insemination Business" means any business relating to the collection, processing, and freezing of bull semen, and the sale or purchase of bulls or bull semen.

D. "CRADA" means a cooperative research and development agreement authorized by the Federal Technology Transfer Act of 1986, 99 P.L. 502, 100 Stat. 1785, 15 U.S.C. § 3710a et seq.

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, as defined in NAAB's Bylaws.

G. "Regulating" means (1) adopting, maintaining, recommending, or encouraging that Members follow any Regulation; (2) taking or threatening to take

formal or informal disciplinary action; or (3) conducting formal or informal investigations or inquiries.

H. "Regulation" means any rule, regulation, resolution, interpretation, ethical ruling, policy, commentary, or guideline.

I. "Research Project" means research and development activity (1) conducted by NAAB, or (2) conducted pursuant to a CRADA or any other arrangement to which NAAB is a party, including but not limited to, research and development activity relating to genetic evaluations.

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 trade 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:

A. The ability of any Member to obtain, disclose, provide, sell, or use any technology or information resulting from any Research Project; and

B. Price-related competition by its Members, including, but not limited to, adopting any regulation that maintains or stabilizes the retail or wholesale prices, credit terms, or other monetary or non-monetary compensation relating to the sale or acquisition of bulls or bull semen;

Provided, however, that nothing in this Order shall prohibit Respondent from any conduct that is reasonably necessary to achieve procompetitive benefits or efficiencies relating to the operation of Respondent or to the operation of an Artificial

Insemination Business by its Members provided that such benefits or efficiencies likely would offset the anticompetitive harms.

III.

IT IS FURTHER ORDERED that;

A. For a period of five (5) years from the date this Order is issued, Respondent shall notify the Commission in writing (hereinafter "Notification") no later than thirty (30) days after it adopts or modifies any Regulation that restricts or restrains the ability of any Member to obtain, disclose, provide, sell, or use any technology or information resulting from any Research Project.

B. In the Notification, Respondent shall describe the Regulation as adopted or modified and the reasons for Respondent's action.

IV.

IT IS FURTHER ORDERED that:

A. No later than thirty (30) days from the date this Order is issued, Respondent shall:

1. For a period of five (5) years, post and maintain the following items in the link on the homepage of NAAB's website entitled "Antitrust Compliance":

   a. An announcement that states "NAAB has agreed to change its practices relating to the use by members of technology and information developed through cooperative research and development programs to 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 this Order to its board of directors, officers, employees, and Members.

B. 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.

C. 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.

D. Respondent shall maintain and make available to Commission staff for inspection and copying upon reasonable notice records adequate to describe in detail any:

1. Action against any Member taken in connection with the activities covered by Paragraph II. of this Order, including but not limited to enforcement, advisory opinions, advice or interpretations rendered; and

2. Complaint received from any person relating to Respondent's compliance with this Order.

V.

IT IS FURTHER ORDERED that from the date this Order is issued until November 2, 2020, Respondent shall design,

maintain, and operate an antitrust compliance program to ensure compliance with this Order and the Antitrust Laws pursuant to the terms set forth in Paragraph IV. of the Decision and Order issued by the Commission in *In the Matter of National Association of Animal Breeders, Inc.*, Docket No. C-4558 (Nov. 2, 2015).

VI.

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.

VII.

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

A. Any proposed dissolution of Respondent;

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

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

VIII.

IT IS FURTHER ORDERED that, for 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.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on September 26, 2037.

By the Commission.

APPENDIX A

(Letterhead of NAAB)

Dear Member:

As you may know, the Federal Trade Commission investigated the Resolution approved by NAAB's Board of Directors on October 14, 2008, titled "NAAB Resolution Regarding Access to USDA Genomic Transmitting Ability." The Resolution, which expired on February 28, 2013, relates to the results of a Cooperative Research and Development Agreement with the

Agricultural Research Service of the United States Department of Agriculture. Policy 5 of the Resolution stated that:

> GPTAs may only be obtained for bulls owned by the submitter or as to which the submitter has a written and signed agreement for purchase of at least 30% or lease of a bull, or an exclusive marketing agreement within the United States. Bull owners will receive GPTAs, unless explicitly stated otherwise in the purchase or lease agreement.

The Federal Trade Commission alleges that Policy 5 violated the Federal Trade Commission Act because it unnecessarily limited competition in the way members may use genomic predicted transmitting abilities (GPTAs) commercially.

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 will not create or enforce rules or guidelines that restrict how members can use any technology or information that results from research and development conducted through NAAB, to the extent such rules or guidelines are not reasonably necessary to achieve procompetitive benefits that likely would offset the anticompetitive harms.

The Decision and Order also prohibits NAAB from regulating or restraining price competition among its members, including adopting any regulation that maintains or stabilizes the retail or wholesale prices, credit terms, or other monetary or non-monetary compensation relating to the sale or acquisition of bulls or bull semen, to the extent such restraints or regulations are not reasonably necessary to achieve procompetitive benefits that likely would offset the anticompetitive harms.

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. ("NAAB"). NAAB is a trade association of cattle artificial insemination firms.

Dairy production in the United States is dependent on volume from more than 9.3 million cows, the market for which relies on services provided by NAAB member breeders. In 2008, the U.S. Department of Agriculture, with partial funding from the NAAB through a Cooperative Research and Development Agreement ("CRADA"), developed a new technology that is the best indicator of genetic merit of dairy bulls for use in artificial insemination in so far as yielding higher producing dairy cows. The Commission's complaint ("Complaint") alleges that NAAB violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by restraining competition among its regular members in the use of this new technology, which dampened competition in the market for dairy bulls used for semen production.

This matter reaffirms the longstanding rule that trade associations composed of members that compete among themselves, while typically serving important and procompetitive functions, must not adopt rules or regulations that unreasonably limit competition among their members. It also illustrates that industry groups that obtain valuable and unique technology from the government may not establish rules or regulations regarding that technology that unreasonably restrain competition.

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

The Consent Agreement is for settlement purposes only and does not constitute an admission by NAAB that it has violated the law as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

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 modify their terms.

I. The Complaint

The Complaint makes the following allegations.

NAAB is a non-profit corporation with about 24 regular members that compete among themselves and with others in the business of collecting, processing, freezing, marketing or selling dairy cattle semen for artificial insemination. NAAB's members buy dairy bulls from dairy farmers and breeders to produce semen for artificial insemination. NAAB members together account for more than 90 percent of dairy cattle semen sales in the United States.

In September 2006, NAAB entered into a CRADA with the United States Department of Agriculture ("USDA") to cooperate with a USDA laboratory in a project for developing the genomic testing technology described above. The CRADA granted NAAB exclusive access to the results of the CRADA project until February 2013. The CRADA did not restrain in any way the ability of NAAB or its members to use the new technology or to sell access to it, nor did it authorize NAAB or its members to adopt rules that restrain in any way the ability of its members to use the new technology or to sell access to it.

By April 2008, the USDA laboratory had developed the new technology, known as the Genomic Predicted Transmitting Ability ("GPTA"), which analyzes the genetics of a dairy bull to predict the ability of the bull to transmit commercially important traits, such as milk yield, to its daughters. This new technology is superior to the traditional method of evaluating dairy bulls for

semen production, and it became the best indicator of a dairy bull's commercial value for transmitting genetic traits.

In October 2008, more than two years after entering into the CRADA, NAAB approved a resolution that regulated its members' access to the new technology during the exclusivity period granted by the CRADA (through February 2013). NAAB acted as a combination of its members when it approved the resolution.

The resolution required that for a NAAB member to obtain the GPTA of a dairy bull, the Member had to have one of the following interests in the bull: (a) own the bull, (b) have an agreement to purchase at least a 30 percent interest in the bull, (c) have a lease on the bull, or (d) have an exclusive marketing agreement for the bull. The USDA laboratory was the only source of GPTAs during the exclusivity period.

The Complaint alleges that NAAB's resolution harmed competition by diminishing competition for dairy bulls used for semen production. First, it impeded the development of a market in which dairy farmers and breeders could pay NAAB members to obtain GPTAs for their dairy bulls. Second, the resolution limited NAAB members from obtaining the GPTA of bulls in which they did not already have a financial interest. Access to a bull's GPTA prior to buying or selling it would tend to increase competition and drive the price of the bull toward a value that more accurately reflects its ability to yield higher producing dairy cows. After the exclusivity period expired in February 2013, GPTAs became available for a fee through an industry organization.

The Complaint alleges that the purpose, effect, tendency or capacity of the resolution was to restrain competition unreasonably among NAAB's Members, and that this conduct injured dairy farmers and breeders by depriving them of the benefits of free and open competition. Therefore, the resolution constitutes an unfair method of competition that violates Section 5 of the Federal Trade Commission Act.

II. The Proposed Order

The Proposed Order has the following substantive provisions. Paragraph II requires NAAB to cease and desist from restraining the ability of its members to obtain, disclose, provide, use or sell any technology or information resulting from research projects conducted by, or pursuant to, an agreement to which NAAB is a party. The Proposed Order also prohibits NAAB from restraining price-related competition among its members relating to the sale or acquisition of bulls or bull semen.

A proviso to Paragraph II specifies that the Proposed Order does not prohibit NAAB from engaging in any conduct that is reasonably necessary to achieve procompetitive benefits or efficiencies relating to NAAB's operation or to the operation of its members, provided that such benefits or efficiencies likely would offset the anticompetitive harms.

Paragraph III requires that, for five years, NAAB notify the Commission if it adopts or modifies any regulation that restrains the ability of its members to obtain disclose, provide, sell or use any technology or information resulting from any research project.

Paragraph V of the Proposed Order requires that NAAB implement an antitrust compliance program to ensure compliance with the Proposed Order and the antitrust laws.

Paragraphs IV and VI-VIII of the Proposed Order impose certain standard reporting and compliance requirements on NAAB.

* * *

Complaint

IN THE MATTER OF

TAXSLAYER, LLC

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE GRAMM-LEACH-BLILEY ACT PRIVACY RULE AND SAFEGUARDS RULE, AND REGULATION P

Docket No. C-4626; File No. 162 3063
Complaint, October 20, 2017 – Decision, October 20, 2017

This consent order addresses TaxSlayer, LLC's products and services, including TaxSlayer Online, a browser-based tax return preparation and electronic filing software and service. The complaint alleges that TaxSlayer failed to comply with the Gramm-Leach-Bliley ("GLB") Act Privacy Rule. The complaint further alleges that TaxSlayer engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for sensitive information from consumers, in violation of the GLB Act Safeguards Rule. The consent order prohibits TaxSlayer from violating any provision of the GLB Act Privacy Rule and Safeguards Rule and requires TaxSlayer to obtain an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: (1) it has in place a security program that provides protections that meet or exceed the protections required by Part I.B of the order, and (2) its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of sensitive consumer information has been protected.

Participants

For the *Commission*: *Jacqueline K. Connor* and *Katherine E. McCarron.*

For the *Respondent*: *Bilal K. Sayyed, McDermott Will & Emery.*

COMPLAINT

The Federal Trade Commission, having reason to believe that TaxSlayer, LLC, a limited liability company, ("TaxSlayer" or "Respondent"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. § 45(a); the Privacy of Consumer Financial Information Rule ("Privacy Rule"), 16 C.F.R. Part 313, recodified at 12 C.F.R. § 1016 ("Reg. P"), and issued pursuant to

Sections 501-504 of the Gramm-Leach-Bliley Act ("GLB Act"), 15 U.S.C. §§ 6801-6803; and the Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, issued pursuant to Sections 501(b) and 505(b)(2) of the GLB Act, 15 U.S.C. §§ 6801(b), 6805(b)(2); and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Georgia limited liability corporation with its principal office at 3003 TaxSlayer Drive, Evans, Georgia 30809.

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

RESPONDENT'S BUSINESS PRACTICES

3. Respondent advertises, offers for sale, sells, and distributes products and services to consumers, including TaxSlayer Online, a tax return preparation and electronic filing software and service.

4. Respondent is a business that began more than 50 years ago as a tax return preparation firm. It developed tax return preparation software for its internal use in the 1980s. In the 1990s, it developed a browser-based software service that it advertises, offers for sale, sells, and distributes to assist consumers in preparing and electronically filing federal and state income tax returns. Over the years, Respondent added other tax return preparation products, including a mobile app. This Complaint refers to the browser-based software service and mobile app as "TaxSlayer Online."

5. In 2016, more than 950,000 individuals filed tax returns with TaxSlayer Online.

6. Respondent typically charges consumers fees for the use of TaxSlayer Online.

7. TaxSlayer Online users create an account by entering a username and password ("login credentials") on an account creation page.

8. They then input a host of personal information in order to create a tax return, including but not limited to: name, Social Security number ("SSN"), telephone number, physical address, income, employment status, marital status, identity of dependents, financial assets, financial activities, receipt of government benefits, home ownership, indebtedness, health insurance, retirement information, charitable donations, tax payments, tax refunds, bank account numbers, and payment card numbers. Respondent also collects IP addresses and persistent identifiers associated with the particular device from which the tax return is prepared and/or filed.

9. TaxSlayer Online uses this personal information to prepare tax returns on behalf of customers. Once a tax return is prepared, a customer can file the return electronically through TaxSlayer Online with the Internal Revenue Service ("IRS") and state departments of revenue. If a customer is entitled to a refund, Respondent offers the option of transferring the refund directly into a customer's bank account. Customers may also elect to receive their tax refunds on a prepaid debit card.

RESPONDENT'S GRAMM-LEACH-BLILEY ACT ("GLB ACT") VIOLATIONS

10. Respondent is a financial institution subject to the GLB Act, as that term is defined by Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A), because among other things, Respondent provides tax planning and tax preparation services, 16 C.F.R. § 313.3(k)(2)(viii); 12 C.F.R. § 1016.3(l)(3)(ii)(H); 12 C.F.R. § 225.28(b)(6)(vi) ("Reg. Y"), and data processing, 12 C.F.R. § 225.28(b)(14). Respondent collects nonpublic personal information, as defined by 16 C.F.R. § 313.3(n) and 12 C.F.R. § 1016.3(p)(1)-(3). Because Respondent is a financial institution that collects nonpublic personal information, it is subject to the requirements of the GLB Privacy Rule, 16 C.F.R. Part 313, Reg. P., 12 C.F.R. Part 1016, and the Safeguards Rule, 16 C.F.R. Part 314.

Privacy Rule and Reg. P

11. The Privacy Rule, which implements Sections 501-503 of the GLB Act, 15 U.S.C. §§ 6801-6803, was promulgated by the

Federal Trade Commission on May 24, 2000, and became effective on July 1, 2001. *See* 16 C.F.R. Part 313. Since the enactment of the Dodd-Frank Act on July 21, 2010, the Consumer Financial Protection Bureau ("CFPB") became responsible for implementing the Privacy Rule, and accordingly promulgated the Privacy of Consumer Financial Information, Regulation P, 12 C.F.R. Part 1016 ("Reg. P"), which became effective on October 28, 2014. Accordingly, Respondent's conduct is governed by the Privacy Rule prior to October 28, 2014, and by Reg. P after that date. The GLB Act authorizes both the CFPB and the Federal Trade Commission to enforce Reg. P. 15 U.S.C. § 6805.

12. Both the Privacy Rule and Reg. P require financial institutions to provide consumers with an initial and annual privacy notice. Both the initial and annual privacy notices must be "clear and conspicuous," 16 C.F.R. § 313.3(b) and 12 C.F.R. § 1016.3(b), and must "accurately reflect[] [the financial institution's] privacy policies and practices." 16 C.F.R. §§ 313.4 and 313.5 and 12 C.F.R. §§ 1016.4 and 1016.5. The privacy notice must include specified elements, including the categories of nonpublic personal information the financial institution collects and discloses, the categories of third parties to whom the financial institution discloses the information, and the security and confidentiality policies of the financial institution. 16 C.F.R. § 313.6; 12 C.F.R. § 1016.6. A financial institution must provide its privacy notice so that each consumer can reasonably be expected to receive actual notice. 16 C.F.R. § 313.9; 12 C.F.R. § 1016.9. An example, for the consumer who conducts transactions electronically, is to require the consumer to acknowledge receipt of the initial notice as a necessary step to obtaining the financial product or service. 16 C.F.R. § 313.9; 12 C.F.R. § 1016.9; Privacy of Consumer Financial Information, 65 Fed. Reg. 33646-01, at 33665-66 (May 24, 2000).

13. Respondent failed to comply with the Privacy Rule requirements discussed in Paragraph 12. Specifically:

a. Respondent failed to provide a clear and conspicuous initial privacy notice. 16 C.F.R. § 313.4, 12 C.F.R. § 1016.4. Respondent's Privacy Policy was contained towards the end of a long License Agreement, and

Respondent did not convey the importance, nature, and relevance of this Privacy Policy to its customers.

b. Respondent failed to deliver the initial privacy notice so that each customer could reasonably be expected to receive actual notice. 16 C.F.R. § 313.9; 12 C.F.R. § 1016.9. For example, Respondent did not require customers to acknowledge receipt of the initial notice as a necessary step to obtaining a particular financial product or service.

Safeguards Rule

14. The Safeguards Rule, which implements Section 501(b) of the GLB Act, 15 U.S.C. § 6801(b), was promulgated by the Commission on May 23, 2002, and became effective on May 23, 2003. The Rule requires financial institutions to protect the security, confidentiality, and integrity of customer information by developing, implementing, and maintaining a comprehensive information security program that is written in one or more readily accessible parts, and that contains administrative, technical, and physical safeguards that are appropriate to the financial institution's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information at issue, including:

a. Designating one or more employees to coordinate the information security program;

b. Identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks;

c. Designing and implementing information safeguards to control the risks identified through risk assessment, and regularly testing or otherwise monitoring the effectiveness of the safeguards' key controls, systems, and procedures;

d. Overseeing service providers, and requiring them by contract to protect the security and confidentiality of customer information; and

e. Evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances.

15. Respondent violated the Safeguards Rule. For example:

a. Respondent failed to have a written information security program until November 2015.

b. Respondent failed to conduct a risk assessment, which would have identified reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, including risks associated with inadequate authentication.

c. Respondent failed to implement information safeguards to control the risks to customer information from inadequate authentication. For example:

i. Respondent did not require consumers to choose strong passwords when setting up their accounts, which is a standard practice for accounts containing sensitive personal information. Respondent's only requirement for passwords was that they be eight to sixteen characters in length. This created a risk that attackers could guess commonly-used passwords, or use dictionary attacks, to access TaxSlayer Online accounts.

ii. Respondent failed to implement adequate risk-based authentication measures sufficient to mitigate the risk of list validation attacks when such attacks became reasonably foreseeable. List validation attacks occur when remote attackers use lists of stolen login credentials to attempt to access accounts across a number of popular Internet sites,

knowing that consumers often reuse user name and passwords combinations.

iii. Respondent failed to inform TaxSlayer Online users when a material change was made to the mailing address, password, or security question associated with their accounts. Respondent also failed to inform TaxSlayer Online users when a material change is made to the bank account routing number or the payment method for a refund (e.g., from bank account to a pre-paid debit card) associated with their accounts.

iv. Respondent failed to require customers to validate their email addresses at account creation, in order to verify accuracy and communicate with customers regarding security-related issues.

v. Respondent failed to use readily-available tools to prevent devices or IP addresses from attempting to access an unlimited number of TaxSlayer Online accounts in rapid succession through a list validation attack.

16. Respondent became subject to a list validation attack that began on October 10, 2015, and ended on December 21, 2015. On that day, Respondent implemented multi-factor authentication, requiring users to first submit their username and password, and then to authenticate their device by, for example, entering a code that Respondent sent to the user's email or mobile phone.

17. As part of this list validation attack, the remote attackers were able to gain full access to 8,882 existing TaxSlayer Online accounts. In an unknown number of instances, the attackers engaged in tax identity theft by altering the bank routing and refund methods, e-filing fraudulent tax returns, and diverting the fabricated tax refunds to themselves. Customers were not notified when these alterations occurred. Respondent was not aware of this list validation attack until a TaxSlayer Online user called on January 11, 2016 to report suspicious activity on her account.

18. Consumers who are the victims of tax identity theft spend significant time resolving this problem. Victims spend time calling the IRS and state tax authorities to report the tax identity theft. Victims then have to obtain PIN numbers from the IRS and file their taxes on paper using those PIN numbers. They then have to wait months to receive their tax refunds. To protect themselves and their dependents from future identity theft, victims freeze or place holds on their credit, and they spend additional time monitoring their credit histories and financial accounts. These victims also suffer out-of-pocket financial losses.

Count I
Violations of the Privacy Rule and Reg. P

19. As described in Paragraphs 11 to 13, the Privacy Rule and Reg. P require financial institutions to provide customers with a clear and conspicuous privacy notice that accurately reflects the financial institution's privacy policies and practices. Further, financial institutions must deliver the privacy notice so that each customer could reasonably be expected to receive actual notice.

20. Respondent is a financial institution, as defined in Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A).

21. As set forth in Paragraph 13.a, Respondent failed to provide its customers with a clear and conspicuous initial privacy notice. Therefore, Respondent violated the Privacy Rule, 16 C.F.R. § 313.4, and Reg. P, 12 C.F.R. § 1016.4.

22. As set forth in Paragraph 13.b, Respondent failed to deliver the initial privacy notice so that each customer could reasonably be expected to receive actual notice. Therefore, Respondent violated the Privacy Rule, 16 C.F.R. § 313.9; and Reg. P., 12 C.F.R. § 1016.9.

23. Therefore, the conduct set forth in Paragraphs 21 and 22 is a violation of the Privacy Rule and Reg. P.

Count II
Violations of the Safeguards Rule

24. As described in Paragraph 14, the Safeguards Rule requires financial institutions to have a written comprehensive information security program that include specified elements, including a requirement to conduct a risk assessment. It also requires financial institutions to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, alteration, destruction or other compromise of such information and then design and implement information safeguards to control the risks identified through the risk assessment.

25. Respondent is a financial institution, as defined in Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A).

26. As set forth in Paragraph 15a, Respondent failed to have a written comprehensive information security program until November 2015.

27. As set forth in Paragraph 15b, Respondent did not conduct risk assessments to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information.

28. As set forth in Paragraph 15c, Respondent did not implement information safeguards to control risks, specifically the risk that remote attackers were using stolen account credentials to take over customers' TaxSlayer Online accounts in order to perpetrate tax identity theft.

29. Therefore, the conduct set forth in Paragraphs 26 to 28 is a violation of the Safeguards Rule.

30. Pursuant to the GLB Act, violations of the Safeguards Rule and the Privacy Rule are enforced through the FTC Act.

THEREFORE, the Federal Trade Commission this twentieth day of October, 2017, has issued this Complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violation of the Federal Trade Commission's Privacy of Consumer Financial Information Rule ("Privacy Rule"), 16 C.F.R. Part 313, recodified at 12 C.F.R. § 1016 ("Regulation P"), and the Federal Trade Commission's Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, each issued pursuant to Title I of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq., and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, the Privacy Rule, Regulation P, and the Safeguards Rule, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure described in

Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent, TaxSlayer, LLC, is a Georgia limited liability corporation with its principal office at 3003 TaxSlayer Drive, Evans, Georgia 30809.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Personal information" means individually identifiable information from or about an individual consumer, including but not limited to: (1) email address; (2) user account credentials, such as a login name and password; (3) first and last name; (4) government-issued identification number, such as a Social Security number; (5) mobile or other telephone number; (6) home or other physical address, including street name and name of city or town; or (7) any information from or about an individual consumer that is combined with any of (1) through (6) above.

B. "Covered product or service" means any tax return preparation product or e-filing service, including any plan or program.

C. "Respondent" means TaxSlayer, LLC, and its successors and assigns.

Provisions

I. GLB Rule Violations

IT IS ORDERED that Respondent, and Respondent's officers, agents, employees and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with any product or service, are hereby permanently restrained and enjoined from violating any provision of:

A. The Privacy of Consumer Financial Information Rule, 16 C.F.R. Part 313, or the Privacy of Consumer Financial Information Rule (Regulation P), 12 C.F.R. Part 1016; or

B. The Standards for Safeguarding Consumer Information Rule, 16 C.F.R. Part 314.

In the event that any of the statutory sections or rules identified in this Part are hereafter amended or modified, compliance with that statutory section or rule as so amended or modified shall not be a violation of this Order.

II. Biennial Assessment Requirements

IT IS FURTHER ORDERED that Respondent, and its successors and assigns, in connection with their compliance with Section I (A) and (B) of this Order, shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, using procedures and standards generally accepted in the profession. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the Order for the initial Assessment, and (2) each two-year period thereafter for ten (10) years after service of this Order for the biennial Assessments. Each Assessment shall:

A. Set forth the specific administrative, technical, and physical safeguards that Respondent has implemented and maintained during the reporting period;

B. Explain how such safeguards are appropriate to Respondent's size and complexity, the nature and scope of Respondent's activities, and the sensitivity of the personal information collected from or about consumers;

C. Explain how the safeguards that have been implemented meet or exceed the protections required by Section I (B) of this Order, and

D. Certify that Respondent's security program(s) is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment must be completed within 60 days after the end of the reporting period to which the Assessment applies. The Assessment must be obtained from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. A professional qualified to prepare such Assessments must be: an individual qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); an individual holding Global Information Assurance Certification (GIAC) from the SANS Institute; or a qualified individual or entity approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission.

Respondent must submit the initial Assessment to the Commission within 10 days after the Assessment has been completed. Respondent must retain all subsequent biennial Assessments, at least until the Order terminates. Respondent must submit any biennial Assessments to the Commission within 10 days of a request from a representative of the Commission.

III. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgements of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 20 years after issuance of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives having managerial responsibilities for the conduct specified in Provisions I through IV; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

IV. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (b) identify all of the Respondent's businesses by their names, primary telephone numbers, and primary physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered; (d) describe in detail whether and how

Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Respondent must submit notice of any change in: (a) any designated point of contact; or (b) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW,

Washington, DC 20580. The subject line must begin: In re TaxSlayer, LLC.

V. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for 20 years after the issuance date of the Order, and retain such records for 5 years. Specifically, Respondent must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and, if applicable, the reason for termination;

C. Records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;

E. A copy of each widely disseminated representation by Respondent that describes the extent to which Respondent maintains or protects the privacy, security and confidentiality of Personal Information, including any representation concerning a change in any website or other service controlled by Respondent that relates to the privacy, security and confidentiality of Personal Information;

F. For 5 years from the date of the last dissemination of any representation covered by this Order:

1. All materials that were relied upon in making the representation; and

2. All evidence in Respondent's possession, custody, or control that contradicts, qualifies, or otherwise calls into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and

G. For 5 years from the date of preparation of each Assessment required by this Order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of Respondent, including all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials concerning Respondent's compliance with related Provisions of this Order, for the compliance period covered by such Assessment.

VI. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of

identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on October 20, 2037, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any provision in this Order that terminates in less than 20 years;

B. This Order's application to a Respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from TaxSlayer, LLC ("TaxSlayer").

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

This matter involves TaxSlayer, a company that advertises, offers for sale, sells, and distributes products and services to consumers, including TaxSlayer Online, a browser-based tax return preparation and electronic filing software and service. TaxSlayer Online assists consumers, typically for a fee, in preparing and electronically filing federal and state income tax returns. In 2016, more than 950,000 individuals filed tax returns using TaxSlayer Online.

TaxSlayer Online users create an account by entering a username and password ("login credentials") on an account creation page. They then input a host of personal information in order to create a tax return, including but not limited to: name, Social Security number ("SSN"), telephone number, physical address, income, employment status, marital status, identity of dependents, financial assets, financial activities, receipt of government benefits, home ownership, indebtedness, health insurance, retirement information, charitable donations, tax payments, tax refunds, bank account numbers, and payment card numbers.

TaxSlayer Online uses this personal information to prepare tax returns on behalf of customers. Once a tax return is prepared, a customer can file the return electronically through TaxSlayer Online with the Internal Revenue Service ("IRS") and state departments of revenue. If a customer is entitled to a refund, TaxSlayer offers the option of directing the refund into a

customer's bank account, or customers may elect to receive their refunds on a prepaid debit card.

The complaint alleges that TaxSlayer became subject to a list validation attack that began in October 2015. List validation attacks occur when attackers use lists of stolen login credentials to attempt to access accounts across a number of websites, knowing that consumers often reuse login credentials. In an unknown number of instances, the attackers engaged in tax identity theft by e-filing fraudulent tax returns and diverting the fabricated refunds to themselves.

The Commission's complaint alleges that TaxSlayer failed to comply with the Gramm-Leach-Bliley ("GLB") Act Privacy Rule in two ways. First, TaxSlayer failed to provide a clear and conspicuous initial privacy notice. TaxSlayer's Privacy Policy was contained towards the end of a long License Agreement, and TaxSlayer did not convey the importance, nature, and relevance of this Privacy Policy to its customers. Second, TaxSlayer failed to deliver the initial privacy notice so that each customer could reasonably be expected to receive actual notice. For example, TaxSlayer did not require customers to acknowledge receipt of the initial privacy notice as a necessary step to obtaining a particular financial product or service.

In addition, the complaint alleges that TaxSlayer engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for sensitive information from consumers, in violation of the GLB Act Safeguards Rule. First, TaxSlayer failed to have a written information security program until November 2015. Second, TaxSlayer failed to conduct a risk assessment, which would have identified reasonably foreseeable risks to the security, confidentiality, and integrity of customer information, including risks associated with inadequate authentication. Third, TaxSlayer failed to implement information safeguards to control the risks to customer information from inadequate authentication.

The proposed order contains provisions designed to prevent TaxSlayer from engaging in practices similar to those alleged in the complaint. Part I prohibits TaxSlayer from violating any provision of the GLB Act Privacy Rule and Safeguards Rule. Part

Analysis to Aid Public Comment

II of the proposed order requires TaxSlayer to obtain, within the first one hundred eighty (180) days after service of the order and on a biennial basis thereafter for a period of ten (10) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: (1) it has in place a security program that provides protections that meet or exceed the protections required by Part I.B of the order, and (2) its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of sensitive consumer information has been protected.

Parts III through VII of the proposed order are reporting and compliance provisions. Part III requires dissemination of the order now and in the future to all current and future principals, offers, directors, and LLC managers and directors, and to persons with managerial or supervisory responsibilities relating to Parts I through IV of the order. Part IV ensures notification to the FTC of changes in corporate status and mandates that TaxSlayer submit an initial compliance report to the FTC. Part V requires TaxSlayer to retain documents relating to its compliance with the order for a five-year period. Part VI mandates that TaxSlayer make available to the FTC information or subsequent compliance reports, as requested. Part VII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

1-800 CONTACTS, INC.

COMPLAINT AND INITIAL DECISION IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. 9372; File No. 141 0200
Complaint, August 8, 2016 – Initial Decision, October 27, 2017

This case addresses 1-800 Contacts, Inc.'s settlement agreements with over a dozen rivals prohibiting both 1-800 and the other parties from bidding on keywords containing the other's trademarks, and requiring each party to implement negative keywords to ensure that their ads do not appear in search engine results pages for searches that contain each other's trademarks. The complaint alleges that these agreements are in restraint of trade in violation of Section 5 of the FTC Act. In his Initial Decision, the Administrative Law Judge found that the Challenged Agreements pose significant, unjustified anticompetitive consequences in the relevant market for the sale of contact lenses online. The Administrative Law Judge ordered 1-800 Contacts to cease and desist from enforcing or attempting to enforce any and all provisions, terms, or requirements in an existing agreement or court order that impose a condition on a Seller, which prohibits, restricts, regulates, or otherwise places any limitation on truthful, non-deceptive, and non-infringing advertising or promotion.

Participants

For the *Commission*: *Joshua Barton Gray, Gustav Chiarello, Kathleen Clair, Stuart Hirschfeld, Nathaniel Hopkin* and *Charlotte Slaiman.*

For the *Respondent*: *Garth Vincent, Munger Tolles & Olson; Darryl Nirenberg, Steptoe & Johnson.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that 1-800 Contacts, Inc. ("1-800 Contacts"), a corporation, hereinafter sometimes referred to as "Respondent," has violated the provisions of said Act, 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 in that respect as follows:

Nature of the Case

1. This action challenges a series of bilateral agreements between 1-800 Contacts and numerous online sellers of contact lenses that prevent the parties from competing against one another in certain online search advertising auctions. The driving force behind these agreements and this anticompetitive scheme is 1-800 Contacts, the largest online seller of contact lenses in the United States.

2. The major online search engine companies, Google and Bing, sell advertising space on their search engine results pages through computerized auctions. Beginning in 2004, 1-800 Contacts secured agreements with at least fourteen competing online sellers of contact lenses providing that the parties would not bid against one another in certain search advertising auctions (the "Bidding Agreements"). As 1-800 Contacts engineered this bid allocation scheme, certain auctions are reserved to 1-800 Contacts alone.

3. These bidding agreements unreasonably restrain both price competition in search advertising auctions and the availability of truthful, non-misleading advertising. The Bidding Agreements individually and in combination constitute an unfair method of competition and violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Respondent

4. Respondent 1-800 Contacts is a corporation organized, existing, and doing business under and by virtue of the laws of the United States, with its office and principal place of business located at 261 Data Drive, Draper, Utah, 84020.

Jurisdiction

5. At all times relevant herein, 1-800 Contacts 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.

6. The acts and practices of 1-800 Contacts, 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.

Overview of Online Search Advertising

7. Search engines, including Google and Bing, are available to users of the internet without charge. This service is financed primarily through the sale of search advertising. Search advertising refers to the paid advertisements that appear, in response to a search query, on the search engine results page above or adjacent to the unpaid "organic" or "natural" results. Attached hereto as Exhibit 1 is a screen shot showing a Google search engine results page that appeared in response to a query on June 27, 2016, for "1 800 Contacts cheaper competitors." The first listing in this screen shot, which is preceded by a yellow box containing the text "Ad," is a paid advertisement (for 1-800 Contacts). The remaining results on the page are unpaid organic results.

8. Search advertising is especially valuable to advertisers because, unlike with other forms of advertising, an advertiser can deliver a message to a user at the precise moment that the user has expressed interest in a specific subject, and may be ready to make a purchase. For example, a seller of contact lenses (or any of a wide variety of products and services advertised online) can display its advertisement to a user who, milliseconds earlier, entered the search query "contact lenses" (or for another product or service).

9. Search advertising is also especially valuable to internet users because a user can quickly and easily navigate between the search engine results page and the websites of several different advertisers (e.g., visiting several different websites that sell contact lenses). In this way, the user can readily compare price and service, purchase the desired merchandise, and arrange for delivery.

10. Search engine companies sell advertising space on the search engine results page by means of auctions. A separate and

automated search advertising auction is conducted each time a user enters a query.

a. Advertisers submit to the search engine companies "bids" specifying the maximum price they are willing to pay to place a particular advertisement on the results page.

b. An advertiser may identify the auctions that it wishes to enter by bidding on particular words, referred to as "keywords," contained in a given query. Alternatively, the advertiser may allow the search engine company, through its algorithms, to identify relevant auctions for the advertiser (thus participating in auctions for relevant queries even without having bid on the precise terms in those queries).

c. When a consumer enters a search query, an algorithm instantly evaluates the relevant bids. The winner or winners of the auction will have their advertisements displayed to the user. If the user clicks on an advertisement and visits the advertiser's website, then the advertiser pays a fee to the search engine company.

11. Search engine companies do not simply place advertisements on the search engine results page in the order of the price bid by the advertiser. Rather, in determining whether and in what order to place advertisements, search engines employ sophisticated algorithms that consider the quality of the advertisement. Quality, in this context, refers to the search engine's assessment of whether the advertisement will be relevant and useful to the user. The search engine makes this assessment based largely on the search engine's continual analysis of user feedback (such as click-through data), which is incorporated, in real-time, into the algorithms that determine which advertisements, if any, will be shown. The search engine demotes or eliminates advertisements that prove, based on user feedback, not to be relevant or useful to users.

12. Computer users sometimes enter a search query that contains a trademarked word or phrase (*e.g.*, "1-800 Contacts," "Mattress Discounters," "POLO shirt"). In response, the search

engine may present the user with relevant advertisements on behalf of multiple companies, including but not limited to the owner of the trademark.

13. An advertiser also may specify to the search engine one or more "negative keywords." This is an instruction that the company's advertisement should *not* appear in response to a search query that contains a particular term or terms. For example, a business that sells eyeglasses and bids on the term "glasses" in search advertising auctions may use a negative keyword (*e.g.*, "wine") to prevent its advertisement from being displayed in response to a query for "wine glasses."

Competition in the Online Retail Sale of Contact Lenses

14. 1-800 Contacts has long been the largest online seller of contact lenses in the United States. In 2015, 1-800 Contacts had revenues of approximately [redacted] million. This represents approximately 50 percent of the online retail sales of contact lenses. The combined share of 1-800 Contacts and the fourteen firms that executed the Bidding Agreements is approximately 80 percent.

15. 1-800 Contacts was a pioneer in the online sale of contact lenses. However, by the early 2000s, a number of competing online retailers had emerged and were expanding rapidly. Online rivals invested in search advertising and competed directly against 1-800 Contacts in search advertising auctions. These online rivals undercut 1-800 Contacts' prices for contact lenses, many by a substantial amount.

16. As early as 2003, 1-800 Contacts recognized that it was losing sales to lower-priced online competitors. However, 1-800 Contacts did not want to lower its prices to compete with these rivals, and devised a plan to avoid doing so. To this day, 1-800 Contacts' prices for contact lenses remain consistently higher than the prices of its online rivals.

The Bidding Agreements

17. In or around 2004, 1-800 Contacts began sending cease-and-desist letters to rival online sellers of contact lenses whose

search advertisements appeared in response to user queries containing the term "1-800 Contacts" (or variations thereof). 1-800 Contacts accused its rivals of infringing its trademarks.

18. 1-800 Contacts claimed—inaccurately—that the mere fact that a rival's advertisement appeared on the results page in response to a query containing a 1-800 Contacts trademark constituted infringement. 1-800 Contacts threatened to sue its rivals that did not agree to cease participating in these search advertising auctions.

19. Most often, rivals quickly acceded to 1-800 Contacts' demands in order to avoid prolonged and costly litigation. Only one competitor refused to settle and proceeded to litigation.

20. Between 2004 and 2013, 1-800 Contacts entered at least fourteen agreements with rival online sellers of contact lenses settling 1-800 Contacts' purported trademark claims by restricting bidding in search advertising auctions. The competitors that agreed not to bid against 1-800 Contacts include:

21. The Bidding Agreements go well beyond prohibiting trademark infringing conduct. They restrain a broad range of truthful, non-misleading, and non-confusing advertising.

22. All fourteen Bidding Agreements bar 1-800 Contacts' competitor from bidding in a search advertising auction for any of 1-800 Contacts' trademarked terms (*e.g.*, "1-800 Contacts") or variations thereof (such as common misspellings).

23. All fourteen Bidding Agreements are reciprocal, barring 1-800 Contacts from bidding for the competitors' trademarked terms or variations thereof. Notably, most of the competitors that entered into these Bidding Agreements had never raised trademark infringement claims or counterclaims against 1-800 Contacts.

24. Thirteen of the Bidding Agreements also require 1-800 Contacts' competitor to employ "negative keywords" directing the search engines not to display the competitor's advertisement in response to a search query that includes any of 1-800 Contacts' trademarked terms or variations thereof, even if the search engines' algorithms determine that the advertisement would be relevant and useful to the user. Thus, even if a user enters a query for "1-800 Contacts **cheaper competitors**," the user will see advertisements only for 1-800 Contacts. (See Exhibit 1.) This undertaking is also reciprocal, requiring 1-800 Contacts to employ its competitors' trade names and variations thereof as negative keywords in its own advertising campaigns.

25. 1-800 Contacts has aggressively policed the Bidding Agreements, complaining to competitors when the company has suspected a violation, threatening further litigation, and demanding compliance.

26. Only one online seller of contact lenses—Lens.com—did not settle with 1-800 Contacts. Instead, Lens.com litigated against 1-800 Contacts at significant expense. Ultimately, the Court of Appeals for the Tenth Circuit rejected 1-800 Contacts' trademark infringement claims. The court found that consumers were not confused when an advertisement for Lens.com appeared on the search results page in response to a user query for "1-800 Contacts." *See 1-800 Contacts, Inc. v. Lens.com*, *Inc.*, 722 F.3d 1229, 1245-49 (10th Cir. 2013). And, in the absence of the likelihood of consumer confusion, there can be no infringement of 1-800 Contacts' trademarks.

27. 1-800 Contacts targeted rivals whose advertisements appeared on the search engine results page in response to a user query for "1-800 Contacts" or variations thereof. 1-800 Contacts acted without regard to whether the advertisements were likely to cause consumer confusion or infringed 1-800 Contacts' trademarks.

Anticompetitive Effects of the Bidding Agreements

28. One relevant product market or line of commerce in which to analyze the competitive effects of 1-800 Contacts' challenged conduct is no larger than the sale of search advertising by auction in response to user queries signaling the user's interest in contact lenses, or smaller relevant markets therein.

29. A second relevant product market or line of commerce in which to analyze the competitive effects of 1-800 Contacts' challenged conduct is no larger than the retail sale of contact lenses, or smaller relevant markets therein, including the online retail sale of contact lenses.

30. The relevant geographic market for each product market alleged herein is no larger than the United States.

31. Respondent's conduct, as alleged herein, had the purpose, capacity, tendency, and likely effect of restraining competition unreasonably and injuring consumers and others in the following ways, among others:

a. Unreasonably restraining price competition in certain search advertising auctions;

b. Distorting prices in, and undermining the efficiency of, certain search advertising auctions;

c. Preventing search engine companies from displaying to users on the results page the array of advertisements that are most responsive to a user's search;

d. Impairing the quality of the service provided to consumers by search engine companies, including the results page;

e. Depriving consumers of truthful and non-misleading information about the prices, products, and services offered by online sellers of contact lenses;

f. Depriving consumers of the benefits of vigorous price and service competition among online sellers of contact lenses;

g. Preventing online sellers of contact lenses from disseminating truthful and non-confusing information about the availability of, and prices for, their products and services;

h. Increasing consumers' search costs relating to the online purchase of contact lenses; and

i. Causing at least some consumers to pay higher prices for contact lenses than they would pay absent the agreements, acts, and practices of 1-800 Contacts.

32. As horizontal agreements that restrain price competition and restrain truthful and non-misleading advertising, the Bidding Agreements are inherently suspect. Furthermore, the Bidding Agreements are overbroad: they exceed the scope of any property right that 1-800 Contacts may have in its trademarks, and they are not reasonably necessary to achieve any procompetitive benefit. Less restrictive alternatives are available to 1-800 Contacts to safeguard any legitimate interest the company may have under trademark law.

Violations Alleged

33. As set forth above, 1-800 Contacts agreed to restrain competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

34. The acts and practices of Respondent, 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, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

NOTICE

Notice is hereby given to the Respondent that the eleventh day of April, 2017, at 10:00 a.m., is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Washington D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46 of said Rules.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after an answer is filed by Respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within five days of receiving the answer of Respondent, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Respondent has violated or is violating Section 5 of the FTC Act, as amended, as alleged in the complaint, the Commission may order such relief against Respondent as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Ordering Respondent to cease and desist from the conduct alleged in the complaint to violate Section 5 of the FTC Act, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anticompetitive practices engaged in by Respondent, or similar practices.

2. Prohibiting Respondent from, directly or indirectly, maintaining, entering into, or attempting to enter into, an agreement with any contact lens retailer that restrains participation in or otherwise restrains competition in any search advertising auction.

3. Prohibiting Respondent from, directly or indirectly, maintaining, entering into, or attempting to enter into, an agreement with any contact lens retailer to forbear from disseminating truthful and non-misleading advertising.

4. Prohibiting Respondent from, directly or indirectly, enforcing, attempting to enforce, or threatening to enforce any provision of an agreement that restricts bidding for

search advertising or that restricts the display of advertisements in response to certain user search queries, or any provision of an agreement requiring the use of negative keywords in search engine advertising.

5. Prohibiting Respondent from filing or threatening to file a lawsuit against any contact lens retailer alleging trademark infringement, deceptive advertising, or unfair competition that is based on the use of 1-800 Contacts' trademarks in a search advertising auction. *Provided, however*, that Respondent shall not be barred from filing or threatening to file a lawsuit challenging any advertising copy where Respondent has a good faith belief that such advertising copy gives rise to a claim of trademark infringement, deceptive advertising, or unfair competition.

6. Ordering Respondent to submit at least one report to the Commission sixty days after issuance of the Order, and other reports as required, describing how it has complied, is complying, and will comply in the future.

7. Requiring, for a period of time, that Respondent document all communications with settlement parties, including the persons involved, the nature of the communication, and its duration, and that Respondent submit such documentation to the Commission.

8. Ordering Respondent, for a period of time, to file annual compliance reports to the Commission describing its compliance with the requirements of the order. The order would terminate twenty years from the date it becomes final.

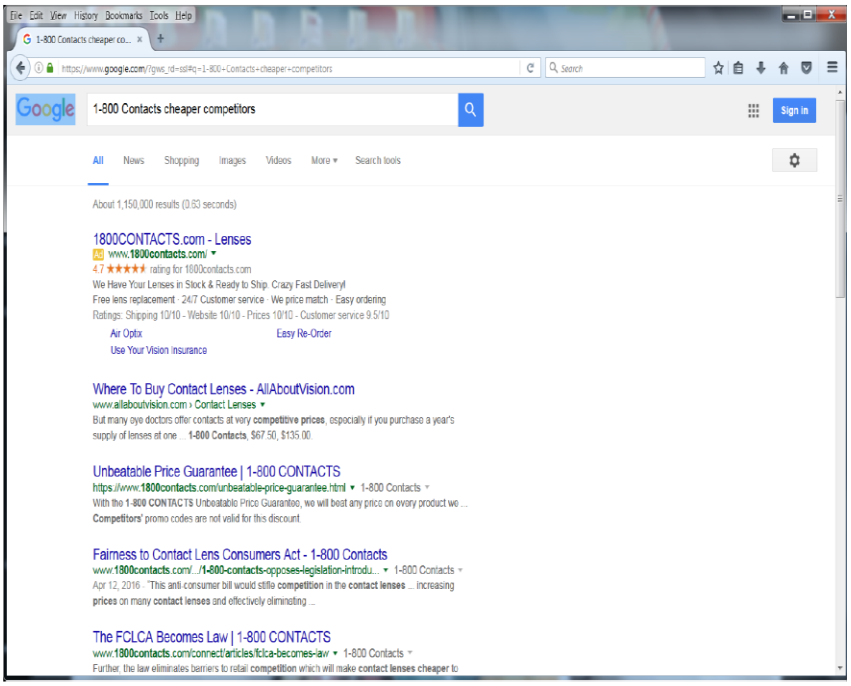
9. Requiring that Respondent's compliance with the order may be monitored at Respondent's expense by an independent monitor, for a term to be determined by the Commission.

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of August, 2016 issues its complaint against Respondent.

By the Commission.

Exhibit 1



INITIAL DECISION

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 8, 2016, alleges that certain agreements between Respondent 1-800 Contacts, Inc., ("1-800 Contacts" or "Respondent"), a seller of contact lenses, and 14 competing online sellers of contact lenses, unlawfully restrain competition in online search advertising auctions, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"). Complaint ¶¶ 1, 4, 20, 33 (the "Challenged Agreements").

According to the Complaint, search engine companies sell advertising space on search engine results pages by means of auctions, which advertisers may enter by bidding on particular words, referred to as "keywords." Complaint ¶ 10, 10b. Search advertising refers to the paid advertisements that appear, in response to a search query, on a search engine results page above or adjacent to the unpaid "organic" or "natural" results. Complaint ¶ 7.

The Complaint further alleges that the Challenged Agreements, which include settlement agreements in connection with trademark claims brought by Respondent, restrict 1-800 Contacts' competitors from bidding on 1-800 Contacts' trademarked terms (*e.g.*, "1-800 Contacts") or variations thereof (such as common misspellings), as keywords in search advertising auctions. Complaint ¶¶ 17-20, 22. The Complaint avers that 13 of the 14 Challenged Agreements further require the competitors to employ "negative keywords" to prevent the search engines' algorithms from causing the display of the competitor's advertisements in response to a search for 1-800 Contacts' trademarked terms or variations thereof. Complaint ¶ 24. The Complaint further alleges that the Challenged Agreements are reciprocal, even though most of the settling parties had not raised any trademark claims against Respondent. Complaint ¶¶ 23, 24.

In addition, the Complaint alleges that the Challenged Agreements unreasonably restrain competition and injure consumers and others, including by unreasonably restraining price competition in search advertising auctions and restricting the availability of truthful, non-misleading advertising, in violation of Section 5 of the FTC Act. Complaint ¶¶ 3, 31, 33.

2. Respondent's Answer and Defenses

Respondent filed its Answer and Defenses ("Answer") to the Complaint on August 29, 2016. Respondent avers that it has been a leader in increasing competition in the contact lens retail marketplace, which has resulted in greater convenience, better service, and lower prices for contact lens consumers. Answer at 1. Respondent further avers that the Challenged Agreements are legitimate, reasonable, and commonplace settlements of *bona fide* trademark litigation based on other contact lens retailers' unauthorized use of 1-800 Contacts' trademarks as keywords to trigger internet search advertising. Answer at 1, ¶¶ 22-24. Respondent denies that the Challenged Agreements unreasonably restrain competition or injure consumers or others, and further denies that its conduct violates Section 5 of the FTC Act. Answer ¶¶ 3, 31, 33.

The Answer includes twelve defenses, including its Second Defense, that the claim set forth in the Complaint is barred because the lawsuits that gave rise to the Challenged Agreements have not been alleged to be and have not been shown to be objectively and subjectively unreasonable; and its Third Defense, that the claim set forth in the Complaint is barred because Respondent's conduct is protected under the *Noerr-Pennington* doctrine and the First Amendment to the United States Constitution. Answer at 7-8.

On November 1, 2016, Complaint Counsel filed with the Commission a motion for partial summary decision, arguing that Respondent's Second and Third Defenses should be dismissed as invalid as a matter of law. Under the Commission's Rules of Practice, the motion was decided by the Commission.[1] The

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

Commission held that Respondent's Second and Third Defenses failed as a matter of law and granted Complaint Counsel's motion. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 19 (Feb. 1, 2017). Thus, the Commission, who issued the Complaint, granted a motion filed with the Commission by Complaint Counsel, who prosecutes the Complaint, the effect of which was to eliminate two defenses raised by Respondent, before the trial of this case, conducted by the independent Administrative Law Judge, had even begun.

B. Procedural History

The evidentiary hearing began on April 11, 2017 and was completed on May 12, 2017. The hearing record was closed by Order dated May 17, 2017.[2]

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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 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 Over 1,250 exhibits were admitted into evidence, 43 witnesses testified, either live or by deposition, and there are 4,554 pages of trial transcript. The Parties' post-trial briefs, proposed findings of fact and conclusions of law, reply briefs and replies to proposed findings of fact and conclusions of law total 3,514 pages.

Rule 3.51(a) of the Commission's Rules of Practice states that "[t]he Administrative Law Judge shall file an initial decision within 70 days after the filing of the last filed initial or reply proposed findings of fact, conclusions of law and order . . . ." 16 C.F.R. § 3.51(a). Complaint Counsel and Respondent ("the Parties") filed concurrent post-trial briefs and proposed findings of fact on June 15, 2017. The Parties filed replies to each other's proposed findings of fact, conclusions of law, and post-trial briefs on July 13, 2017. Pursuant to Commission Rule 3.41(b)(6), closing arguments were held on July 27, 2017.[3]

Seventy days from the last filed reply proposed findings and conclusions and briefs was September 21, 2017, and, absent an order pursuant to Rule 3.51, the Initial Decision was to be filed on or before September 21, 2017. Based on the voluminous and complex record in this matter, an Order was issued on September 11, 2017, finding good cause for extending the time period for filing the Initial Decision by 30 days. Accordingly, issuance of this Initial Decision by October 23, 2017 is in compliance with Commission Rule 3.51(a).

C. Evidence

This Initial Decision is based on a consideration of the whole record relevant to the issues, including the exhibits properly admitted into evidence, deposition transcripts, and the transcripts of testimony at trial, and addresses the material issues of fact and law. The briefs and proposed findings of fact and conclusions of law, and the replies thereto, submitted by the Parties, and all contentions and arguments therein were thoroughly reviewed and considered.

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3 On August 22, 2017, Respondent filed a Notice of Supplemental Authority. Complaint Counsel filed its Response to Respondent's Notice of Supplemental Authority on August 25, 2017. Rule 3.15(a) permits, upon reasonable notice and such terms as are just, service of a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented and which are relevant to any of the issues involved. 16 C.F.R. § 3.15(a). The materials in Respondent's Notice of Supplemental Authority have been considered and do not affect the analysis or the conclusions contained in the Initial Decision.

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.[4]

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."[5]

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4 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).

5 References to the record are abbreviated as follows:

CX – Complaint Counsel's Exhibit

The Parties' burdens of proof are governed by Federal Trade Commission Rule 3.43(a), 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). The APA, "which is applicable to administrative adjudicatory proceedings unless otherwise provided by statute, establishes '. . . the traditional preponderance-of-the evidence standard.'" *In re Rambus, Inc.*, 2006 FTC LEXIS 101, at *45 (Aug. 20, 2006) (quoting *Steadman v. SEC*, 450 U.S. 91, 95-102 (1981)), *rev'd on other grounds*, 522 F.3d 456 (D.C. Cir. 2008).

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). In addition, when the Parties sought to elicit testimony at trial that revealed information that had been granted *in camera* treatment, the hearing went into an *in camera* session.

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 Corrected Proposed Findings of Fact
CCRRFF – Complaint Counsel's Reply to Respondent's Proposed Findings of Fact
CCCL – Complaint Counsel's Corrected Conclusions of Law
RB – Respondent's Post-Trial Brief
RRB – Respondent's Corrected Post-Trial Reply Brief
RFF – Respondent's Proposed Findings of Fact
RRCCFF – Respondent's Corrected Reply to Complaint Counsel's Proposed Findings of Fact
RCL – Respondent's Conclusions of Law

Commission Rule 3.45(a) allows the Administrative Law Judge "to grant *in camera* treatment for information at the time it is offered into evidence subject to a later determination by the [administrative] law judge or the Commission that public disclosure is required in the interests of facilitating public understanding of their subsequent decisions." *In re Bristol-Myers Co*., Nos. 8917-19, 90 F.T.C. 455, 457, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). As the Commission later reaffirmed in another leading case on *in camera* treatment, since "in some instances the ALJ or Commission cannot know that a certain piece of information may be critical to the public understanding of agency action until the Initial Decision or the Opinion of the Commission is issued, the Commission and the ALJs retain the power to reassess prior *in camera* rulings at the time of publication of decisions." *In re General Foods Corp*., No. 9085, 95 F.T.C. 352, 356 n.7; 1980 FTC LEXIS 99, at *12 n.7 (March 10, 1980). Thus, 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 the public version of this Initial Decision, pursuant to Commission Rule 3.45(a) (the ALJ "may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding"). Where *in camera* information is used in this Initial Decision, it is indicated in bold font and braces ("**{ }**") in the *in camera* version and is redacted from the public version of the Initial Decision, in accordance with Commission Rule 3.45(e).

D. Summary of Initial Decision

Complaint Counsel has met its burden of proving that the Challenged Agreements unreasonably restrain trade in violation of Section 5 of the FTC Act. Contrary to Respondent's argument, *FTC v. Actavis*, 133 S. Ct. 2223 (2013), is not authority for the proposition that trademark settlement agreements are immune from antitrust scrutiny.

The evidence in this case demonstrates that the advertising restraints imposed by the Challenged Agreements cause harm to consumers and competition in the market for the sale of contact lenses online. This is sufficient to establish Complaint Counsel's *prima facie* case that the agreements are anticompetitive. The

evidence fails to prove that the Challenged Agreements have countervailing procompetitive benefits that outweigh or justify the demonstrated anticompetitive effects of the Challenged Agreements. Accordingly, the Challenged Agreements violate Section 5 of the FTC Act. An appropriate remedial order is entered herewith.

II. FINDINGS OF FACTS

A. Jurisdiction

1. 1-800 Contacts, Inc., ("1-800 Contacts") is headquartered at 261 West Data Drive, Draper, Utah. (Joint Stipulations of Jurisdiction, Law, and Facts, JX0001 ¶ 1).

2. 1-800 Contacts is a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. (Joint Stipulations of Jurisdiction, Law, and Facts, JX0001 ¶ 2).

3. 1-800 Contacts, through its operations based in Draper, Utah, has engaged in and continues to engage in commerce and activities affecting commerce in each of the fifty states in the United States and the District of Columbia, as the term "commerce" is defined by Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. (Joint Stipulations of Jurisdiction, Law, and Facts, JX0001 ¶ 3; CX1441 at 004 (Responses of Respondent 1-800 Contacts, Inc. to Complaint Counsel's First Set of Requests for Admissions, Admission No. 3)).

B. Contact Lenses – Industry Background

1. Contact Lens Manufacturers

4. In the United States, the total sales of contact lenses at retail in 2015 was estimated to be about $4.7 billion. (Bethers, Tr. 3551-52; RX0428 at 0006).

5. In the United States, total sales of contact lenses at retail grew about 4% to 5% annually from 2001 through 2015. (CCRFF 13; RX0428 at 0006; RX0904 at 0038).

6. Around 40 million consumers use contact lenses in the United States. (CX8006 (Evans Expert Report at 020 ¶ 46); CX0429 at 029).

7. There are four major manufacturers of contact lenses that account for about 95% of the United States market: Johnson & Johnson, Alcon, CooperVision, and Bausch & Lomb. (Clarkson, Tr. 183; RX0739 (Murphy Expert Report at 0085)).

2. Contact Lenses are Prescription-Only Medical Devices

8. Contact lenses are medical devices. (Clarkson, Tr. 177-78).

9. Labeling regulations of the U.S. Food and Drug Administration effectively require that contact lenses are sold only pursuant to a prescription. (RX0566 at 007 (Federal Trade Commission, 16 CFR Parts 315 and 456, Contact Lens Rule, Ophthalmic Practice Rules, Proposed Rule and Final Rule)).

10. A consumer interested in wearing contact lenses must go to an optometrist or ophthalmologist for a contact lens prescription. (Bethers, Tr. 3511-12).

11. Optometrists and ophthalmologists are commonly referred to as eye care practitioners or "ECPs." (RX0569 at 0005).

12. ECPs are licensed and authorized to write the prescriptions required for the purchase of contact lenses pursuant to the laws of the states in which they deliver their services. (Joint Stipulations of Jurisdiction, Law and Facts, JX0001 ¶ 4; *see also* Bethers, Tr. 3511-12, 3526-27 (ECPs, who write contact lens prescriptions, are "gatekeepers" for contact lens wearers)).

13. Contact lenses originally were made of a rigid material and required an ECP to custom fit each pair. (RX0569 at 0009).

14. Beginning in the late 1980s, contact lens manufacturers began to make disposable lenses that were designed to be replaced on a daily, weekly, or monthly basis. (RX0569 at 0009).

15. Technological improvements in manufacturing contact lenses eliminated the need for an ECP to fit each pair of contact lenses during the contact lens fitting process. (RX0569 at 0009).

16. The evolution in contact lens technology allows the sale of contact lenses to be unbundled from the fitting exam by an ECP. (RX0569 at 0009).

17. On December 6, 2003, Congress passed the Fairness to Contact Lens Consumers Act, 15 U.S.C. § 7601, which requires that ECPs provide contact lens prescriptions to their patients upon completion of a contact lens fitting. (RX0566 at 002).

18. Contact lens prescriptions typically expire within one or two years. In most states, a contact lens prescription expires in one year. In seven states, a contact lens prescription expires in two years. (Bethers, Tr. 3601; CX8006 (Evans Expert Report at 020-21 ¶ 49)).

19. Because of the expiration of a contact lens prescription, a contact lens wearer must visit an ECP at least once every year (or every two years in seven states) to renew their prescription or obtain a new prescription. (Bethers, Tr. 3601).

3. Prescription Verification

20. Before selling contact lenses to a customer, contact lens retailers must either obtain a copy of the prescription or verify the information in the prescription with the prescribing doctor. (Clarkson, Tr. 177-78; 16 C.F.R. § 315.5(a): "*Prescription requirement.* A seller may sell contact lenses only in accordance with a contact lens prescription for the patient that is: (1) Presented to the

seller by the patient or prescriber directly or by facsimile; or (2) Verified by direct communication.").

21. A contact lens prescription is verified if one of the following occurs: (1) The prescriber confirms the prescription is accurate by direct communication with the seller; (2) The prescriber informs the seller through direct communication that the prescription is inaccurate and provides the accurate prescription; or (3) The prescriber fails to communicate with the seller within eight (8) business hours after receiving from the seller the information described in Section 315.5(b) of the Contact Lens Rule. (Clarkson, Tr. 179-81; 16 C.F.R. § 315.5(c)).

22. If a prescriber does not actively verify the prescription within eight business hours of notice, the prescription is treated as verified. This is referred to as passive or presumed verification. (Clarkson, Tr. 178; Coon, Tr. 2719-20; Bethers, Tr. 3714).

4. Contact Lenses are a Commodity Product

23. A contact lens prescription specifies the power, base curve, and the specific brand of contact lens. (Clarkson, Tr. 185-86; Holbrook, Tr. 1880-81; CX0439 at 040; *see also* Bethers, Tr. 3592).

24. Contact lenses that consumers purchase will be identical, regardless of whether the patient receives the lens from his or her prescribing ECP or from another seller. (RX0569 at 0009).

25. At the point that a consumer has a prescription and is shopping for contact lenses, the lenses are a commodity product. (Clarkson, Tr. 202-03 ("[A] contact lens might be a highly differentiated product when it's manufactured, but the moment the doctor writes a prescription for it, it becomes a pure commodity. I mean, a box of ACUVUE [is] a box of ACUVUE, it really doesn't matter where you buy it."); CX9029 (Bethers, Dep. at 22-23); Coon, Tr. 2688-89; Alovis Tr. 993-94).

26. Even if multiple manufacturers manufacture contact lenses with the same parameters, there can be differences between the brands in terms of fit and comfort, which can be associated with slight differences in the materials used in the lens or the thickness of the lens, thus a consumer cannot switch brands once a prescription is written. (Clarkson, Tr. 186, 293; CX9000 (Batushanky, IHT at 13)).

27. 1-800 Contacts sells the same products as other retailers of contact lenses. (CX9029 (Bethers, Dep. at 22-23) (contact lens retailers "sell a commodity that [is] a mass- produced product. A consumer can only buy one product. They have no ability to buy a different product. And the product we sell is the exact same product they can buy from any other retailer."); CX9035 (Coon, Dep. at 111) ("[Y]ou can't compete on the product because there is no alternative, unless somebody can get a prescription for a different brand. So once a prescription's been written, you're only left with two things that you can compete on, price and service . . . ."); CX9034 (Roush, Dep. at 177) ("[W]e sell the same contact lenses other retailers sell.")).

C. 1-800 Contacts

1. Company Background

28. Jonathan Coon was the chief executive officer ("CEO") of 1-800 Contacts from 1992 until approximately January 2014. (Coon, Tr. 2649).

29. Brian Bethers currently serves as the CEO of 1-800 Contacts and has been the CEO of 1-800 Contacts since January 2014. Mr. Bethers began his career with 1-800 Contacts in 2003 as a chief financial officer ("CFO"). (Bethers, Tr. 3506-07).

30. Mr. Coon started the business that became 1-800 Contacts from his college dormitory room in February 1992. (Coon, Tr. 2649).

31. Based on his own contact lens purchasing experience in 1992, Mr. Coon believed that the process of buying contact lenses was inconvenient, the service was not very good, and the prices were high. (Coon, Tr. 2649-50).

32. Mr. Coon believed that there was a good opportunity for a mail order business to provide contact lenses at lower prices and with better service than ECPs. (Coon, Tr. 2650-51).

33. Mr. Coon began a mail order contact lens business called Eye Supply, which he promoted by distributing fliers. Eye Supply initially carried four products that it sold exclusively to college students living in nearby dormitories on campus. (Coon, Tr. 2651-52).

34. After about a year of doing business under the name Eye Supply, Mr. Coon obtained the phone number for 1-800 Lens Now. (Coon, Tr. 2653).

35. After a few years, Mr. Coon combined his business with another mail order contact lens business, Discount Lens Club, which he operated out of a house. (Coon, Tr. 2654-55).

36. In June 1995, after obtaining the 1-800 Contacts phone number, the name of the business was changed to 1-800 Contacts. (Coon, Tr. 2658-61).

37. 1-800 Contacts' sales more than doubled the first month after activating the 1-800 Contacts phone number. (Coon, Tr. 2661-62).

38. The company launched the 1-800 Contacts website in or about 1996. (Coon, Tr. 2664).

39. 1-800 Contacts designed its website to be as simple and efficient as possible for a customer to place an order and to minimize the amount of time spent on the website and the number of clicks a consumer had to make to purchase contact lenses. 1-800 Contacts' repeat customers could

place an order for contact lenses with two clicks on the website. (CX9027 (Larson, Dep. at 94)).

40. 1-800 Contacts has made recent changes to its website that allow potential customers to enter just their ECP's name and 1-800 Contacts will contact the ECP to obtain the necessary prescription information. (Bethers, Tr. 3643).

41. In 2011, 1-800 Contacts developed a mobile application for customers to order contact lenses online. (Coon, Tr. 2678-79, 2691-92; RX0428 at 0017; CX1775 at 001).

42. 1-800 Contacts recently expanded its mobile application features to allow customers to take a photo with their mobile device of their prescription and send it to 1-800 Contacts immediately. (Bethers, Tr. 3643; CX1446 at 012).

43. 1-800 Contacts' business objective from the company's inception was to make the process of buying contact lenses simple and it tries to distinguish itself from other contact lens retailers by making it faster, easier, and more convenient to get contact lenses. (Coon, Tr. 2669-70).

44. 1-800 Contacts has more inventory in stock than any other contact lens retailer, allowing 1-800 Contacts to fill 98% of all orders with inventory on hand. (Coon, Tr. 2690-91; Bethers, Tr. 3640; CX9029 (Bethers, Dep. at 136); RX0904 at 0016; CX1446 at 012).

45. 1-800 Contacts' customer care representatives answer most calls with a live person by the third ring and most emails within 10 minutes. (Coon, Tr. 2691; RX0904 at 0019; CX0525 at 020).

46. 1-800 Contacts offers free replacements for torn contact lenses. (Coon, Tr. 2700; RX0904 at 0016; CX1446 at 012).

47. 1-800 Contacts' customer service has been recognized by, and received awards from, many third parties, including J.D. Power and Associates, StellaService Elite award, and

Foresee (a commonly used company to measure customer satisfaction). (CX9027 (Larson, Dep. at 71-72); RX0590 at 0002; RX0901 at 0001; RX0904 at 0019; RX0155 at 0001; *see also* Goodstein, Tr. 2396-98; RX0736 (Goodstein Expert Report at 012-16, Table 2); RX0739 (Murphy Expert Report at 0020)).

48. 1-800 Contacts currently has plans to expand its distribution network from one distribution center currently in Salt Lake City to add another hub in the eastern United States with five additional distribution spokes. This will allow 1-800 Contacts to deliver contact lenses to 98% of the United States population with free, standard two-day delivery. (Bethers, Tr. 3641-42).

49. 1-800 Contacts was a public company from February 1998 to July 2007, when it was acquired by the private equity firm Fenway Partners. 1-800 Contacts was later acquired in 2012 by Wellpoint/Anthem, and then by the private equity firm THL in 2014. Today, 1-800 Contacts is owned by the private equity firm AEA Investors. (Coon, Tr. 2672, 2677; RX0428 at 0023; CCRFF 62).

2. Marketing Strategy

50. 1-800 Contacts began marketing itself through Valpak, free-standing inserts, and other print advertising under the 1-800 Contacts name in or about September 1995. (Coon, Tr. 2661, 2663-64).

51. Once the company began advertising the 1-800 Contacts name and phone number, it saw a 20% to 25% increase in customer acquisition and customer retention. (Coon, Tr. 2662-63).

52. 1-800 Contacts began advertising on television in or about June 1998. (Coon, Tr. 2666).

53. 1-800 Contacts' business grew approximately 50% in a few months after it started advertising on television. (Coon, Tr. 2667).

54. 1-800 Contacts opened a new distribution center in 1999 that it believed had the largest inventory of contact lenses in terms of the number and variety of SKUs ("Stock Keeping Units") in one location and began promoting itself as "The World's Largest Contact Lens Store." (Coon, Tr. 2668-70).

55. 1-800 Contacts' marketing efforts have focused on offering consumers a better alternative to buying contact lenses from their ECP. (Coon, Tr. 2687, 2695).

56. A difficult challenge faced by 1-800 Contacts was persuading consumers to purchase a medical device like contact lenses from someone other than their ECP. (Coon, Tr. 2686).

57. 1-800 Contacts markets itself as having the highest levels of service and convenience, with retail prices below independent ECPs (F. 76) and optical retail chains. (Coon, Tr. 2708-10; CX9001 (Bethers, IHT at 80-81); RX0904 at 0016; CX0525 at 017; CX1446 at 012).

58. 1-800 Contacts' advertising message, which it repeated in many of its advertisements, was that the consumer could get the exact same contact lenses delivered to their door for less than they would pay to drive to their ECPs' office and pick them up. (Coon, Tr. 2666-67, 2687; CX9013 (Aston, Dep. at 182-83); RX0904 at 0002).

59. 1-800 Contacts' television advertising has emphasized that ECPs are not the only place where a consumer can buy contact lenses and that there is a choice of different contact lens retailers. (CX9017 (Blackwood, Dep. at 174)).

60. 1-800 Contacts has had a marketing strategy of generating brand awareness and new orders. (Schmidt, Tr. 2927-28).

61. 1-800 Contacts has sought a multichannel integrated marketing plan that took into account both online and traditional offline advertising channels and integrated

them to ensure consistency in messaging across channels. (Schmidt, Tr. 2932).

62. 1-800 Contacts has used print advertising, television advertising, radio advertising, internet display advertising, affiliate marketing, social media advertising, and search engine optimization, in addition to internet search advertising. (Bethers, Tr. 3700-02).

63. 1-800 Contacts has found that there is a correlation between 1-800 Contacts' television advertisements and traffic to its website from clicks on a sponsored ad by 1-800 Contacts that appeared in response to a search for 1-800 Contacts' trademarks. (CX9017 (Blackwood, Dep. at 176); CX9032 (L. Schmidt, Dep. at 246-47); CX9029 (Bethers, Dep. at 98) ("as we increase our [television] advertising . . . , we have more potential customers and existing customers who come through trademark search. Those have been historically correlated.")).

64. 1-800 Contacts has spent a total of [redacted] on television advertising from 2002 through 2014. In 2002, 1-800 Contacts spent [redacted] on television advertising. In 2014, 1-800 Contacts spent [redacted] on television advertising. (RX0739 (Murphy Expert Report at 0092 Exhibit 8), *in camera*).

65. 1-800 Contacts has spent a total of [redacted] on internet advertising, growing from under [redacted] in 2002 to over [redacted] in 2014. (RX0739 (Murphy Expert Report at 0092 Exhibit 8), *in camera*).

66. In 2014, the most recent year for which data was available, [redacted]% of 1-800 Contacts' advertising budget was spent on internet advertising and between [redacted]% of 1-800 Contacts' internet advertising budget was spent on paid search advertising each year from 2004 through 2014. (RX0739 (Murphy Expert Report at 0092 Exhibit 8), *in camera*).

3. 1-800 Contacts' Sales

67. In 2004, 1-800 Contacts' internet sales surpassed its phone sales. (CX1775 at 001).

68. In 2015, 1-800 Contacts had revenues of approximately $460 million. (Joint Stipulations of Jurisdiction, Law, and Facts, JX0001 ¶ 6).

69. The annual volume of contact lenses sold via the internet to U.S. consumers by 1-800 Contacts currently exceeds the annual volume of contact lenses sold via the internet to U.S. consumers by any other single company. (Joint Stipulations of Jurisdiction, Law, and Facts, JX0001 ¶ 5).

70. 1-800 Contacts' total customer orders for week 28 of 2015 were attributed to the following channels: [redacted]% by phone; [redacted]% by mobile app; [redacted]% by mobile website; [redacted]% by tablet computer; and [redacted]% by desktop computer. (Bethers, Tr. 3560-66, *in camera*; RX0428 at 0029, *in camera*).

71. 1-800 Contacts' total internet customer orders for the first and second quarters of 2015 were attributed to the following channels: [redacted]% for mobile app; [redacted]% for email; [redacted]% for typed address (Uniform Resource Locator ("URL") and bookmark; [redacted]% for paid search on 1-800 Contacts' trademarks; [redacted]% for natural search; [redacted]% for affiliates; [redacted]% for other paid search; and [redacted]% for other, which includes portals and media partners. (Bethers, Tr. 3569-80, *in camera*; RX0428 at 0030, *in camera*).

D. Categories of Contact Lens Retailers

72. There are tens of thousands of locations in the United States where contact lens consumers can go to purchase contact lenses. (Bethers, Tr. 3509, 3537-41; RX0739 (Murphy Expert Report at 0017)).

73. There are four different types of contact lens retailers: (1) independent ECPs; (2) optical retail chains; (3) mass

merchants and club stores; and (4) online retailers. (Bethers, Tr. 3509; RX0739 (Murphy Expert Report at 0015-17)).

1. ECPs

74. There are approximately 40,000 optometrists and 18,000 ophthalmologists in the United States. (Bethers, Tr. 3509-10).

75. ECPs are permitted to sell the contact lenses that they prescribe. (Coon, Tr. 2685; Bethers, Tr. 3509-10; RX0569 at 0013).

76. ECPs can operate in independent practices ("independent ECPs"), with optical retail chains, and in conjunction with mass merchants and club stores. (Bethers, Tr. 3509-11; RX0739 (Murphy Expert Report at 0015-16)).

77. Independent ECPs, optical retail chains, and mass merchants and club stores have physical retail locations where consumers can purchase contact lenses. (Bethers, Tr. 3512, 3522, 3525-28).

78. Some independent ECPs, optical retail chains, and mass merchants and club stores also have websites through which consumers can purchase contact lenses. (Bethers, Tr. 3512-19, 3522, 3525-26, 3529-30, 3538-43).

a. Independent ECPs

79. There are about 16,000 independent ECP practices in the United States. (Bethers, Tr. 3509-10, 3546).

80. A number of independent ECPs sell contact lenses online through, or in conjunction with, services provided by contact lens manufacturers, contact lens wholesale distributors, or vision insurance providers. (Bethers, Tr. 3513-14).

81. Each of the major contact lens manufacturers offers to ship its contact lenses either to an ECP's office or directly to

the ECP's patient, which gives independent ECPs the ability to provide home delivery of contact lenses to their patients. (Bethers, Tr. 3514).

b. Optical retail chains

82. In the United States, there are national and regional optical retail chains that sell contact lenses. (Bethers, Tr. 3520).

83. Optical retail chains provide eye care professionals on location and sell contact lenses. (Clarkson, Tr. 188; Bethers, Tr. 3509-11, 3520-22).

84. National optical retail chains include LensCrafters, Pearle Vision, Visionworks, America's Best Contacts and Glasses, and MyEyeDr. (Bethers, Tr. 3520-21).

85. Regional optical retail chains include Cohen Optical, Sterling Optical, and many others. (Bethers, Tr. 3520-21).

86. Luxottica Retail North America ("Luxottica") is an Ohio corporation that sells and distributes optical products, including contact lenses, through the brands LensCrafters, Pearle Vision, Sears Optical, and Target Optical, among others, and also operates internet websites for these stores. (CX0331 at 001, 006).

87. Visionworks of America, Inc. ("Empire Vision/Visionworks") provides optical services and products through its subsidiaries, including Visionworks, Inc. ("Visionworks") and Empire Vision Centers, Inc. ("Empire Vision"). Empire Vision/Visionworks operates more than 700 optical retail stores in 42 states and the District of Columbia. (CX0943 (Duley, Decl. at 001 ¶¶ 1, 5); *see also* CX9036 (Duley, Dep. at 23, 119-20).

88. For many optical retail chains, a consumer can purchase contact lenses in the store, by phone, or on the chain's website. (Bethers, Tr. 3522).

c. Mass merchants and club stores

89. Many mass merchant and club stores have an onsite optometrist and a separate optical department located within the store unless they are in a state where employing optometrists is prohibited. (Bethers, Tr. 3526, 3528).

90. Mass merchants, such as Walmart, Target, Sears, Fred Meyer, and JCPenny, sell contact lenses in their stores. (Bethers, Tr. 3544, 3583; Clarkson, Tr. 188-89).

91. Walmart sells contacts lenses in its stores, over the phone, and through its own website. (Bethers, Tr. 3529; CX9037 (Owens, Dep. at 10)).

92. Walmart's retail prices for contact lenses are the same in-store and online. (CX9037 (Owens, Dep. at 26)).

93. Club stores – Costco, Sam's Club, and BJ's Wholesale Club – sell contact lenses in their stores and online through their own websites. (Bethers, Tr. 3525-26, 3530).

94. Costco had about $230 million in contact lens sales in 2015. (CX8004 at 001).

95. Costco has been selling contact lenses to its members in its brick and mortar stores for over twenty-five years. (CX8004 at 001).

96. Costco began selling contact lenses online to its members in October 2016. (CX8004 at 001).

97. Costco's retail prices for contact lenses are the same in-store and online. (CX8004 at 002).

2. Online Retailers

98. Contact lens retailers who sell online but do not have a physical store are often referred to as "pure-play" online retailers. (Bethers, Tr. 3536-38).

99. 1-800 Contacts is generally categorized as a "pure-play" online retailer, although it recently opened four physical retail stores under the name Lumen Optical in the Chicago area. (Bethers, Tr. 3535).

a. AC Lens

100. Arlington Contact Lens Service, Inc. ("AC Lens") is an online retailer of contact lenses in the United States. AC Lens began selling contact lenses in 1996 and began search advertising in 1999. (CX1623; Clarkson, Tr. 173, 183; CX9039 (Clarkson, Dep. at 88; CX9003 (Clarkson, IHT at 89)).

101. AC Lens sells contact lenses online through several websites, primarily ACLens.com and DiscountContact Lenses.com. (Clarkson, Tr. 182-83; CX9018 (Drumm, Dep. at 18-19, 172-73)).

102. AC Lens also provides "wholesale contact lens services" to several companies, including Sam's Club and Walmart. AC Lens' wholesale service entails shipping to stores or making shipments to partners' customers based on in-store orders. (Clarkson, Tr. 175-77).

103. AC Lens also provides "white label services" (F. 423) to allow rebranding for several partners including CVS, Sam's Club, Walmart and Giant Eagle. (Clarkson, Tr. 176-77; CX9003 (Clarkson, IHT at 9-10); CX9039 (Clarkson, Dep. at 192-93)).

b. Coastal Contacts

104. Coastal Contacts, Inc. ("Coastal Contacts") headquartered in Vancouver, British Columbia, is an online retailer of contact lenses in the United States through the website coastalcontacts.com. (*See* CX1615 at 002 ¶ 4; CX0621 at 122*;* CX0310 at 018).

c. Contact Lens King

105. Contact Lens King, Inc. ("Contact Lens King"), founded in 2004, is an online retailer of contact lenses in the United States. (CX0461 at 002 ¶ 6; Murphy, Tr. 4262; RX0739 (Murphy Expert Report at 45 ¶ 115)).

d. EZ Contacts USA

106. As of 2008, EZ Contacts USA.com ("EZ Contacts USA") was an online retailer of contact lenses in the United States. (CX0313 at 001, 003).

e. Lens.com

107. Lens.com, Inc. ("Lens.com"), founded in 1995, is an online retailer of contact lenses in the United States through the website lens.com. (*See* CX1125 at 003; CX0462 at 001).

f. LensDirect

108. LensDirect, LLC ("LensDirect"), founded in 1992, is an online retailer of contact lenses in the United States through the website lensdirect.com. (Bethers, Tr. 3538-41; Alovis, Tr. 977, 979; CX1241; CX9023 (Alovis, Dep. at 106)).

g. Lens Discounters

109. LD Vision Group, Inc. ("Lens Discounters"), founded in 2002, is an online retailer of contact lenses in the United States through websites, including LensDiscounters.com. (CX8003 (Mitha, Decl. at 001 ¶¶ 2-3)).

h. Lensfast

110. Lensfast, LLC ("Lensfast"), founded in 2001, is an online retailer of contact lenses in the United States through the websites lensfast.com, contactlens.com, and E-Contacts.com. (CX0315 at 006, 010; CX1618 at 017, Exhibit B).

i. LensWorld

111. As of 2008, LensWorld was an online retailer of contact lenses located in New Jersey with sales in the United States. (CX1622 at 003-04).

j. Lenses for Less

112. Lenses for Less, in business since 1999, sells contact lenses online in the United States and is a subsidiary of Oakwood Eye Clinic, a privately owned eye care provider company. (CX8000 (Studebaker, Decl. at 001 ¶¶ 1-3)).

k. Memorial Eye

113. Memorial Eye P.A. ("Memorial Eye"), founded in 1990, is based in Houston, Texas, and sells glasses, contact lenses, and optometry services through several brick and mortar facilities. (Holbrook, Tr. 1851, 1853; RX0072 at 0002-03 ¶¶ 7-8).

114. Memorial Eye sold contact lenses online directly to consumers in the United States through the internet from December 2004 through December 2013. (Holbrook, Tr. 1856-59, 1873-74; CX9024 (Holbrook, Dep. at 10-11); RX0072 at 0005 ¶ 17).

115. During the time it sold contact lenses online, Memorial Eye did so through two websites: ShipMyContacts.com and IWantContacts.com. (Holbrook, Tr. 1858-59).

l. ReplaceMyContacts

116. Tram Data, LLC d/b/a ReplaceMyContacts.com ("ReplaceMyContacts") was an online seller of contact lenses in the United States. (CX0638 at 004-06).

m. Web Eye Care

117. Web Eye Care, Inc. ("Web Eye Care"), founded in 2009, is an online seller of contact lenses in the United States.

(CX9000 (Batushansky, IHT at 8-9); Murphy, Tr. 4262; RX0739 (Murphy Expert Report at 45 ¶ 115)).

118. The vast majority of Web Eye Care's net revenue is attributable to online sales of contact lenses. (CX9000 (Batushansky, IHT at 9)).

n. Walgreens and Vision Direct

119. Walgreens operates over 8000 retail pharmacy chains but does not sell contact lenses through its brick and mortar stores. (Hamilton, Tr. 388-90; CX8001 (Hamilton, Decl. at 001 ¶ 2).

120. Walgreens sells contact lenses online through its website Walgreens.com and through the website VisionDirect.com. (Hamilton, Tr. 388-89).

121. Vision Direct is an online retailer of prescription optical products, which sells only contact lenses and related accessories. Vision Direct sells contact lenses through its website only and does not have brick and mortar stores. (Hamilton, Tr. 389-90).

122. Walgreens currently owns Vision Direct, which it acquired in or about 2011. (Hamilton, Tr. 389).

3. New Contact Lens Retail Companies

123. In the last two years, there have been new companies offering different services and new business models for selling contact lenses. (Bethers, Tr. 3584, 3588).

a. Simple Contacts

124. Simple Contacts is a new company that offers customers the ability to extend their contact lens prescription online and purchase contacts lenses online from Simple Contacts. (Bethers, Tr. 3588-89).

125. To extend a contact lens prescription, Simple Contacts allows consumers to use the camera on a mobile device to

record a video while looking at a visual acuity chart. The results are reviewed by an ophthalmologist who determines the prescription. (Bethers, Tr. 3588-89).

126. Simple Contacts sells online all of the major contact lenses manufactured in the United States. (Bethers, Tr. 3589).

b. Sightbox

127. Sightbox is a new company that sells contact lenses online and also arranges for its customers to obtain an eye exam with an ECP. (Bethers, Tr. 3589-90).

128. Sightbox operates on a subscription model whereby the customer pays a monthly subscription fee and Sightbox takes care of the customer for the whole year by supplying contact lenses, arranging an appointment for an eye exam with an ECP, and paying for the eye exam. (Bethers, Tr. 3589-90).

c. Hubble Contacts

129. Hubble Contacts is a new company that launched around the end of 2016, has its own brand of contact lenses, and sells those directly to consumers online. (Bethers, Tr. 3593-94; Clarkson, Tr. 289-90).

130. Hubble Contacts contact lenses are manufactured in Taiwan. (Bethers, Tr. 3594).

131. Hubble Contacts operates with a subscription model that costs a consumer $30 per month for daily disposable contact lenses. (Bethers, Tr. 3595).

132. Hubble Contacts introduced its concept through Facebook and other vehicles of social media. (Bethers, Tr. 3594).

d. Daysoft

133. Daysoft is a manufacturer of contact lenses that sells its lenses directly to consumers online. (Bethers, Tr. 3591-92).

134. Daysoft is located in the United Kingdom, but consumers in the United States can use Daysoft's website and have contact lenses delivered to the United States. (Bethers, Tr. 3593).

E. Internet Search Methods and Mechanics

135. Internet search engines organize information to allow their users to access the vast amount of information on the internet. (Joint Stipulation Regarding Search Engines Mechanics and Glossary of Terms. ("Joint Stipulation on Search Engines") ¶ 1).

136. Search engines employ complex algorithms to match the end user's request with parts of the web that may contain relevant responses. (Joint Stipulation on Search Engines ¶ 1).

137. Google is the dominant internet search engine provider in the United States. It is generally recognized that Google receives 82% of search advertising spending. (Joint Stipulation on Search Engines ¶ 3); Van Liere, Tr. 3103; Evans, Tr. 1373-74).

138. Beginning in 2010, through an agreement with Yahoo!, Microsoft's Bing Network sold paid search advertising that appeared in response to user queries on Yahoo.com. Bing and Yahoo! together account for 18% of search advertising spending; Yahoo!'s percentage is significantly smaller than Bing's. (RX0704 (Iyer, Decl. at 0001-02 ¶ 2); Van Liere, Tr. 3102-03; Evans, Tr. 1373-74).

139. Users can access internet search engines through desktop computers, laptop computers, tablets, and mobiles phones. (Joint Stipulation on Search Engines ¶ 2).

140. Internet search engines are free for users. These search engines derive the majority of their revenue through advertisements. (Juda, Tr. 1064-65) ("Google makes money predominantly by showing ads on the search results page, where ads can appear either above the organic search results or below the organic several results,

and when a user clicks on an ad, the advertiser behind that ad will accumulate a cost."); CX8005 (Iyer, Decl. at 001 ¶ 7).

141. When a user enters a search query, the internet search engine generally displays two types of results on the search engine results page: (1) organic or natural search results and (2) search results that are paid advertisements ("ads"). (RX0704 (Iyer, Decl. at 0002 ¶ 3); RX0716 at 0068; Juda, Tr. 1330).

142. "Most searches . . . are ones where no ads appear." Google displays ads "when the inherent task of a user is commercial in nature." (Juda, Tr. 1080-81; CX9019 (Juda, Dep. at 24)).

1. Organic or Natural Search Results

143. Organic or natural search results are links to websites the search engine has determined are relevant to the user's search terms. In general, organic results are ranked in order of relevance, with the most relevant result at the top of the list. The relevance of organic results is determined by algorithms that are proprietary to each search engine. (RX0716 at 0068, 0099; Juda, Tr. 1330; RX0704 (Iyer, Decl. at 0002 ¶ 8)).

144. Organic links are "free," i.e., the company whose link appears is not charged any money by the search engine for the appearance of its link or if a user clicks on the link. No one can pay to have an organic result appear or to change the ranking of a particular organic result. (RX0716 at 0068; *see also* RX0716 at 0100 ("Ads will never appear within the organic search results themselves.")).

145. Companies are able to engage in "search engine optimization," to increase the likelihood that their website will be displayed in a prominent position in the organic listings of a search engine's results page. (Clarkson, Tr. 225; Alovis, Tr. 1030; Bethers, Tr. 3655).

146. Search engine optimization techniques include ensuring that a website has new content, new reviews, a lot of interaction, page load speed, multiple screen sizes, more content, and many links. (CX9033 (Mohan, Dep. at 111)).

147. Even with search engine optimization, the advertiser does not accrue any costs when a user clicks on an organic link. (Alovis, Tr. 985).

2. Paid Search Advertising

148. Paid search advertising, also referred to as sponsored advertisements, refers to a method of advertising where the advertiser pays the search engine to place its advertisement on the search engine results page, based on an advertiser's selected "keywords" (F. 162). (Juda, Tr. 1065; *see also* RX0733 (Ghose Expert Report at 0013-24)).

149. The format by which search engine advertisements are presented to consumers has varied over the years. (Jacoby, Tr. 2288; CX8008 (Jacoby Expert Report at 015)).

150. Currently, search engine advertisements consist of a blue headline, followed by the word ("Ad") (for Google, in a green box; for Bing, in gray bold text) and the actual URL of the site being advertised by the ad copy, which is text the advertiser provides to the search engine provider. (Joint Stipulation on Search Engines ¶ 11).

151. Paid search advertising consists of advertisements that are displayed above, below, and/or to the side of the organic results. (RX0704 (Iyer, Decl. at 0002 ¶ 3); RX0716 at 0099).

152. Paid search advertisements are text and do not include images. (Joint Stipulation on Search Engines ¶ 2).

153. Paid search advertising does not include product listing advertisements, known as PLAs (F. 271-277). (Juda, Tr. 1322-23, 1334; RX0715 at 0116, 0158, 0593-94, 0766).

154. Paid search advertising is sometimes referred to as "pay-per-click" or "cost-per-click" advertising. (Clarkson, Tr. 217, Coon, Tr. 2722; *see also* Athey, Tr. 723).

155. A cost-per-click ("CPC") is the price that an advertiser pays to the search engine each time its advertisement is clicked. (Joint Stipulation on Search Engines at 3; F. 215-222).

156. A "conversion" refers to a sale made over the internet. The conversion rate is the number of times a conversion occurs divided by the total number of ad clicks. (Joint Stipulation on Search Engines at 2).

157. An advertiser has "more control over" the placement of its advertisements as compared to the placement of organic links. (Juda, Tr. 1330).

3. How Paid Search Results are Generated by Google

158. Google uses an "auction" to determine which ads will appear on a search engine results page. (RX0716 at 0038).

159. Every time a user enters a search query, Google runs an instantaneous auction to determine which, how many, and the position of paid ads to be displayed on the results page. (RX0716 at 0038; *see also* CX9019 (Juda, Dep. at 134)).

160. Google's paid search platform is called AdWords. (Juda, Tr. 1065).

161. The Google AdWords auction has three steps. First, the AdWords system finds all ads whose keywords (F. 162) match the user search. Second, the AdWords system ignores any ads that the system determines are not eligible to appear, such as ads that target a different country or are disapproved. Third, of the remaining ads, only those with a sufficiently high Ad Rank (F. 181-185) may be displayed. (RX0716 at 0038).

a. Keywords and match types

162. Keywords are words or phrases the advertiser believes potential customers are likely to use when searching for products or services provided by the advertiser. (RX0716 at 0087). The advertiser matches the keywords with an ad or ads in an ad group (the "ad's keywords"). (RX0716 at 0029).

163. An advertiser's ad may be shown when the ad's keywords match a user's search query. (RX0716 at 0016, 0087; RX0119 at 0002).

164. Advertisers frequently bid on hundreds or thousands of keywords. Walmart, for instance, bids on somewhere under 5,000 keywords related to contact lenses. (CX9033 (Mohan, Dep. at 26-27)).

165. Keywords may consist of a single word (e.g., "contacts"), a set of words (e.g., "contacts," "Accuview," and "coupon"), a phrase (e.g., "contact lens"), or a combination of words and phrases. (Joint Stipulation on Search Engines ¶ 21).

166. There are several "match types" or "matching options" in AdWords. (RX0716 at 0016-17).

i. Broad match

167. "Broad match" allows an ad to be matched to relevant variations of the ad's keywords, "including synonyms, singular or plural forms, possible misspellings, stemmings (such as floor and flooring), related searches, and other relevant variations." (RX0716 at 0090).

168. Broad match is a "semantic" match; it seeks to match with the "meaning of a user's search." For example, a broad match keyword "low-carb diet plan" may match with a search for "carb-free foods" or "Mediterranean diet plans." (RX0119 at 0005; RX0716 at 0090).

ii. Modified broad match

169. "Modified broad match" allows the advertiser to "specify that certain broad match keyword terms, or their close variants, must appear to trigger [the] ad." (RX0716 at 0090).

170. Modified broad match keywords are indicated by a "+" symbol. For instance, the modified keyword "+women's +hats" would match to a search for "hats for women." (RX0716 at 0016).

iii. Phrase match

171. "Phrase match" allows an ad to be matched to searches that include the ad's "exact keyword and close variants of [the] exact keyword, with additional words before or after." (RX0716 at 0094, 0117).

172. Phrase match keywords are indicated by quotation marks around the keyword phrase. For example, for the phrase match keyword "tennis shoes," ads may be shown on searches for "red leather tennis shoes" or "buy tennis shoes on sale." But such ads will not be shown on searches for "shoes for tennis" or "tennis sneakers laces." (RX0716 at 0094).

iv. Exact match

173. "Exact match" allows an ad to be matched to searches that include the ad's "exact keyword, or close variants of [the] exact keyword, exclusively." (RX0716 at 0092).

174. Exact match keywords are indicated by square brackets. For instance, the exact match keyword "[tennis shoes]" may be matched to searches for "tennis shoes" but not for "red tennis shoes." (RX0716 at 0092).

v. Negative keywords

175. "Negative keywords" are a type of keyword that prevents an "ad from being triggered by a certain word or phrase."

A negative keyword is a tool by which advertisers can specify search terms against which they wish their ads not to appear. For example, a retailer that sells eyeglasses may add the negative keyword "wine glasses" to prevent its ads from showing in response to searches for that term. (RX0716 at 0019, 0067; Juda, Tr. 1131).

176. Negative keywords override the search engine's own determination of relevance. (Juda, Tr. 1131-33).

177. The "exact negative" match type "prevent[s] an ad from appearing on searches that identically match the term that's expressed in the negative keyword." (Juda, Tr. 1131).

178. The "phrase negative" match type "prevent[s] an ad from appearing on searches where the search term is a larger string of words that contain the negative keyword." (Juda, Tr. 1131-32).

179. A "broad negative" match type will not "exclude queries that are synonyms or close variations of the negative keyword. It will only exclude queries that include all words within a keyword, irrespective of the order in which the words appear." Queries "that are close variations of phrase and exact match negative keywords won't be excluded." (RX0119 at 011).

180. Google tells retailers that because of the matching behavior described in F. 179, an advertiser must separately add close variations as negative keywords. (RX0119 at 011).

b. Ad Rank and its components

181. In AdWords, which ads appear and the order in which an ad appears on a page (the ad position) is determined by a formula called Ad Rank. (RX0716 at 0030).

182. For those ads that have keywords that match the user's search query and are otherwise eligible to be shown, the

AdWords system determines each ad's Ad Rank (F. 183). (RX0716 at 0038).

183. Ad Rank is a "score that's based on [the advertiser's] bid, auction-time measurements of expected CTR [(click-through rate (F. 188)], ad relevance, landing page experience, and the expected impact of extensions and other ad formats." (RX0716 at 0001).

184. Google's algorithms consider factors other than the advertiser's bid and will show no ads in response to some searches to avoid the long-term "negative ramifications of users not clicking on ads." (Juda, Tr. 1081). Based on experiments, Google has found that the "natural rate at which users are clicking on ads actually decreases over time" when AdWords shows "additional ads or lower-quality ads." (Juda, Tr. 1083).

185. Google considers factors other than the advertiser's bid because showing ads that do not meet Google's criteria could lead to a reduction in clicks on paid search advertisements, which would negatively impact Google's revenue. (CX9019 (Juda, Dep. at 129-30); Juda, Tr. 1198).

i. Bids

186. In AdWords, each advertiser specifies a bid for each keyword, which is the maximum the advertiser will pay for a click on its ad. This amount is the "maximum cost-per-click" or "maximum CPC." (Joint Stipulation on Search Engines ¶ 54; RX0716 at 0041).

187. The advertiser's bid, or maximum CPC, is one of the factors considered in calculating Ad Rank, which determines whether and in what position the ad may appear. (RX0716 at 0001).

ii. Expected CTR

188. The click-through rate ("CTR") is the number of clicks an ad receives divided by the number of times the ad is shown. (Joint Stipulation on Search Engines at 2).

189. Expected CTR is a measurement of "how likely it is that [the advertiser's] ads will get clicked when shown for [the particular] keyword." (RX0716 at 0049).

190. Google's algorithms calculate expected CTR based on a variety of inputs, including "the actual search of the user, information about the ad copy, the geography of the user, [and] the time and day in which the user's search" was conducted. In addition, if "the user has personalization turned on," the algorithm will also "use various historical information about that user and their past activities." (Juda, Tr. 1096).

191. Expected CTR is not based [redacted]. Rather, the "[redacted]." (CX09019 (Juda, Dep. at 31-32), *in camera*). The assessment is based on "[redacted]." (Juda, Tr. 1099, *in camera*).

192. The predicted CTR for a given ad could vary from auction to auction. (Juda, Tr. 1260-61) ("It's hypothetically possible it could go [up or down] based on how the characteristics have changed.").

iii. Ad relevance

193. Ad relevance is a measure of how closely related the advertiser's keyword is to a user's search term. (Juda, Tr. 1104; RX0716 at 0032).

194. Ad relevance is an important priority for Google because Google aspires to show relevant and useful commercial information to users. (Juda, Tr. 1072 (explaining that Google benefits from showing relevant ads because it generates users only when users click on ads)).

195. In the AdWords algorithms, ad relevance is based on models that use human-evaluated data as an input "to identify patterns that will allow [the system] to predict . . . what the human raters would have thought of the ads." (CX09019 (Juda, Dep. at 38-39); *see also* Juda, Tr. 1105).

iv. Landing page experience

196. Landing page experience is a "measure that AdWords uses to estimate how relevant and useful [the advertiser's] website's landing page will be to people who click [on the advertiser's] ad." (RX0716 at 0061).

197. In the AdWords algorithms, landing page experience is based on models that use human evaluations of search terms and landing pages "to identify patterns between what [the system] can observe from the landing pages and the search terms . . . [to] predict what the human raters are going to say." (CX9019 (Juda, Dep. at 40); Juda, Tr. 1101-02).

198. To determine the landing page experience "signal," the AdWords algorithms take into account [redacted]. (Juda, Tr. 1101-02, *in camera*).

199. Google considers landing page experience in its algorithms because, based on its experiments, "when users encounter low-quality landing pages, their propensity for wanting to look at and click on ads in the future goes down," which "can diminish future revenue opportunities for Google" and because Google wants to have high quality ads so that users return to Google. (CX9019 (Juda, Dep. at 121-22); RX0612A at 0004).

v. Ad extensions and format

200. Ad extensions are "a type of ad format that show extra information . . . about [the advertiser's] business." Examples of ad extensions include information about the advertiser's location, consumer ratings of the advertiser,

and links to different parts of the advertiser's website. (RX0716 at 0045-46).

201. The AdWords algorithms estimate the influence of ad extensions on an ad's CTR as well as "the extent to which a particular advertisers' click-through rate uplift may compare to other advertiser's click-through rate uplifts with the same format . . . ." (CX9019 (Juda, Dep. at 40-41); Juda, Tr. 1113).

c. The Auction Outcome: Ad Rank, Ad Position, and Actual CPC

202. The Google AdWords system combines the advertiser's bid with the auction-time measurements of predicted CTR, ad relevance, landing page experience, and the expected impact of extensions and other ad formats, in a functional form, which produces a signal number, referred to as "Ad Rank." (CX9019 (Juda, Dep. at 41-42)).

203. For each auction, the AdWords algorithms calculate Ad Rank for each ad that is eligible to be shown in response to the particular user query. (CX9019 (Juda, Dep. at 41-42)).

204. The quality signals used to determine CPC and Ad Rank (predicted CTR, ad relevance, and landing page experience) are recomputed at auction time. (Juda, Tr. 1260).

205. Ads must have an Ad Rank greater than zero to be eligible to be shown. If there are no ads with an Ad Rank greater than zero, the AdWords system will not show any ads in response to the particular user query. (CX9019 (Juda, Dep. at 41-42)).

206. Google requires higher quality scores to achieve an Ad Rank greater than zero for the ad positions at the top of the page. (Juda, Tr. 1094-95; CX9019 (Juda, Dep. at 182)).

i. Minimum bids

207. The requirement that an ad's Ad Rank be greater than zero means that each advertiser faces a minimum bid to have its ads shown in response to a particular user search. (CX9019 (Juda, Dep. at 168-69); Juda, Tr. 1093).

208. [redacted]. (Juda, Tr. 1266-67, *in camera)*.

209. In general, the lower the quality of the ad, the higher the minimum bid necessary to qualify to be shown. (CX9019 (Juda, Dep. at 169)).

210. Google requires a minimum bid to try to ensure a "positive net long-term experience" for users, to avoid a result where users click less on ads and possibly "start installing ad-blocking software onto their browsers to suppress any ads from being presented to them." (Juda, Tr. 1095).

ii. Ad position

211. Ads are positioned on the search results page based on Ad Rank; the ad with the highest Ad Rank is placed at the top of the page. (Juda, Tr. 1077; RX0716 at 0001; CX9019 (Juda, Dep. at 42)).

212. Google will show a maximum of four ads above the organic search results. (Juda, Tr. 1080; CX9019 (Juda, Dep. at 53)).

213. Because AdWords takes into account a number of factors other than the bid amount, advertisers that obtain the top ad positions may not be the highest bidders. (RX0612A at 0009).

214. Google's data shows that the expected click-through rate is higher for ads in positions higher on the page. (Juda, Tr. 1216-18).

iii. Actual cost-per-click

215. The actual amount an advertiser pays for a click, or "actual CPC," depends on the outcome of the auction process and may vary from auction to auction. (RX0716 at 0026; CX9019 (Juda, Dep. at 137)).

216. Even if an ad appears in response to a user search (thus generating an "impression" (RX502 at 0001)), the advertiser pays only if the user clicks on its ad. (RX0716 at 0026).

217. Google uses a modified second price auction to determine the advertiser's actual cost-per-click (the amount the advertiser will pay for a click on its ad). In a second price auction, the buyer does not have to pay its full bid; it only has to pay the amount of the next highest bidder below it. (RX0612A at 0005; Juda, Tr. 1114-15).

218. For each advertiser, Google's algorithms determine the lowest bid the advertiser could have made to still have an Ad Rank greater than the advertiser whose ad is in the position below (second place bidder). (CX9019 (Juda, Dep. at 54)).

219. Under the second price auction used by Google, the number of bidders may or may not affect the actual CPC. If a number of additional bidders were to enter the auction, and all of them had an AdWords score that was lower than the second-highest score, then the increase in bidders would have no influence on the price that the highest person was paying. Alternatively, if some of the additional bidders were to have a higher second highest AdWords score, then that would result in a higher actual CPC. (CX9019 (Juda, Dep. at 55); Juda, Tr. 1204-05).

220. Although it is not always the case, in general, more advertisers bidding on keywords results in higher CPCs. If an advertiser notices competitors entering the auction and that this is resulting in a decrease in traffic to the advertiser's website, the advertiser may respond by raising

its bids. (Juda, Tr. 1205, 1337; CX9019 (Juda, Dep. at 55)).

221. Because of the effects of predicted CTR, ad relevance, landing page quality, ad extensions, and other ad formats in the AdWords system, an advertiser may have a lower actual CPC than advertisers whose ads appear in lower positions. (RX0612A at 0009-10).

222. Depending on the particular quality scores and relative ad ranks, an additional bidder who wins the top ad position above another advertiser may have a lower CPC (i.e., it may pay less for a click) than the advertiser previously in the top position. (Juda, Tr. 1213-15; *see also* RXD026 at 0003-04 (illustrating effect of additional bidder winning top position)). In such an instance, Google would make less money if the user clicked on the top ad. (Juda, Tr. 1215-17).

iv. User information

223. In Google's paid search advertising system, the ads shown can vary from consumer to consumer even if two consumers enter the same search query. This can occur for a number of reasons, such as the algorithm's predictions of quality have changed, some advertiser's budgets may have been exhausted, an advertiser has chosen to pause its advertising, or the consumers are using different types of devices. (Juda, Tr. 1264-65; CX9019 (Juda, Dep. at 136-37)).

224. [redacted]. (Juda, Tr. 1265-66, *in camera*; CX9019 (Juda, Dep. at 134-36, *in camera*)).

v. Whether an ad is shown may change over time

225. Given the dynamic nature of the AdWords algorithms, the quality score for a particular advertiser with a particular ad may change. (Juda, Tr. 1262).

226. Because an ad's quality scores may change over time, a particular advertiser's ads may show up in response to a particular search query, but may not show up in response to the very same search query at a later point in time. (Juda, Tr. 1263).

d. Advertiser budgets

227. In the AdWords system, advertisers may set a daily budget. When an advertiser's budget is reached, its "ads will typically stop showing for that day." The AdWords system may show ads on a given day accruing up to 20% of the daily budgeted costs, but the advertiser's monthly costs will not exceed its daily budget times the average number of days (roughly 30.4) in a month. (RX0716 at 0004, 0025, 0042).

228. Most advertisers [redacted]. (Juda, Tr. 1122, *in camera*).

e. AdWords keyword planner

229. Google AdWords Keyword Planner is a tool that Google provides to companies that are engaged in search advertising "to research new keywords to add to their account." (Hamilton, Tr. 418; *see also* Juda, Tr. 1290-91; CX8002 (Hamilton, Decl. at 005- 06 ¶ 18)).

230. The Google AdWords Keyword Planner allows an advertiser to input keywords and then provides the advertiser with estimates of the upper limit of the number of ad impressions and clicks (as well as other information

such as cost-per-click and at times, expected number of orders or conversions) that would result from that advertiser bidding on those keywords. (Juda, Tr. 1290-91; Hamilton, Tr. 418; CX9038 (Hamilton, Dep. at 82-83); *see also* CX8002 (Hamilton, Decl. at 005-06 ¶ 18)).

4. How Paid Search Results are Generated by Bing

231. Microsoft launched the Bing Network in 2009. The Bing Network consists of numerous websites that provide search functionality, known as publisher partners, including Microsoft's search engine Bing, available at www.bing.com. (RX0704 (Iyer, Decl. at 0001-02 ¶ 2)).

232. The Bing Network displays two kinds of results on the search results pages: (1) "organic" or "natural" search results, and (2) search results that are paid advertisements. (RX0704 (Iyer, Decl. at 0002 ¶ 3)).

233. On the Bing Network, paid search advertisements appear above, to the right side of, and beneath the organic search results on the search engine results page. (RX0704 (Iyer, Decl. at 0002 ¶ 3)).

234. Today, Microsoft displays a maximum of four paid search advertisements on the top of the search engine results page for searches conducted on Bing.com using a desktop or laptop computer and a maximum of four paid search advertisements on the top of the search engine results page for searches conducted on Bing.com using a mobile device such as a smartphone. (RX0704 (Iyer, Decl. at 0002 ¶ 3)).

235. Microsoft uses a different algorithm with a different computer code to determine how to display paid search advertisements on the Bing Network than the algorithm that it uses to determine how to display organic search results. (RX0704 (Iyer, Decl. at 0002 ¶ 8)).

236. Microsoft earns revenue each time that a user clicks on a paid search advertisement. (RX0704 (Iyer, Decl. at 0003 ¶ 9)).

237. The amount of revenue that Microsoft earns depends upon the amount per click that each advertiser bids in a generalized second-price auction (F. 242) that Microsoft's algorithm conducts each time a user enters a user query. (RX0704 (Iyer, Decl. at 0003 ¶ 9)).

238. In general, an advertisement's rank in response to a user query depends on (1) the bid by the advertiser, (2) Microsoft's determination of the relevance of the advertisement to the user query, (3) Microsoft's determination of the relevance of the advertiser's website to the user query, and (4) [redacted]. (RX0704 (Iyer, Decl. at 0003 ¶ 10, *in camera*)).

239. Microsoft's algorithm for determining how to display paid search advertisements in response to a user query also takes into account the website's relevance to the user query, as determined by a number of factors, including the attractiveness of the advertising copy, the predicted CTR, the quality of the landing page, and [redacted]. (RX0704 (Iyer, Decl. at 0003-04 ¶ 12, *in camera*)).

240. In many cases, Microsoft's algorithm for determining how to display paid search advertisements also takes into account the [redacted]. (RX0704 (Iyer, Decl. at 0004 ¶ 13, *in camera*)).

241. In general, the more an advertiser bids, the less relevant its advertisement needs to be to be displayed on the search engine results page. (RX0704 (Iyer, Decl. at 0003 ¶ 11)).

242. Generally, an advertiser pays Microsoft an amount per click that it would have had to pay for the advertisement to maintain its rank above the advertisement ranked immediately below it. (RX0704 (Iyer, Decl. at 0003 ¶ 9)).

243. Because each advertiser does not pay the maximum amount of its bid, but rather just enough to keep its position in Bing's ranking of advertisements, removing one bidder from an auction can reduce the price paid by one or more other bidders. (CX8005 (Iyer, Decl. at 006 ¶ 36)).

5. Other Marketing Channels on the Internet

244. In addition to keyword-based paid search advertising, there are multiple, varied marketing channels available to retailers on the internet. These include display advertising, retargeting advertising, social media advertising, affiliate marketing, email marketing, mobile applications, comparison shopping engines, and product listing advertisements. (RX0426 at 0002 at 6-17; CX9005 (Dansie, IHT at 23-24); Clarkson, Tr. 219-29).

245. 1-800 Contacts has used each of the internet marketing channels listed in F. 244 to market its products and services. (RX0426 at 0002 at 6-17; CX9005 (Dansie, IHT at 23-25); CX0764 at 003-04, 010-14).

a. Display advertising

246. Display advertising refers to various methods of displaying a graphic advertisement to consumers on the internet. (*See* Clarkson, Tr. 228-29; Alovis, Tr. 1030; *see also* Athey, Tr. 716; Evans, Tr. 1674-75).

247. One type of display advertising, banner advertising, involves displaying a graphic advertisement to a consumer in a certain space on a third-party website. The third-party leases a portion of its website to an advertising publisher, such as Google, who then sells the right to place advertisements in that portion of the third-party website to advertisers. (CX9000 (Batushansky, IHT at 106)).

248. When a consumer visits the third-party website (F. 247), the banner advertisement is visible to the consumer. (CX9000 (Batushansky, IHT at 106); CX9010 (Larson, IHT at 22-23)).

b. Retargeting and remarketing advertising

249. One type of display advertising is retargeting or remarketing advertising. (Clarkson, Tr. 229; Alovis, Tr. 1030; Evans, Tr. 1674).

250. Retargeting or remarketing refers to a type of advertising where a specific advertisement is displayed to a consumer based on the consumer's past browsing history. (Evans, Tr. 1674-75; Alovis, Tr. 1030; CX9000 (Batushansky, IHT at 35-36); CX9004 (Coon, IHT at 285)).

251. "[R]etargeting is where a consumer has visited a website, and then they go away. If they haven't purchased, the third party providing the retargeting service, which could be Google [or it] could be others, will show them [an advertisement for the initial website] in display form when they visit other websites." (Clarkson, Tr. 229; *see also* Alovis, Tr. 1030; CX9000 (Batushansky, IHT at 35-36); CX9004 (Coon, IHT at 285)).

c. Social media advertising

252. Social media advertising involves displaying advertisements and other content to consumers on social media websites, such as Facebook, Instagram, and Twitter. (Clarkson, Tr. 223; CX9000 (Batushansky, IHT at 57); CX9008 (Hamilton, IHT at 64)).

253. Social networks, such as Facebook, maintain demographic information about their users, such as age, gender, hobbies, and interests, to allow advertisers to target their advertisements to specific consumers based on the consumer's demographics and interests. (CX9003 (Clarkson, IHT at 55-56); CX9043 (Athey, Dep. at 279)).

d. Affiliate marketing

254. Affiliate marketing is a method of advertising where an advertiser enlists the assistance of an affiliated website to refer traffic to the advertiser's website in return for a commission on sales resulting from the referred traffic.

(Clarkson, Tr. 221; Craven, Tr. 639-40; Schmidt, Tr. 2891; Bethers, Tr. 3578).

255. Affiliate marketing can be an efficient method for generating new customers because an advertiser only pays a commission when a sale is realized and because affiliates frequently offer discount coupons for the advertisers' products. (Clarkson, Tr. 221-22; CX9001 (Bethers, IHT at 86); CX9023 (Alovis, Dep. at 26); CX9008 (Hamilton, IHT at 65-66)).

256. In 2015, approximately [redacted]% of 1-800 Contacts' online orders were received through affiliate marketing. (RX0428 at 0030, *in camera*; Bethers, Tr. 3569, 3578, *in camera*).

e. Email marketing

257. Email marketing allows advertisers to send promotions and advertisements to current and prospective customers by email. (Clarkson, Tr. 222-23; Bethers, Tr. 3572-73; CX9000 (Batushansky, IHT at 17); CX9036 (Duley, Dep. at 18)).

258. Online contact lens retailers contact former customers by email to let them know it is time for them to reorder their contact lenses and to provide them with an easy method to take advantage of current promotions. (Holbrook, Tr. 1892; CX9010 (Larson, IHT at 48)).

259. The cost of email marketing "is minimal to nothing." (Holbrook, Tr. 1892).

260. In 2015, approximately [redacted]% of 1-800 Contacts' online orders were received through email marketing. (RX0428 at 0030, *in camera*; Bethers, Tr. 3569, 3575, *in camera*).

f. Mobile applications

261. A mobile application is a program downloaded from the Apple or Android application store onto a smartphone or

tablet device that allows consumers to interact with a retailer using a mobile device. (Bethers, Tr. 3565).

262. Mobile applications are important marketing tools for returning customers because they permit returning customers to easily repurchase products. (Bethers, Tr. 3565).

263. Mobile applications allow a retailer to remind customers when it is time to reorder. (CX9010 (Larson, IHT at 48)).

264. In 2015, approximately [redacted]% of 1-800 Contacts' online orders were received through its mobile application. (RX0428 at 0030, *in camera*; Bethers, Tr. 3569, 3575, *in camera*).

g. Comparison shopping engines

265. A comparison shopping engine, also called a comparison shopping feed, is "a website that will list different website offers of the same product with their price, so it allows a consumer to go to a single page and do a price comparison between different websites." (Clarkson, Tr. 224).

266. Examples of comparison shopping engines include Shopping.com and Shopzilla.com. (CX9018 (Drumm, Dep. at 14)).

267. On Google, at the top of a Google search results page is a link titled "Shopping." (*E.g.*, RX0310 at 0001; RX0311 at 0001; RX0312 at 0001).

268. Clicking the link titled "Shopping" on the top of a Google search results page takes the user to the shopping-specific Google property ("Google Shopping"). (Juda, Tr. 1324-25; *see also* RXD022 (illustrating testimony)).

269. The Google Shopping page may contain listings for different types of contact lenses in response to a search on the term "1800contacts." (Juda, Tr. 1325; *see also* RXD024 (illustrating testimony)).

270. The Google Shopping page displays a series of product listing advertisements (F. 271-273). (Juda, Tr. 1324-26; CX9000 (Batushansky, IHT at 51-52)).

h. Product listing advertisements

271. Product listing advertisements, known as PLAs, are a type of targeted advertisements that appear on search engine results pages in response to a search for a particular type of product. (RX0715 at 0115; RX0739 (Murphy Expert Report at 0026); Juda, Tr. 1321-22; CX9000 (Batushansky, IHT at 50-51); CX9002 (Craven, IHT at 25)).

272. In November 2009, Google introduced PLAs. PLAs appear in their own box in response to a Google search, separate from text ads, and on the Google Shopping page (F. 267-268). (RX0715 at 594; RX0716 at 0074).

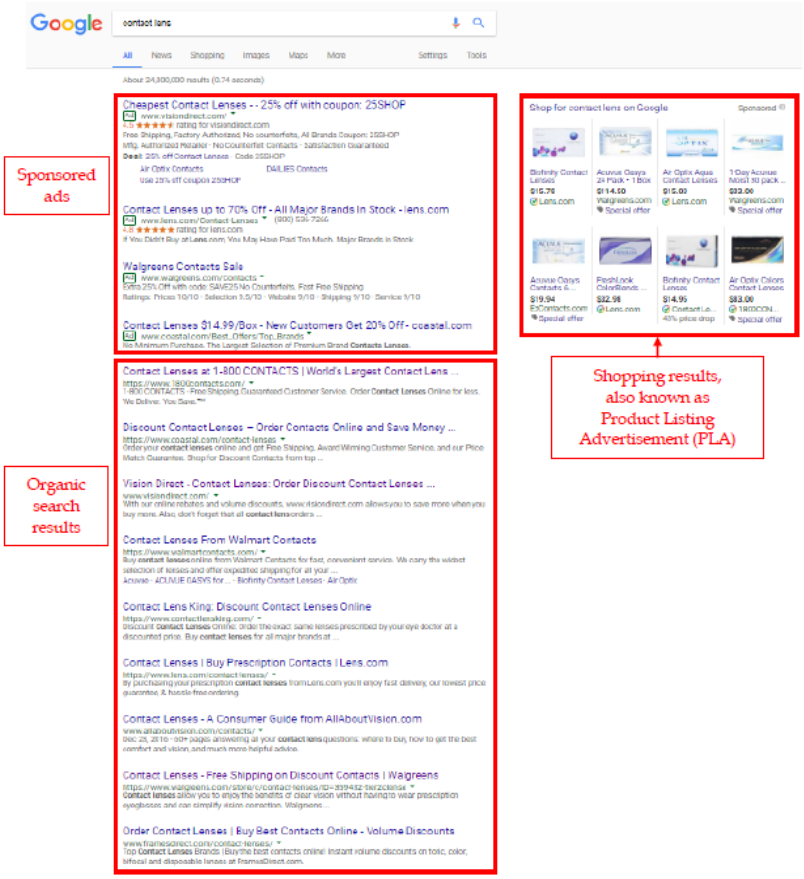
273. PLAs typically have photographs or images of the product for sale, the prices of the product, the specific names of retailers who sell the product, and links to the websites of the retailers who sell the product. (Juda, Tr. 1322; RX0715 at 0115; CX9000 (Batushansky, IHT at 50-51); CX9002 (Craven, IHT at 25)).

274. In Google's PLAs, PLAs are not displayed in response to advertisers selecting specific keywords. Rather, Google will automatically show the most relevant products, along with the associated image, price, and product name. (Juda, Tr. 1322-23, 1334; RX0715 at 0116, 0158, 0594, 0766).

275. In Google's PLAs, an advertiser pays for a PLA only when a user clicks on the ad and completes a purchase on the advertiser's website. (RX0715 at 0593-94).

276. A search for the keyword "contact lenses" using either Google or Bing will display a box in the upper area or on the right-hand side of the search engine results page with prices for contact lens brands at different online retailers. (RX0739 (Murphy Expert Report at 0026)).

277. The image below (RX0739 (Murphy Expert Report at 0094) depicts the position of PLAs relative to the organic search results and the sponsored ads with respect to a Google search for "contact lens."



i. Knowledge graphs

278. In May 2012, Google began displaying a "Knowledge Graph" or "Knowledge Card" on some search engine results pages. The Knowledge Graph or Knowledge Card is a summary of content relevant to a user's search query, which is displayed on the right side of certain Google search results. (RX0721 at 0001-04).

279. Information displayed in the Knowledge Graph is based on Google's assessment of user searches about the particular item. For instance, the Knowledge Graph for a

user query on "Marie Curie" includes information and links to further information about her husband, children, and the family's Nobel Prizes. (RX0721 at 0004).

280. The Knowledge Graph also contains a "People also searched for" feature, which includes links to other sites. (RX0721 at 0005).

281. The links in the "People also searched for" feature are not generated as a result of any payment to Google. (Juda, Tr. 1307-08).

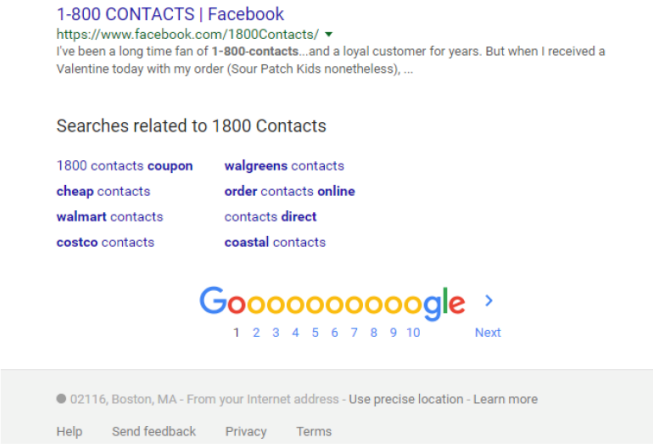
282. Google search results for the query "1-800 Contacts" and variants of that search term include a Knowledge Graph regarding 1-800 Contacts. (*See, e.g.*, RX0310 at 0001, 0005; RX0311 at 0001-03; *see also* CX8007 (Athey Expert Report at 010)).

283. Below is an example of a Knowledge Graph shown in response to the search query "1-800 contacts," as shown in the report of one of Complaint Counsel's expert witnesses:

(CX8007 (Athey Expert Report at 010)).

284. The Knowledge Graph displayed in F. 283 includes links to other contact lens retailers, Vision Direct, AC Lens, Coastal Contacts, and Costco. (F. 283).

285. Below is an example of the "Searches related" to section displayed in response to the search query "1-800Contacts" as shown in the report of one of Complaint Counsel's expert witnesses:



(CX8010 (Athey Rebuttal Expert Report at 020)).

286. The "Searches related to" section displayed in F. 285 includes links to other contact lens retailers, Walmart, Costco, Walgreens, Contacts Direct, and Coastal Contacts. (F. 285).

F. Search Engine Trademark Policies

1. Google Trademark Policies

287. Prior to 2004, Google permitted a trademark owner to restrict the use of its trademark by third parties both (a) as keywords in AdWords advertising auctions, and (b) in the text of advertisements. (CX1148; CX9022 (Charlston, Dep. at 19-20, 179) (". . . so pre April 2004 in the U.S. and Canada . . . , even if we had a trademark complaint on file for a trademark term, we would still serve ads if the user's query included the trademark term and another non-

trademark term on which the advertiser had broad matched.")).

288. In early 2004, Google determined that its trademark policy had created an "AdWords marketplace restriction" that prevented "[u]sers . . . from seeing relevant ads." (CX0470 at 002 (Feb. 23, 2004, Domestic Trademark Policy Change Transition Plan Discussion presentation); CX9022 (Charlston, Dep. at 23-24)).

289. Google concluded that users who entered a search using the brand of one trademark owner may be interested in information from competing firms, and thus "[the policy change] was 'correcting' a bit of the balance that [it had] in place between users, advertisers, and trademark owners. The pre-2004 policy was really overly protective, as far as trademarks were concerned, and, again, as a result, was limiting the information that was available to users." (CX9022 (Charlston, Dep. at 23-24)).

290. In April 2004, Google changed its U.S. trademark policy to allow third parties to bid on trademarks, including on competitors' trademarks, as keywords in AdWords advertising auctions. (CX1148; CX9022 (Charlston, Dep. at 19-21); CX1785 at 003-04).

291. Under Google's April 2004 trademark policy, advertisers were still prohibited from using others' trademarks in the text of their ads without authorization. (CX1148; CX9022 (Charlston, Dep. at 19-21); CX0471).

292. Google acknowledged in its filing with the Securities and Exchange Commission that its April 2004 change in the U.S. trademark policy could subject Google "to more trademark infringement lawsuits." (RX0140 at 0028).

293. After it changed its U.S. trademark policy in 2004, Google stated on its website that "Google is not in a position to arbitrate trademark disputes between advertisers and trademark owners." Google accordingly encouraged "trademark owners to resolve their disputes directly with the advertisers." (RX0159 at 0004).

294. In June 2009, Google again revised its U.S. trademark policy. Under Google's U.S. trademark policy since June 2009, in response to a complaint by a trademark holder, advertisers are not permitted to include the holder's trademark in the text of their ads. (CX9022 (Charlston, Dep. at 16); CX1148).

295. To submit a complaint under Google's U.S. trademark policy, a trademark holder can submit a Google-provided form to Google. (RX0716 at 0053-54).

2. Bing Trademark Policies

296. At the time that Microsoft launched the Bing Network in 2009, Microsoft did not permit advertisers to bid on keywords consisting of a trademark owned by a third party. (RX0704 (Iyer, Decl. at 0004 ¶ 16)).

297. At the time that Microsoft launched the Bing Network in 2009, Microsoft also adopted a policy that it would not mediate disputes between advertisers related to trademarked keywords and communicated that policy to advertisers. This remains Microsoft's policy today. (RX0704 (Iyer, Decl. at 0005 ¶ 17)).

298. In 2011, Bing changed its policy and began permitting advertisers to bid on competitors' trademarked keywords. (RX0704 (Iyer, Decl. at 0004 ¶ 16)).

299. In 2013, Microsoft implemented [redacted]. (RX0704 (Iyer, Decl. at 0005 ¶ 18, *in camera*)).

300. [redacted]

[redacted]. (RX0704 (Iyer, Decl. at 0005 ¶ 18, *in camera*)).

G. The Challenged Agreements[6]

1. Trademark Litigation Settlements

a. Early history: Vision Direct and Coastal Contacts

i. Vision Direct

301. 1-800 Contacts filed a complaint in federal court against Vision Direct and WhenU.com, Inc. on October 9, 2002, alleging trademark infringement, among other causes of action. The complaint alleged in part that Vision Direct had caused "pop-up" advertisements[7] for Vision Direct to appear when internet users visited the www.1800contacts.com website. The complaint did not contain any allegations regarding the use of 1-800 Contacts' trademarks as keywords to trigger search engine advertisements. (CX1614).

302. On January 22, 2004, counsel for Vision Direct wrote a letter to counsel for 1-800 Contacts in response to a January 16, 2004 letter from 1-800 Contacts "alerting" Vision Direct that a link to Vision Direct was appearing on Google results pages in response to searches for 1-800

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6 The Complaint in this matter challenges as unlawful 14 agreements between 1-800 Contacts and other online sellers of contact lenses. Complaint ¶¶ 1, 20, 33. *See also* CCB at 71. Of these agreements, 13 were settlement agreements to resolve trademark litigation ("the Settlement Agreements"). F. 343. The remaining agreement is a Sourcing and Services Agreement with Luxottica. F. 393. Collectively, the agreements at issue in this case are referred to as the "Challenged Agreements."

7 Pop-up ads are triggered by software in response to specific keywords or types of websites by which an ad will pop-up in front of another website when the consumer browses to that website. (Clarkson, Tr. 320).

Contacts' trademark. Vision Direct indicated it would notify its affiliates to cease their activities, but also advised that 1-800 Contacts could file a trademark complaint with Google requesting that the search engine take down advertising on 1-800 Contacts' trademark. (RX0100).

303. On or about February 13, 2004, 1-800 Contacts filed a complaint with Google regarding advertisements being triggered by keywords that were trademarks of 1-800 Contacts. (CX1397; RX0796).

304. In April 2004, Google modified its policies to permit advertisers to purchase each other's trademarks as keywords. (F. 290).

305. During negotiations, Vision Direct requested changes to 1-800 Contacts' draft settlement with regard to comparative advertising, which 1-800 Contacts accepted. (CX0058 at 001 (deleting provision from draft and stating "[w]e should both retain the right to participate in lawful comparative advertising, parodies, etc."); Coon, Tr. 2742-43. *See* CX0311 § 4(B)i (stating that prohibited acts do not include "use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in an non-Internet context, e.g., comparative advertising, parodies, and similar non-Infringing uses.")).

306. In June 2004, after negotiations, 1-800 Contacts and Vision Direct resolved their dispute by executing a settlement agreement. The settlement agreement included terms related to pop-up advertising and use of trademark keywords. (CX0058; CX0311 (2004 Vision Direct settlement agreement)).

307. The 2004 Vision Direct settlement agreement included as "prohibited acts" "causing a Party's website or Internet advertisement to appear in response to any Internet search for the other Party's brand name, trademarks or URLs." (CX0311 § 4(A)d).

308. The prohibited acts set forth in the 2004 Vision Direct settlement agreement include "causing a Party's brand name, or link to the Party's Restricted Websites to appear as a listing in the search results page of an Internet search engine, when a user specifically searches for the other Party's brand name, trademarks, or URLs." (CX0311 § 4(A)e).

309. The 2004 Vision Direct settlement agreement stated that the prohibited acts did not include "(i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in a[] non-Internet context, e.g., the use on the Internet of comparative advertising, parodies, and similar non-Infringing, uses; and (ii) the purchase by either Party of the key words that are generic words such as 'contacts,' 'contact lens,' and 'lens'." (CX0311 § 5(B)).

310. Between June 2004 and September 2007, 1-800 Contacts and Vision Direct had an "established practice" of using negative keywords to ensure no ads would show up on branded queries. (CX0843 at 012; CX0134 at 001; CX0137 at 002 ("As illustrated by over 30 email communications, Vision Direct and 1-800 Contacts, Inc. have both interpreted the Settlement Agreement as requiring each party to implement negative keywords.")).

311. In late October 2007, Vision Direct represented to 1-800 Contacts that Vision Direct did not believe that the 2004 Vision Direct settlement agreement required Vision Direct to use negative keywords to prevent its ads from appearing on searches for 1-800 Contacts' trademarks. (CX0136).

ii. Coastal Contacts

312. On March 18, 2004, 1-800 Contacts filed a complaint in federal court against Coastal Contacts alleging trademark infringement, among other causes of action. The complaint alleged that Coastal Contacts had caused pop-up advertisements for Coastal Contacts to appear when internet users visited the www.1800contacts.com website. The complaint did not contain any allegations regarding

the use of 1-800 Contacts' trademarks as keywords to trigger search engine advertisements. (CX1615).

313. Coastal Contacts answered 1-800 Contacts' complaint and filed counterclaims. (CX0310 at 001).

314. 1-800 Contacts and Coastal Contacts reached a settlement agreement effective October 29, 2004. (CX0310).

315. Pursuant to the Coastal Contacts settlement agreement, 1-800 Contacts and Coastal Contacts agreed to refrain from and not to cause in the future certain "prohibited acts," which include "causing a Party's website or Internet advertisement to appear in response to any Internet search for the other Party's brand name, trademarks or URLs but not through a search employing Generic or Descriptive terms." (CX0310 § 3(A)d).

316. The prohibited acts set forth in the Coastal Contacts settlement agreement include "causing a Party's brand name, or link to that Party's websites to appear as a listing in the search results page of an Internet search engine, when a user specifically searches for the other Party's brand name, trademarks, or URLs but not through a search employing Generic or Descriptive terms." (CX0310 § 3(A)e).

b. Trademark monitoring and cease and desist letters

317. Trademark owners are often advised to obtain information as to how their marks are being used and to prepare appropriate steps to enforce their rights. (Hogan, Tr. 3265-66).

318. The failure to police third-party use of a trademark could lead to a finding by a court that the mark is no longer enforceable. (Hogan, Tr. 3265 ("[A] court could find that a mark is not enforceable because there is extensive third-party use. In a specific case, a court could find that because the plaintiff did not take steps with respect to the specific practice or use at issue by the defendant that the

[equitable] defense of laches . . . creates a defense to a trademark infringement claim.")).

319. In 2006, 1-800 Contacts' internal marketing personnel began regularly monitoring competitors' advertisements appearing response to searches for 1-800 Contacts' key trademark terms and providing that information to the legal team in trademark monitoring reports. (CX0067 at 073; Craven, Tr. 685-86; CX9002 (Craven, IHT at 121, 128-29); CX9020 (Craven, Dep. at 45); Pratt, Tr. 2513 ("I received reports, periodic reports, from my client as they monitored those results. They monitored – they did searches for their trademarks themselves on Google and other search engines. They kept track of who was coming up in response to those searches."). *See, e.g.,* CX0078; CX0256; CX0508; CX0507; CX0505; CX0255; CX0944; CX1068; CX1069; CX1070; CX0279; CX1071; CX0887; CX1072).

320. 1-800 Contacts' legal personnel and its outside counsel monitored competitors' advertisements to evaluate whether and when the appearance of competitor advertisements in response to searches for 1-800 Contacts' trademarks constituted trademark infringement or was otherwise unlawful. (CX9031 (C. Schmidt, Dep. at 105); CX9002 (Craven, IHT at 128-29)).

321. Outside counsel to 1-800 Contacts with respect to trademark matters were Bryan Pratt and Mark Miller. (Pratt Tr. 2493-95; CX0904 (Miller, Dep. at 10-11)).

322. 1-800 Contacts' outside counsel reviewed trademark monitoring reports in order to provide legal guidance to 1-800 Contacts, by evaluating potential infringement, potential misappropriation of goodwill, and similar issues. Mr. Pratt and Mr. Miller also typed in their own search queries for 1-800 Contacts' trademark terms and confusingly similar variations, to see which advertisements were displayed in response. (CX9021 (Pratt, Dep. at 20-21, 25-26); Pratt, Tr. 2513).

323. In addition to trademark monitoring reports, 1-800 Contacts relied on reports generated by Keyword Spy and BrandVerity, which services enabled 1-800 Contacts to see if advertisers were using certain keywords to generate advertising. (CX9021 (Pratt, Dep. at 27-30, 140-41); CX9040 (Miller, Dep. at 127-29); CX9020 (Craven, Dep. at 62-63)).

324. In addition to seeing which advertisements appeared in response to a search for 1-800 Contacts' trademark terms and confusingly similar variations, Mr. Pratt and/or Mr. Miller would conduct an analysis of pertinent factors to determine if there was a good faith basis to allege trademark infringement. (CX9040 (Miller, Dep. at 19, 129, 132) ("There's a lot of factors that – outside of just looking at a search results page that you take into account when you're evaluating potential infringement. And then if you have the basis to argue there's a likelihood of confusion or we've got a good faith basis to allege trademark infringement here, then you've got a claim. And then discovery will prove out what kind of evidence you have."); CX9021 (Pratt, Dep. at 78-79, 131-32)).

325. In the years between 2005 and 2010, 1-800 Contacts sent cease and desist letters to multiple online contact lens retailers whose advertisements appeared in response to an internet search for 1-800 Contacts' trademark terms. (Pratt, Tr. 2498-2500, 2526-29, 2553; CX9040 (Miller, Dep. at 150-52). *E.g.*, CX1472 (Contact Lens King, May 12, 2009); CX1235 (Lens Discounters, September 20, 2005); CX1751(Memorial Eye, September 13, 2005); CX1318 (Memorial Eye, February 27, 2008); CX1513 (Lens.com, September 20, 2005); CX1229 (Lens Discounters, May 12, 2009); CX1623 at 001-04 (AC Lens, February 2, 2010); RX1010 (Lensfast, September 12, 2007); RX1011 (Lensfast, March 14, 2008); Lenses for Less (CX0637, November 9, 2009). *See also* CX0643 at 001-03 (Web Eye Care); CX0965 at 001-03 (Standard Optical, July 14, 2010); CX0638 at 001-03 (Tram Data, May 6, 2010)).

326. 1-800 Contacts' cease and desist letters referenced in F. 325 charged that the recipient had "purchased sponsored advertisements at Google . . . for at least one of" 1-800 Contacts' trademarks, "or a confusingly similar variation thereof, to trigger a link to your directly competitive" website or affiliate. The letters continued in pertinent part:

> [W]e are concerned that you have continually purchased sponsored advertisements at Google, and possibly other search engines, that are triggered upon a search for "1800 CONTACTS," or a confusingly similar variation thereof. Your use of the 1800 CONTACTS trademark as a triggering keyword to advertise for your directly competitive goods and services is an obvious attempt to trade off the goodwill established by 1800 CONTACTS, INC. in its famous 1800 CONTACTS trademark. . . . The use of the mark 1800 CONTACTS and/or any confusingly similar variation of the mark as a keyword in the United States may constitute trademark infringement under state and federal law in that it is likely to cause initial interest confusion, or likely to cause the public to mistakenly assume that your business activities originate from, are sponsored by, or are in some way associated with 1800 CONTACTS, INC. For the same reasons, such use may constitute unfair competition, and false advertising under state law and similarly may [violate federal law against] 'false designation of origin' . . . [and] may also violate the Federal Dilution Act . . . ."

327. 1-800 Contacts' cease and desist letters referenced in F. 325 "request[ed] that you cease and desist from further use" of 1-800 Contacts' trademarks and "confusingly similar variations thereof in the United States." (*E.g.*, CX1513 (Sep. 20, 2005 letter to Lens.com); CX1754 (Sep. 12, 2007 letter to Memorial Eye); RX1010 (Sep. 12, 2007 letter to Lensfast)).

c. Litigation

328. On December 28, 2007, 1-800 Contacts sued Vision Direct in state court for breach of the 2004 Vision Direct settlement agreement. 1-800 Contacts alleged that Vision Direct was violating the 2004 settlement agreement (F. 306) by purchasing advertisements without utilizing negative keywords to prevent the appearance of Vision Direct advertisements when users search for the 1-800 Contacts brand name. (CX1062).

329. In February 2008, 1-800 Contacts filed a complaint against Vision Direct in federal court, based on alleged breach of the 2004 Vision Direct settlement agreement. (CX0314).

330. In addition to the lawsuits against Vision Direct and Coastal Contacts (F. 328-329, 312), 1-800 Contacts filed complaints in federal court against the following online contact lens sellers, asserting claims for trademark infringement under 15 U.S.C. § 1114, in addition to federal unfair competition (15 U.S.C. § 1125(a)), state and common law unfair competition (Utah Code Ann. § 13-5-1 *et seq*.), misappropriation, and unjust enrichment: AC Lens (CX1623 at 029-39, February 18, 2010); Contact Lens King (CX0461, March 8, 2010); Empire Vision (CX0808, February 25, 2010); EZ Contacts USA (CX1617, December 6, 2007); Lensfast (CX1618, December 23, 2008); Lenses for Less (CX0452 at 003-13, January 20, 2010); Lens.com (CX1125, August 13, 2007); LensWorld (CX1622, January 8, 2008); Memorial Eye (RX0072, December 23, 2008); Standard Optical (CX0965 at 004-15, July 13, 2010); Tram Data (CX0638 at 004-14, May 6, 2010); Walgreens (CX1620, June 8, 2010); Web Eye Care (CX1621, August 10, 2010); CX9021 (Pratt, Dep. at 163-64) (collectively the "lawsuits" or the "litigation").

331. In general, the lawsuits alleged that the defendant contact lens seller had purchased 1-800 Contacts' trademarks "and/or confusingly similar variations or misspellings thereof" as keywords to trigger the defendant's paid search advertising and/or failed to implement negative keywords

to prevent the triggering of defendant's advertisements in response to a consumer searching for 1-800 Contacts; and that the defendant's use of the trademarks "caused, and will continue to cause, confusion and mistake, including initial interest confusion, as to the source or origin" of the defendant's products, and "is likely to falsely suggest a sponsorship, connection, license, endorsement or association" by or with 1-800 Contacts. (*See, e.g.*, CX1623 at 032-33 (AC Lens); CX0461 at 004-05 (Contact Lens King); CX0808 at 004-05 (Empire Vision); CX1618 at 006-09 (Lensfast); CX0452 at 006-07 (Lenses for Less); RX0072 at 0005-09 (Memorial Eye); CX0965 at 007-09 (Standard Optical); CX0638 at 007-08 (Tram Data); CX1620 at 004-06 (Walgreens); CX1621 at 004-06 (Web Eye Care)).

332. Some of the lawsuits listed in F. 330 contained alleged infringing conduct in addition to the allegations summarized in F. 331. (*See, e.g.*, CX1617 at 012 (EZ Contacts USA) (allegations included "wholesale copying of portions of [1-800 Contacts'] website, including [1-800 Contacts'] Marks"); CX1622 at 005-10 (LensWorld) (same); CX1125 at 005-11 (Lens.com) (allegations included using 1-800 Contacts marks in Lens.com ads)).

333. In the initial years of paid search advertising litigation, which began in approximately 2004, the issue of whether the purchase of trademark keywords to generate paid search advertising constituted a "use in commerce" for trademark law purposes was unsettled. Eventually, after the 2009 decision by the Second Circuit Court of Appeals in *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 127 (2d Cir. 2009), the circuit courts came to agree that "keyword advertising programs constitute 'use in commerce' because search engines make trademarks available for purchase and display them in search results," and the focus of infringement analysis shifted to the issue of the likelihood of consumer confusion from that use. (RX0734 (Hogan Expert Report at 0059-60); Hogan, Tr. 3256; CX9044 (Tushnet, Dep. at 59-60) (The use in commerce question is now "basically settled with respect to keyword advertising.")).

334. The multi-factor tests applied by courts to determine the likelihood of confusion vary between the circuits, but the tests are generally considered fact-intensive, to be resolved by judges and juries. (Hogan, Tr. 3258).

335. In search engine advertising cases, courts have generally focused on the "species of confusion known as initial interest confusion." (Hogan, Tr. 3359; CX9044 (Tushnet, Dep. at 101) ("There are cases adopting the concept of initial interest confusion as part of actionable confusion.")).

336. Respondent's expert witness on trademark law, Mr. Hogan, is unaware of any United States court holding one way or the other as to whether the appearance of an ad in response to a trademark search due to broad matching (F. 167-168) to the advertiser's purchase of a generic keyword constitutes a use in commerce. (Hogan, Tr. 3476, 3478, 3480).

337. In September 2008, the federal court entered a default judgment in 1-800 Contacts' litigation against LensWorld. The court's order prohibited LensWorld from purchasing 1-800 Contacts' "federally registered trademarks" as keywords "for any search engine advertising program" and required LensWorld to implement certain negative keywords, attached as an exhibit to the order, "where possible." (CX0162).

338. On December 14, 2010, the United States District Court for the District of Utah issued an opinion granting summary judgment in favor of Lens.com on 1-800 Contacts' trademark infringement claim. 1-800 Contacts appealed to the Tenth Circuit Court of Appeals. (*1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151 (D. Utah 2010); *1-800 Contacts v. Lens.com*, 722 F.3d 1229 (10th Cir. 2013)).

339. On July 16, 2013, the Tenth Circuit Court of Appeals upheld the district court's decision granting Lens.com's summary judgment motion except with respect to issues regarding Lens.com's potential secondary liability for its

affiliates. The appellate court did not resolve whether or not initial interest confusion could arise, as a matter of law, from an ad triggered by a trademark keyword where the trademark was not used in the ad text. (*1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013)).

340. Memorial Eye filed an answer and counterclaims to 1-800 Contacts' complaint (F. 330), including a counterclaim alleging sham litigation. The district court dismissed Memorial Eye's counterclaim and the case proceeded to discovery. (Pratt, Tr. 2535. *See 1-800 Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-CV-983 TS, 2010 WL 988524, *6 (D. Utah Mar. 15, 2010)).

341. In the litigation between 1-800 Contacts and Memorial Eye (F. 340), Memorial Eye produced 100,000 documents and reviewed 250,000 to 260,000 customer orders. In Memorial Eye's document production, Mr. Holbrook "located only seven instances that could be remotely considered as some type of confusion." (Holbrook, Tr. 1957) (testifying that those were "the only ones that I know of ever, and I never heard of any other instances in office of any other possible confusion.")).

342. In December 2010, 1-800 Contacts and Memorial Eye agreed to stay the case pending the outcome of a then-pending appeal in litigation between 1-800 Contacts and Lens.com. (Pratt, Tr. 2535; Holbrook, Tr. 2021-22; RX1793).

d. Settlements

343. During the time period 2004 through 2013, 1-800 Contacts entered into settlement agreements with 13 contact lens retailers to resolve trademark litigation (the "Settlement Agreements"). (F. 306-307, 314-315, 344-345, 348, 351, 359-360).

344. 1-800 Contacts settled with EZ Contacts effective May 2008. (CX0313).

345. In May 2009, 1-800 Contacts and Vision Direct entered into a settlement agreement which, by joint request of the parties, was entered as a permanent injunction by the federal court. (CX0314; CX0316).

346. The 2009 Vision Direct settlement agreement provided that the 2004 Vision Direct agreement would "remain in full force and effect except that the Parties' sole obligations with respect to the use of negative keywords" would be governed by the 2009 Vision Direct settlement agreement. (CX0314 at 004).

347. Pursuant to the 2009 Vision Direct settlement agreement and the injunction referred to in F. 345, 1-800 Contacts and Vision Direct were required to implement certain negative keywords, attached as exhibits to the injunction, "for the purpose of preventing a Party's Internet advertising from appearing in response to a search for another Party's trademarks, URLs, or variations." (CX0314, CX0316 and Exhibits A and B).

348. Between the fall of 2009 and February 2011, 1-800 Contacts entered into settlement agreements with the following online contact lens retailers: AC Lens (RX0028 (March 2010)); Lensfast (CX0315 (December 2009)); Empire Vision (CX0319 (May 2010); Lenses for Less (CX0320 (March 2010)); Tram Data (CX0321 (May 2010)); Walgreens (CX0322 (June 2010)); Contact Lens King (CX0323 (March 2010); Web Eye Care (CX0324 (September 2010)); and Standard Optical (RX0408 (February 2011)).

349. In 2013, Memorial Eye decided to settle the case because of the cost of litigation and legal uncertainty regarding the issue of advertisements that are triggered by broad matching of keywords. (Pratt, Tr. 2535; Holbrook, Tr. 1942 ("[W]e knew that the Lens.com/1-800 Contacts case was still going on and they had spent $2 million. We knew that the broad matching issue had not firmly been put to rest by the court."); CX9024 (Holbrook Dep. at 63)).

350. Memorial Eye settled with 1-800 Contacts to avoid paying an expected $150,000 in expert witness fees. (Holbrook, Tr. 2032; CX9024 (Holbrook, Dep. at 63, 160-61)).

351. 1-800 Contacts settled with Memorial Eye effective November 2013. (CX0326).

352. AC Lens made a business decision to settle with 1-800 Contacts in light of the potential costs and protracted nature of the litigation between the companies. (Clarkson, Tr. 342; CX9039 (Clarkson, Dep. at 86-87, 144); CX9003 (Clarkson, IHT at 108-10)).

353. Web Eye Care settled with 1-800 Contacts in part because the costs of litigation were "way more than what we wanted to spend" and "not worth it." Web Eye Care settled with 1-800 Contacts in part because of the risks of losing the litigation. (CX9000 (Batushansky, IHT at 93-94); CX9014 (Batushansky, Dep. at 46-48)).

354. Empire Vision settled with 1-800 Contacts in order to avoid the litigation expense of defending the case. (CX0943 (Duley, Decl. at ¶¶ 5, 10)).

355. Settling lawsuits is generally efficient. (RX0739 (Murphy Expert Report at 0053 ¶ 137); Murphy, Tr. 4208; CX 9042 (Evans, Dep. at 196)).

356. Economists generally assume that firms act rationally in settling litigation. Complaint Counsel's expert witness, Dr. David Evans, sees no reason that this general economic assumption should not apply in this case. (Evans, Tr. 1830).

357. Dr. Evans agrees that, from the settling parties' perspectives, the settlements were economically rational. (CX9042 (Evans, Dep. at 119-20)).

358. Dr. Evans agrees that economists analyzing a settlement generally assume that, in deciding whether to proceed with litigation, parties evaluate the cost of litigation and the likely benefits of a favorable outcome, accounting for the

likelihood of that outcome. (Evans, Tr. 1830-31; CX8009 (Evans Rebuttal Expert Report at 045 n.103) ("As a purely general matter I agree that parties in litigation bargain to reach settlements and they take expected values and costs into account. Most litigation, and particularly routine litigation, settles for this reason.")).

e. Relevant provisions of the Settlement Agreements

359. The Settlement Agreements include recitals describing the litigation between the parties and stating that "the Parties have determined that, in order to avoid the expense, inconvenience, and disruption" of litigation, "it is desirable and in their respective best interests to terminate" the litigation and "settle any claims related thereto." (RX0028 at 0001; RX0408 at 0001; CX0310 at 001; CX0311 at 001; CX0313 at 001; CX0315 at 001; CX0319 at 001; CX0320 at 002; CX0321 at 001; CX0322 at 001; CX0323 at 001 CX0324 at 001; CX0326 at 001).

360. The Settlement Agreements include a "Release" of "any and all liability, claims, counterclaims, demands, debts, charges, liens and causes of action" arising from the various claims asserted in the litigations, and required the dismissal of pending litigation. (RX0028 § 1; RX0408 § 3; CX0310 § 1; CX0311 § 1; CX0313 § 2; CX0315 § 2; CX0319 § 1; CX0320 § 2; CX0321 § 1; CX0322 § 1; CX0323 § 2; CX0324 § 2; CX0326 § 1).

361. In general, the Settlement Agreements prohibit each party from causing advertisements to appear in response to an internet search for the other party's trademarks or URLs, or variations thereof, although some agreements more broadly encompass internet searches that "include" the other party's trademarks or URLs, or variations thereof. (*See, e.g.*, CX0310 § 3(A)d (Coastal Contacts); CX0313 § 5(A)a (EZ Contacts); CX0315 § 4(A)a (Lensfast); CX0311 § 4(a)d (Vision Direct). *See also* RX0028 § 2(A)a (AC Lens); CX0320 § 4(A)a (Lenses for Less); CX0321 § 3(A)a (Tram Data); CX0323 § 4(A)a (Contact Lens King); CX0319 § 2(A)a (Empire Vision); CX0324 §

4(A)a (Web Eye Care); RX0408 § 5(A)a (Standard Optical)).

362. Four of the thirteen Settlement Agreements specifically prohibit a party's link from appearing in the organic search results, when a user searches for the other party's brand name, trademarks, or URLs, but not through a search employing generic or descriptive terms. (CX0310 § 3(A)e; CX0311 § 4(A)e; CX0313 § 5(A)b; CX0315 § 4(A)b).

363. Although the specific language may vary, the Settlement Agreements forbid each party from using the other party's trademarks, URLs, and certain variations thereof, as set forth on an attached exhibit list, as keywords to trigger advertisements "or other content." (*See*, *e.g.*, RX0028 § 2(A)b (AC Lens); CX0310 § 3d, e (Coastal Contacts); CX0323 § 4(A)b (Contact Lens King); CX0319 § 2(A) a, b (Empire Vision); CX0313 § 5(A)b (EZ Contacts); CX0320 § 4(A)b (Lenses for Less); CX0315 § 4(A)a (Lensfast); CX0326 § 3a (Memorial Eye); RX0408 § 5(A)b (Standard Optical); CX0311 § 4(A)d, e (Vision Direct); CX0322 § 3a (Walgreens); CX0321 § 3(A)b (Tram Data); CX0324 § 4(A)b (Web Eye Care)).

364. Although the specific language may vary, the Settlement Agreements require the parties to implement as negative keywords those trademark and URL terms and variations thereof listed on an attached exhibit, in order to prevent the display of advertisements in response to an internet search for, or as stated in some agreements, an internet search that "includes" or "contains," the other party's trademarks or URLs. (RX0028 § 2(C) (AC Lens); CX0323 § 4(C) (Contact Lens King); CX0319 § 2(C) (Empire Vision); CX0313 § 5(B) (EZ Contacts); CX0320 § 4(C) (Lenses for Less); CX0315 § 4(B) (Lensfast); CX0326 § 3b (Memorial Eye); RX0408 § 5(C) (Standard Optical); CX0314 § 4, CX0316 § 1 (Vision Direct settlement and permanent injunction); CX0322 § 3b (Walgreens); CX0321 § 3(C) (Tram Data); CX0324 § 4(C) (Web Eye Care)).

365. The Settlement Agreements do not state whether or not the required negative keywords are to be implemented in broad match, phrase match, or exact match. (F. 364).

366. Although the specific language may vary, the Settlement Agreements do not prohibit the purchase of generic keyword terms, provided that the parties implement the required negative keywords to prevent the advertisement from appearing in response to a search for the designated trademark terms. (*See, e.g.*, CX0326 § 3 (Memorial Eye) (stating: "Nothing in this Section shall be construed to prohibit the use or purchase of generic words such as contact, contacts, lenses, contact lenses, glasses, eyeglasses, eyewear, frames, or other, similar generic terms as long as the appropriate negative keywords are implemented"); CX0323 § 4(A)c, (C) (Contact Lens King) (prohibiting using generic keywords in an internet advertising campaign without also using the listed trademark and URL terms as negative keywords); CX0315 § 5(B) (Lensfast) (stating that prohibited acts "shall not include" purchase of "generic, non-trademarked words," provided that the parties "use the prohibited key words as listed in Exhibit 2" as negative keywords); CX0320 § 4(B), (C) (Lenses for Less) (exempting purchase of generic keywords but requiring implementation of negative keywords, "such that advertisements and/or links will not be displayed when the negative keywords are part of a search . . . unless" the internet search provider does not permit negative keywords)).

367. The Settlement Agreements do not restrict the purchase or appearance of advertisements in response to searches for generic terms, such as "contacts," "contact lens," and "contact lenses." (F. 359-366; *see* Hamilton, Tr. 453-54; CX9031 (C. Schmidt, Dep. at 234)).

368. Absent the implementation of negative keywords, a retailer that bids on the generic keyword "contacts" in broad match might cause its ads to appear in response to a search for 1-800 Contacts. (CX9033 (Mohan, Dep. at 185-87); CX9040 (Miller, Dep. at 27-28, 65-66); CX1787; Clarkson, Tr. 237-40; *see also* F. 175-179).

369. Ten of the thirteen Settlement Agreements provide that the prohibited acts "shall not include (i) use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in an non-Internet context, e.g., the use on the Internet of comparative advertising, parodies, and similar non-Infringing, uses." (RX0028 § 2(B)(i) (AC Lens); CX0311 § 4(B)(i) (2004 Vision Direct); CX0313 § 5(B)(i) (EZ Contacts); CX0315 § 4(B)(i) (Lensfast); CX0320 § 4(B)(i) (Lenses for Less); CX0319 § 2(B)(i) (Empire Vision); CX0321 § 3(B)(i) (Tram Data); CX0323 § 4(B)(i) (Contact Lens King); CX0324 § 4(B)(i) (Web Eye Care); RX0408 § 5(B)(i) (Standard Optical)).

370. From a marketing perspective, the fact that an ad appears in response to a search for "1-800 Contacts" is not considered to be comparative advertising. Comparative advertising is an advertisement that makes reference to a competitor and compares a given feature, price, or characteristic. (Goodstein, Tr. 2470-71; CX9031 (C. Schmidt, Dep. at 237, 239-40)).

f. Post-settlement enforcement of the Settlement Agreements

371. 1-800 Contacts enforced the Settlement Agreements in accordance with their design, which was to prevent the settling parties' advertisements from appearing in response to an internet search for 1-800 Contacts. (F. 372-396).

i. AC Lens

372. In April 2010, Mr. Miller, counsel for 1-800 Contacts, wrote to Peter Clarkson of AC Lens claiming that AC Lens had breached the settlement agreement between the two parties, attaching screenshots that Mr. Miller stated demonstrate the breach by affiliates of AC Lens. (CX1107; F. 509).

373. In a May 30, 2014 letter, Mr. Miller of 1-800 Contacts notified Mr. Clarkson of AC Lens of a claimed breach of the AC Lens Agreement, claiming that "sponsored links

for the aclens.com and discountcontactlenses.com websites" had been "triggered by searches for the term 'www800contacts.'" In a June 4, 2014 reply, Mr. Clarkson denied any breach because the specified search term was not on the list attached to the settlement agreement, but agreed to add the term "[r]egardless." (CX0006).

ii. Coastal Contacts

374. In August 2006, Ed McCready of 1-800 Contacts sent an email to Coastal Contacts stating that "[s]earch engine advertisements from Coastal Contacts and their affiliates are being triggered by searches on variations of 1-800 CONTACTS' trademarks . . . in violation of the settlement agreement . . ." and asked Coastal Contacts to "ensure the proper steps are taken to remedy this." Sarah Villeneuve Bundy of Coastal Contacts responded that Coastal Contacts was "not aware of this discrepancy" and would remove the ads "immediately." (CX0260).

375. On November 13, 2006, Mr. McCready of 1-800 Contacts wrote to Ms. Bundy of Coastal Contacts regarding their advertisements being triggered by searches for variations of 1-800 Contacts' trademarks, and attached screenshots of the "violating ads." These screenshots showed Coastal Contacts advertisements appearing in response to searches for "800 contacts"; "800contacts"; "1800 contacts"; and "1-800 contacts." (CX0751 at 002-08).

376. On November 15, 2006, Ms. Bundy of Coastal Contacts wrote to Mr. McCready of 1-800 Contacts that the advertisements referenced in Mr. McCready's email of November 13, 2006 (F. 375) were being displayed as a result of an "Advanced Match" of the term "contacts" or a misspelling thereof, and stated it could "do a negative on '800' to help remove them. Mr. McCready replied on November 16, 2006 that "[s]ince the agreement . . . prohibits one company's ads from appearing in response to any search for the other company's brand name . . . we've added negative keywords, like 'coastal' to prevent our general keywords from triggering ads on your

company's brand names." Mr. McCready asked that Coastal Contacts implement negative keywords as described in Ms. Bundy's email of November 15, 2006. (CX0751 at 001).

377. On March 2, 2011, Bryce Craven, then senior marketing manager of 1-800 Contacts, emailed Curtis Petersen of Coastal Contacts to notify him that "Lensway.com ads" were "showing up on our trademarked terms . . . ." Mr. Craven asked Mr. Petersen to "double check to ensure the appropriate negatives are implemented . . . ." Mr. Petersen responded that he had complied. (CX0432).

378. In June 2011, Mr. Petersen of Coastal Contacts wrote to Mr. Craven of 1-800 Contacts that the "issue has been addressed" and that the list of negative keywords had been added, "across the entire US Google Contacts account" for Coastal Contacts. (CX0757).

379. On June 10, 2014, Brady Roundy of 1-800 Contacts emailed Braden Hoeppner of Coastal Contacts. Mr. Roundy listed terms alleged to be in violation of the parties' settlement agreement and attached screenshots. The listed terms included 1-800 Contacts' trademark terms as well as trademark terms combined with other terms, such as "1-800contacts coupon" and "1-800contacts rebate." Mr. Roundy stated that "[a] few negative keywords should take care of the problem," and requested that Mr. Hoeppner, "[p]lease let me know when these are added to the account." Mr. Hoeppner replied later that day that the issue "should now be resolved." (CX0703 at 001).

iii. Vision Direct

380. In December 2009, David Zeidner of 1-800 Contacts emailed Yukio Morikubo of Vision Direct, stating that Vision Direct "has been showing up on several terms for the last two weeks, and my marketing guy has not . . . heard back from Colin. . . . We need to get this resolved ASAP, as it has already been up for two weeks." (CX0481 at 003).

381. In March 2010, Mr. Craven of 1-800 Contacts wrote to Rick Mitchell of Drugstore.com (then owner of Vision Direct), stating: "We've seen Vision Direct ads showing up periodically for these terms," referencing a list of 1-800 Contacts related terms, "during the past few weeks" and asked Mr. Mitchell to "double check [the] negative keywords" in place. (CX0845 at 002; Hamilton, Tr. 389, 469).

382. In January 2013, Mr. Miller, counsel for 1-800 Contacts, sent a notice of "Breach of . . . Settlement Agreement" to Drugstore.com alleging that Vision Direct had breached the agreement because Vision Direct's ad appeared on the Yahoo! and Google search engine results pages in response to a search for "1800contacts coupon," and on the Google search engine results page in response to a search for "1800contacts contact lenses." (CX0837).

iv. Walgreens

383. In April 2010, David Zeidner of 1-800 Contacts emailed Cary Pumphrey of Walgreens, regarding "a spike in Walgreens ads showing up on our [1-800 Contacts] marks," and asked to "[p]lease let me know . . . how your company is handling the situation." (CX1177 at 001).

384. In December 2010, Mr. Miller, counsel for 1-800 Contacts, emailed Peter Wilson, an attorney for Walgreens, asserting that "1-800 Contacts discovered Walgreens ads coming up on Google searches for 1-800-contacts, 1800contacts.com and 1800 contacts coupon" and asserting that this was a violation of the parties' settlement agreement. In May 2011, the parties agreed to implement a weekly audit of the ad campaigns to ensure the necessary negative keywords were in place. (CX1521 at 001; RX1029).

385. In a series of email communications between 1-800 Contacts and Walgreens in July 2013, 1-800 Contacts complained to Walgreens that Walgreens ads were continuing to appear in response to 1-800 Contacts'

trademark terms, which Walgreens agreed to "fix" through its application of negative keywords. (CX1058; CX1060).

386. In June 2014, Brady Roundy of 1-800 Contacts emailed screenshots to Glen Hamilton, senior manager for online marketing for Walgreens, asserting that they showed that "Walgreens is showing up for a handful of our Trademark terms," and asked Mr. Hamilton to add a list of additional negative keywords to Walgreens' advertising campaigns, saying that doing so "should take care of it." (CX0042).

v. EZ Contacts

387. In January 2008 and August 2008, Mr. Pratt, counsel to 1-800 Contacts, communicated with William Thomashower of EZ Contacts regarding EZ Contacts ads appearing in response to searches for 1-800 Contacts' trademark terms, which Mr. Pratt asserted was a violation of the parties' settlement agreement. (CX0816 at 001-02).

vi. Lensfast

388. In May 2014, Mr. Miller, counsel for 1-800 Contacts, sent a "Notice of Breach" to Randolph Weigmer of Lensfast, asserting that advertisements for Lensfast were being displayed in results for the search term "1800 contact lenses." Mr. Miller notified Lensfast that he was adding the term "1800 contact" as a supplemental prohibited trademark term pursuant to the parties' settlement agreement. (CX0453; *see* CX0315 § 4(E)).

vii. Contact Lens King

389. In April 2010, Mr. Miller, counsel to 1-800 Contacts, sent a letter to Jacques Matte of Contact Lens King, asserting that Contact Lens King had breached the parties' settlement agreement, based on screenshots showing ads in response to searches for 1-800 Contacts and variations thereof. (CX0796).

390. In May 2014, Mr. Miller, counsel to 1-800 Contacts, sent a letter to Mr. Matte of Contact Lens King, asserting that

advertisements for Contact Lens King had been triggered by a search for certain variations of the 1-800 Contacts' trademark terms that were provided under the parties' settlement agreement, including "1800 contact coupon." Mr. Miller notified Mr. Matte that 1-800 Contacts was adding these terms as supplemental prohibited trademark terms pursuant to the parties' agreement. (CX0800; CX0323 § 4(F)(b)).

viii. Empire Vision

391. In July 2010, Mr. Miller, counsel to 1-800 Contacts, notified Empire Vision that, pursuant to the terms of the parties' settlement agreement, 1-800 Contacts was amending the list of prohibited trademark terms to include the term "1800 contact," based on advertisements having appeared in response to searches for this term. (CX0811; CX0319 § 2(F)(b)).

ix. Lenses for Less

392. In August 2010, Mr. Miller, counsel to 1-800 Contacts, sent a letter to Lenses for Less asserting that Lenses for Less had breached the parties' settlement agreement, based on screenshots and other data on advertisements in response to searches for 1-800 Contacts and variations thereof. (CX0822).

2. Luxottica Sourcing and Services Agreement

393. On December 23, 2013, 1-800 Contacts and Luxottica entered into a sourcing and services agreement ("Luxottica Sourcing and Services Agreement"). (CX0331; CX9001 (Bethers, IHT at 221-22)).

394. Pursuant to the Luxottica Sourcing and Services Agreement, 1-800 Contacts provides fulfillment services by shipping contact lenses to Luxottica's retail chain stores (e.g., LensCrafters, Pearle Vision, Sears Optical, and Target Optical). The agreement further provides for other services including assistance with sourcing contact lenses from the four major contact lens manufacturers.

(CX0331; Bethers, Tr. 3524-25, 3694-95; CX9001 (Bethers, IHT at 225)).

395. As a result of the agreement between 1-800 Contacts and Luxottica (F. 393-394), 1-800 Contacts is [redacted]. (CX1336 at 003, *in camera*).

396. Within the Luxottica Sourcing and Services Agreement is a section that contains provisions prohibiting the parties, and their affiliates (including, for Luxottica, retailers such as EyeMed, LensCrafters, Pearle Vision, Sears Optical, and Target Optical), from purchasing or using the other party's trademarks or confusingly similar variations thereof "as triggering keywords in any internet search engine advertising campaign" and requiring each party to enter the other party's trademarks, and variations thereof, as listed in the agreement, as "exact match" negative keywords in all advertising campaigns. (CX0331 §§ 17.10-17.11; Bethers, Tr. 3697-99, 3721-22; CX9001 (Bethers, IHT at 221-22)).

H. Relevant Product Market

397. Online sales of contact lenses constitute a relevant product market. (Evans, Tr. 1432; CX8006 (Evans Expert Report at 014, 111-12 ¶¶ 30, 245-46); F. 398-487).

1. Convenience

398. For consumers who purchase contact lenses online, ECPs are not close substitutes, and for consumers who purchase contact lenses from their ECPs, online retailers are not close substitutes. (CX8006 (Evans Expert Report at 116 ¶ 254); F. 399-409).

399. Convenience is a key factor in determining where consumers buy contact lenses. (CX8006 (Evans Expert Report at 112-13 ¶ 248) (citing CX1743 at 009)).

400. Consumers who tend to shop online place a high premium on the convenience of online shopping, home delivery,

low prices, and fast (and often free) shipping. (CX9003 (Clarkson, IHT at 17-18) (characterizing the category of online contacts retailers as having a combination of the best service, convenience, and relatively low pricing compared to ECPs and most other retail channels); Holbrook, Tr. 1889 ("online customers are looking primarily for low price and quick delivery.")).

401. Online purchasing is more convenient than purchasing from any other channel because the consumer does not need to return to the store to pick up his or her purchase. (Coon, Tr. 2693; Clarkson, Tr. 189-91).

402. A consumer may find it is inconvenient to order contact lenses at a physical store if they are not already at the store for an eye exam, if they need to make a separate trip to the store to fill a prescription that was not in stock or is a refill, or if they need to go out of their way to travel to the ECP. (Coon, Tr. 2693; Clarkson, Tr. 189-91; CX8006 (Evans Expert Report at 113 ¶ 249)).

403. A consumer may find it is convenient to order contact lenses at a physical store if they have just had an eye exam and if the ECP has his or her contact lenses in stock. (CX8006 (Evans Expert Report at 112-13 ¶ 248); CX0547 at 036 (Only 40 to 50% of all contact lens sales are addressable by online vendors, because 52% of purchases "occurs at [the] same time and place as [an] ECP visit.")).

404. Some consumers buy their initial contact lenses from their ECP when they have had their eye exam, but then buy their refill contact lenses online because that is more convenient than going back to the store. Online retailers account for less than 20% of initial orders, but account for almost 50% of refill orders. Thus, while consumers may appear to be switching between brick and mortar retailers and online retailers, they are choosing the different types of stores under different circumstances. (CX8006 (Evans Expert Report at 114 ¶ 251) (citing CX1449 at 034 (Dec. 1, 2015 Bain & Company Presentation: Project Mars – Integrated Materials))).

405. ECPs are generally not able to fill a patient's prescription with on-hand inventory. ECPs typically carry only a small assortment of retail products. Those ECPs that maintain an inventory are able to fill a patient's prescription about 25% of the time from the on-site inventory. (CX1449 at 119).[8]

406. 1-800 Contacts' founder, Mr. Coon, distinguished his business from ECPs by conveying to consumers that purchasing from 1-800 Contacts is simple, easy, convenient, and fast, and that 1-800 Contacts delivers to your door the exact same contacts as your doctor for less than you pay to travel to your doctor to pick them up. (Coon, Tr. 2693).

407. 1-800 Contacts recognizes that 1-800 Contacts and other online retailers compete on the basis of convenience and price. (CX1743 at 009 (1-800 Contacts Management Presentation, September 2015) ("Online penetration within the contact lens industry continues to increase steadily due to superior convenience and price. Strong secular trends toward smartphones and ease of re-ordering via mobile enhance the value proposition of online's convenience."); CX0439 at 0014 ("Consumer[s] are primarily going online for convenience and better pricing.")).

408. Online retailers, including 1-800 Contacts, are not well positioned to capture sales made to consumers with vision insurance who prefer to purchase from in-network retailers, which typically includes ECPs, but excludes major online retailers (F. 409). (Evans, Tr. 1440-41; CX8006 (Evans Expert Report at 114 ¶ 252); CX1449 at 189; RX0428 at 0040 (2015 1-800 Contacts Management Presentation noting: "Today consumers cannot use their vision benefits to buy contact lenses online.")).

409. 1-800 Contacts and most other online retailers are, for purposes of insurance coverage, out-of-network providers. (CX8006 (Evans Expert Report at 114 ¶ 252); CX1449 at

8 *See* JX0002-A at 030 (CX1449 admitted for all purposes).

189; RX0428 at 0040; CX1818 (showing that Vision Service Provider's network includes only ECPs, Walmart, Costco, and participating retail chains, and listing 1-800 Contacts and all "other online" as out-of-network providers); CX9017 (Blackwood Dep. at 165) ("We did not actually – we did not execute insurance policies. We did not accept insurance."); CX9034 (Roush Dep. at 199) (1-800 Contacts is out-of-network for insurance carriers, "which means the customer has to fill out a form," while "[d]octors a lot of times can take insurance just simply by asking them for an insurance card, and then they can process it. That's in-network insurance.")).

2. Industry Recognition

410. Online contact lens retailers recognize the online contact lens retail market as a distinct market. (F. 411-417).

411. A 2004 1-800 Contacts document identified one of its "growth strategies," as the development and execution of a plan to dominate the "Internet contact lens market." (CX0055 at 006 (2004 Strategy Offsite Summary)).

412. Documents prepared and presented by 1-800 Contacts refer to the online market as a separate economic entity. ([redacted] at 0005, *in camera* (1-800 Contacts has "#1 overall market share in the contact lens industry and 60%+ share of the online contact lens market.")). *See* Bethers, Tr. 3807-08 (testifying that he personally presented [redacted]).

413. Documents prepared by 1-800 Contacts to present at Board of Directors Meetings refer to the online market as a separate entity. (*E.g.*, CX0621 at 117, 120 (analyzing status of trademark litigation in relation to share of online market for sales of contact lenses); CX0535 at 010 (describing pricing strategy: "price below independent ECPs, close to retail chains, but above our online competitors and Costco.")).

414. A [redacted] focused on 1-800 Contacts' competitive position compared to its online rivals. ([redacted] at 0005, *in camera* (2015 1-800 Contacts Management Presentation) ("20x the unaided brand recognition of the next largest online competitor"), 0008 (analyzing 1-800 Contacts' share of online contact lens market), 0010 ("Only online player with scale to conduct broad advertising such as TV.")).

415. 1-800 Contacts' CEO and president Mr. Bethers has publicly described online retailers as 1-800 Contacts' major competitors. (Bethers, Tr. 3724-28) (confirming statements made in an October 2016 radio interview).

416. Other online retailers of contact lenses consistently identify online retailers as their main or closest competitors. (Clarkson, Tr. 187-88; Hamilton, Tr. 391-93; Holbrook, Tr. 1887-88, 1898-1900; CX9018 (Drumm, Dep. at 115-16); CX9000 (Batushansky, IHT at 19-20); CX8003 (Mitha, Decl. at 001 ¶ 4); CX8001 (Hamilton, Walgreens, Decl. at 001 ¶ 3); CX8002 (Hamilton, Vision Direct, Decl. at 001 ¶ 3); CX9003 (Clarkson, IHT at 23-24)).

417. LensDirect's CEO Ryan Alovis does not consider any brick and mortar retailers to be among its "main competitors" or its "primary competition." (Alovis, Tr. 988 (LensDirect's "primary competition" consists exclusively of online firms); CX9023 (Alovis, Dep. at 108, 110) (LensDirect's "main competitors" are exclusively online firms, and none of its main competitors are "companies that sell contact lenses in brick-and-mortar stores.")).

3. Specialized Facilities

418. Specialized facilities are required in order to sell contact lenses online on a significant scale. (F. 419-429).

419. 1-800 Contacts has specialized facilities, including a 130,000 square foot distribution center and "[f]ully-

automated packaging, sealing, sorting and validation system." (RX0428 at 0034. *See also* Bethers, Tr. 3642 (1-800 Contacts is looking to open an east coast distribution hub and five additional "spoke" facilities in order to provide two-day delivery, which online customers often expect.)).

420. 1-800 Contacts sells fulfillment services to physical retailers including LensCrafters, Pearle, Sears, and Target Optical. "1-800 CONTACTS' robust infrastructure" provides a "strong[] value proposition" to "brick and mortar retailers" which do not have such an infrastructure and are instead "focus[ed] on core prescription business (e.g. selling higher margin glasses." (Bethers, Tr. 3519-20; RX0428 at 0045; *see also* CX0439 at 014 ("Fulfillment and distribution capabilities [are] critical for online" sellers and even "[l]arge scale B&M [(brick and mortar)] players even have issues managing this part of the business.")).

421. 1-800 Contacts recognizes that its specialized assets created a "growth opportunity" to provide "e-commerce, fulfillment, distribution and sourcing services" to brick and mortar retailers. (RX0428 at 0045).

422. Walmart contracted with 1-800 Contacts for its online operations, including prescription verification, distribution, customer service, and marketing from January 2008 until December 31, 2012. (CX0526 at 039; RX0428 at 0019).

423. In 2013, AC Lens began providing "white label services" to Walmart. White label service allows rebranding and is an e-commerce service that entails building a website for its partner, providing customer service such as answering telephone calls on the partner's behalf, fulfilling orders, providing prescription verification, and providing customer retention services such as sending emails to existing customers. Under the arrangement between AC Lens and Walmart, AC Lens fulfilled orders placed on Walmart's websites and handled customer retention efforts for Walmart customers, but Walmart conducted its own

marketing activities, including internet search marketing. (CX9037 (Owens, Dep. at 40-42); CX9018 (Drumm, Dep. at 53-54); Clarkson, Tr. 176-77; CX9003 (Clarkson, IHT at 9-10); CX9039 (Clarkson, Dep. at 192-93)).

424. 1-800 Contacts and other online retailers have extensive inventories of contact lenses. (Coon, Tr. 2881 (1-800 Contacts had an inventory of 65,000 SKUs worth millions of dollars); RX1228 at 0010 (1-800 Contacts stocks over 60,000 SKUs); Clarkson, Tr. 191-92 (AC Lens has 37,000 SKUs in stock); Holbrook, Tr. 1869-70 (Memorial Eye made "a huge investment" in purchasing inventory, which was significantly larger than the inventory carried by its brick and mortar stores); CX9014 (Batushansky, Dep. at 108-09, *in camera*) (Web Eye Care is able to fill the vast majority of orders quickly from its stock or through distributors, with only approximately [redacted]% of orders going on backorder)).

425. ECPs and brick and mortar retail stores do not carry nearly as extensive inventories of contact lenses as online retailers. (Coon, Tr. 2876 (Costco could fill at most 30% of its prescriptions from inventory, which was higher than most eye doctors); Clarkson, Tr. 191-92 (Walmart and Sam's Club have a selection of maybe four different lenses, perhaps a total of 400 SKUs in the store. "A doctor usually would have even less [than Walmart and Sam's Club], and many doctors don't carry any inventory.")).

426. Online retailers must invest in, build out, and maintain sophisticated websites. (Holbrook, Tr. 1860-62 (designing and building out website was an investment); CX0525 at 016 (2012 1-800 Contacts management presentation notes that 1-800 Contacts invests in having a "best-in-class website," with continuing "site optimization through constant user monitoring and surveys," "new customer tutorials to help enter order and prescription information," "simple and streamlined order process for new and repeat customers," and 24/7 "click-to-chat" services)).

427. To participate in online sales at scale, online contact lens retailers must invest in prescription verification systems. (Clarkson, Tr. 180-81; *see also* CX9003 (Clarkson, IHT at 26) ("larger companies now would have an online database of all of the doctors in the United States" for prescription verification)).

428. Online retailers of contact lenses, other than 1-800 Contacts, rely almost exclusively on internet search advertising to reach potential customers. (*Infra* II.K.1).

429. Brick and mortar retailers, including independent ECPs and club stores, generally do not engage in substantial internet search advertising to reach potential customers. (*See, e.g.*, CX8004 (Salas, Decl. at 002 ¶ 8) (Costco does not use search advertising to promote sales of contact lenses); CX9024 (Holbrook, Dep. at 26-28) (for its brick and mortar stores, Memorial Eye relies mostly on direct mailing; but for its online stores it relied primarily on internet search advertising).

4. Distinct Prices

430. Online retailers of contact lenses charge distinct prices which differ from prices charged by physical retailers. (F. 431-453).

431. On average, independent ECPs have the highest prices for contact lenses. (Bethers, Tr. 3543-44; RX0428 at 0012; Clarkson, Tr. 189-90 ("historically we have thought of eye doctors as being 25-plus percent higher"); Coon, Tr. 2709-10 ("doctors . . . have generally higher prices and relatively poor service")).

432. On average, retail optical chains, such as LensCrafters, Pearle Vision, and Visionworks, are priced just below independent ECPs, but generally above online retailers and club stores (Costco, Sam's Club, and BJ's Wholesale). (Bethers, Tr. 3544; RX0428 at 0012).

433. 1-800 Contacts sets its prices by looking primarily at independent ECPs' and optical retail chains' prices. (Bethers, Tr. 3542, 3549-50).

434. 1-800 Contacts on average has retail prices for contact lenses below independent ECPs and retail optical chains, but higher than mass merchants, club stores, and other online retailers. (Bethers, Tr. 3544).

435. A 2015 analysis shows that 1-800 Contacts' net prices were [redacted]% lower than independent ECPs and [redacted]% lower than LensCrafters. (RX1228 at 0036, *in camera*). A 2014 analysis of prices shows that based on a subset of high-volume products, 1-800 Contacts prices were [redacted]% lower than independent ECPs for an annual supply and [redacted]% lower than independent ECPs for a 6-month supply. (CX0549 at 063, *in camera*).

436. In 2011, in response to competition from "aggressive price messaging" by other online retailers, 1-800 Contacts reinstituted a price matching policy, pursuant to which 1-800 Contacts' online advertising copy was changed to state: "We Beat Any Online Price." (CX0658 at 001; CX9012 (L. Schmidt, IHT at 251-54)).

437. When the unilateral pricing policies ("UPP") (F. 476) was in place after the first half of 2014, 1-800 Contacts offered to beat any price where they could by 2% or to match any price. (CX9032 (L. Schmidt, Dep. at 130).

438. In 2016, 1-800 Contacts price matching policy states: "We'll beat any price on every product we carry by 2%" ("price matching policy"). (CX9034 (Roush, Dep. at 158); CX1334 at 013).

439. To take advantage of 1-800 Contacts' price matching policy, a customer needs either to make a phone call to 1-800 Contacts or to utilize the chat function on the 1-800 Contacts' website. (CX1334 at 013; Bethers, Tr. 3798).

440. 1-800 Contacts' decision to implement the price matching policy was not influenced by the prices charged by physical retailers. (CX9012 (L. Schmidt, IHT at 258)).

441. On average, mass merchandisers, such as Walmart, Target, Sears, and J.C. Penney, have contact lens prices below independent ECPs, optical retail chains, and 1-800 Contacts, but higher than club stores and other online retailers. (Bethers, Tr. 3544; RX0428 at 0012).

442. Online retailers other than 1-800 Contacts generally offer the lowest prices for contact lenses, except for membership clubs. (Bethers, Tr. 3536-37, 3544-45; Clarkson, Tr. 189-90 ("[I]t's also generally true that in most cases online pricing is significantly lower than for any of the brick-and-mortar channels, with the exception of the clubs."); Holbrook, Tr. 1888 (Memorial Eye's small chain of brick and mortar stores priced contact lenses "quite a bit higher" than its national pure-play online storefront)).

443. LensDirect looks at its online competitors' prices and sets its prices below 1-800 Contacts' prices to be competitive with the other online retailers. (Alovis, Tr. 989; CX9023 (Alovis, Dep. at 108)).

444. AC Lens sets its prices to be in line with other online retailers such as Vision Direct, Coastal Contacts, and Lens.com. AC Lens' prices are not based on prices charged by ECPs because "[t]hose prices are typically so much higher that they're not going to be relevant in the [pricing] decision." AC Lens' prices are not based on prices charged by brick and mortar stores because those prices are higher to cover overhead costs, such as a trained optical staff and rent costs for retail space. (Clarkson, Tr. 196).

445. Web Eye Care does not "consider the prices for contact lenses at brick and mortar stores" and focuses exclusively on online rivals' prices. (CX9000 (Batushansky, IHT at 18-21); CX9014 (Batushansky, Dep. at 68)).

446. During the time period that Memorial Eye sold contacts both online and in physical stores, it charged significantly lower prices online than it did in its physical stores. (Holbrook, Tr. 1888-89).

447. In setting its online prices, Memorial Eye considered only the prices of other online retailers and did not consider the prices charged by ECPs or brick and mortar retailers because those prices were not "relevant" to its online business. (Holbrook, Tr. 1898-1900).

448. Membership clubs, such as Costco, Sam's Club, and BJ's Wholesale, generally have the cheapest prices for contact lenses. (Bethers, Tr. 3544-45; RX0428 at 0012).

449. Prices charged by membership clubs such as Costco are distinct from the prices charged by online retailers because of the separate membership fee charged to their members. (CX9017 (Blackwood, Dep. at 288) (Costco and BJ's pricing strategies take into account that part of the pricing comes from the membership fee); Clarkson, Tr. 196-97 ("[E]ven though club stores have very competitive pricing, they're not a big part of . . . [our] analysis to figure out where to put prices because, for one thing, it's a very different category of customer. They've paid a membership fee and in some cases, especially Costco, they're incredibly loyal to Costco."); CX9000 (Batushansky, IHT at 19) (Web Eye Care does not "consider the prices for contact lenses at brick and mortar stores" including Costco, because customers are "not comparing us to Costco."); CX9017 (Blackwood, Dep. at 288); CX9034 (Roush, Dep. at 156) (warehouse clubs have a distinct pricing model that includes membership fees)).

450. 1-800 Contacts' stated price matching policy (F. 438) is that it does not match membership clubs, such as Costco or Sam's Club. (CX1334 at 013 (Sept. 2016 Price Matching Review); RX0428 at 012 (price matching excludes membership clubs); CX9034 (Roush, Dep. at 156) ("[O]ur price matching has typically excluded clubs as a policy. And the reason for that is pretty simple, and

that is that there's a fee, a membership fee that's associated with clubs, and so you have to pay that fee."); CX9017 (Blackwood, Dep. at 288); CX9032 (L. Schmidt, Dep. at 140-41); CX1337 at 001-02)).

451. "[O]nline customers are looking primarily for low price and quick delivery." (Holbrook, Tr. at 1889 ("low price is a substantial part of what goes into them making a decision as to where they buy"); Alovis, Tr. 1034; Clarkson, Tr. 218).

452. 1-800 Contacts' price-matching program is an attempt to compete on price against online retailers. (Bethers, Tr. 3629, 3774).

453. Dr. Evans concluded that the price difference between online retailers and physical stores was strong evidence that the online channel is a separate relevant market: "[W]e have a set of firms, the doctors and other physical retailers, that are charging higher prices and offer less convenience and service. It is not possible for that situation to exist in a market where they're all close substitutes and they're competing . . . ." (Evans, Tr. 1522-24).

5. Critical Loss Analysis

454. Complaint Counsel's expert witness, Dr. Evans, analyzed whether the proposed market for the online sale of contact lenses would satisfy the hypothetical monopolist test. The hypothetical monopolist test asks whether a hypothetical monopolist could profitably impose a "small but significant non-transitory increase in prices" ("SSNIP"). (CX8006 (Evans Expert Report at 116-17 ¶¶ 255-56) (citing DOJ & FTC, Horizontal Merger Guidelines § 4.1.1 (2010)); RX0739 (Murphy Expert Report at 0076-77 ¶ 211)).

455. If a hypothetical monopolist is able to raise prices significantly, this indicates that consumers in the proposed market do not have the ability to turn to other substitutes easily enough to defeat that price increase and thus the

proposed market is a relevant antitrust market since it excludes products that are not materially important substitutes. (Evans Tr. 1448-49; CX8006 (Evans Expert Report at 116 ¶ 255)).

456. A commonly used method for implementing the SSNIP test is referred to as a "critical loss analysis." Respondent's expert witness, Dr. Kevin Murphy, agrees that a critical loss analysis can provide useful information for defining a relevant market. (RX0739 (Murphy Expert Report at 0076-77 ¶¶ 211-12); CX8006 (Evans Expert Report at 117-18 ¶¶ 257-58)).

457. Performing a critical loss analysis requires a determination of: (1) profit margins; and (2) diversion ratios (F. 458). (Evans, Tr. 1448-49; CX8006 (Evans Expert Report at 117 ¶ 257; RX0739 (Murphy Expert Report at 0077 ¶ 212)).

458. A diversion ratio is the share of a firm's lost sales that would be diverted to other firms in the candidate market in response to a price increase of some specified level. (Evans, Tr. 1448-49; RX0739 (Murphy Expert Report at 0077 ¶ 212); CX8006 (Evans Expert Report at 117 ¶ 257)).

459. Dr. Evans found 1-800 Contacts' contribution profit margin[9] to be about [redacted]% and calculated other online sellers' contribution profit margins to be about [redacted]%.[10] (Evans, Tr. 1455; CX8006 (Evans Expert Report at 123 ¶ 268), *in camera*).

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9 Dr. Evans explained that 1-800 Contacts defines contribution margin as Net Revenue less the sum of cost of goods sold, credit card expense and Variable SG&A (Selling, General, and Administrative expenses), where Variable SG&A does not include most marketing. Dr. Evans further explained that exclusion of most marketing expenses as a variable cost makes sense in performing a critical loss analysis because a rival would not need to increase its marketing to obtain additional customers that were driven to it because of a price increase by its rivals. (CX8006 (Evans Expert Report at 123 ¶ 268)).

10 Dr. Evans calculated "other online sellers'" margins based on data from Walgreens, Vision Direct, Lens Discounters, and AC Lens. (CX8006 (Evans Expert Report at 123-24 ¶ 268 n.294)).

460. Given the profit margins (F. 459), a diversion ratio of 23% or higher would support a finding that a SSNIP would be profitable. (Evans, Tr. 1454-56; CX8009 (Evans Rebuttal Expert Report at 061-62 ¶ 106); *see also* Murphy, Tr. 4168 (if the diversion ratio is below the mid-20s, then it would not pass the SSNIP test)).

461. Dr. Evans determined the diversion ratio from 1-800 Contacts to other online retailers to be 40%, based principally on a January 2013 1-800 Contacts presentation titled, "Where's the love? Deadfile Customer Survey," combined with other available evidence (F. 464). (CX8006 (Evans Expert Report at 121-22 ¶ 266); CX1117).

462. A January 2013 1-800 Contacts presentation titled, "Where's the love? Deadfile Customer Survey" ("the 2013 Deadfile Customer Survey") reported the results of a survey conducted by 1-800 Contacts of its customers. The 2013 Deadfile Customer Survey reports that for those customers who are unlikely to buy from 1-800 Contacts for their next purchase, 40% responded they would purchase from an online retailer other than 1-800 Contacts. (CX8006 (Evans Expert Report at 121-22 ¶ 266); CX1117 at 015).

463. Dr. Evans did not know if the results in the 2013 Deadfile Customer Survey on which he relied (F. 462) asked consumers what they would do if 1-800 Contacts raised prices. (Evans, Tr. 1777).

464. Dr. Evans supported his selection of 40% as his diversion ratio by other evidence showing consistent percentages of 1-800 Contacts' customers who switched to other online retailers. (CX8006 (Evans Expert Report at 120-23 ¶¶ 263-68) (citing survey data showing that for participants who previously purchased from 1-800 Contacts, 34% switched to other online retailers; survey data showing that for participants who previously purchased from 1-800 Contacts, "the high 20 percent range" switched to other online retailers; a presentation prepared by Bain & Company which reports "[p]rice-driven lapsers are more

likely to move to another online player" and shows 50% of price-driven lapsers shifting to other online retailers); *see also* CX1117 at 006 (The 2013 Deadfile Customer Survey reporting that of former customers who have purchased elsewhere and self-report that they will not make their next purchase from 1-800 Contacts, 38% say they will make their next purchase from another online supplier.)).

465. 1-800 Contacts' documents show that many customers switch between making their initial purchase of contact lenses (after receiving a new prescription) from an ECP and their refill purchases from 1-800 Contacts. Thus, much of the switching to ECPs and brick and mortar retailers reflects switching due to a change in circumstance rather than a change in competitive factors. (CX8006 (Evans Expert Report at 121-22 ¶ 266); [redacted], *in camera*).

466. In Dr. Evans' critical loss analysis, his 40% diversion ratio was based on former customers who have actually left 1-800 Contacts, rather than customers switching back and forth between ECPs and 1-800 Contacts. (CX8009 (Evans Rebuttal Expert Report at 060 ¶ 104)).

467. Dr. Evans assigned a 40% diversion ratio from other online sellers to 1-800 Contacts based on evidence that suggested that a large share of customers at other online retailers previously shifted from 1-800 Contacts to these retailers to get better prices and an assumption that those customers would presumably shift back to 1-800 Contacts if prices at all other online retailers rose. (CX8006 (Evans Expert Report at 122 ¶ 267)).

468. Dr. Murphy used a 17% diversion ratio to calculate that a hypothetical monopolist consisting of all online retailers of contact lenses could profitably increase prices by only 3.5%, which is below the 5% SSNIP threshold. (Murphy, Tr. 4168; RX0739 (Murphy Expert Report at 0078 ¶¶ 214-16)).

469. Dr. Murphy acknowledged that documents provided by 1-800 Contacts show a wide range of lost sales diverted

from 1-800 Contacts to other online retailers, with some documents reporting that as few as 17% of 1-800 Contacts' former customers have substituted to other online suppliers, but other documents reporting as many as 40% or 50% of 1-800 Contacts' former customers would purchase from an online retailer other than 1-800 Contacts. (RX0739 (Murphy Expert Report at 0078 ¶ 214)).

470. Dr. Murphy derived his 17% diversion ratio from a different slide in the same document relied upon by Dr. Evans, the January 2013 1-800 Contacts presentation titled, "Where's the love? Deadfile Customer Survey." The 2013 Deadfile Customer Survey reports that for those customers whose last purchase was not from 1-800 Contacts, 49% reported their most recent contact lens purchase was from an eye doctor and 17% reported their most recent contact lens purchase was from another online supplier. (RX0739 (Murphy Expert Report at 0078 ¶ 214); CX1117 at 016).

471. Every customer of 1-800 Contacts must go back to an ECP to renew their prescription or obtain a new prescription and when they do so, they often make purchases from their ECP. (Bethers, Tr. 3626-27).

472. Dr. Murphy's reliance on a high percentage of 1-800 Contacts' customers who made purchases from ECPs compared to those who switch to other online sellers is not an appropriate diversion ratio because it does not rely on customers who are actually lost. Dr. Murphy errs by treating as a "lost sale" a 1-800 Contacts customer who cycles between buying from ECPs when they require a new prescription and buying from 1-800 Contacts when they need a refill. (Evans, Tr. 1538-39 (discussing CX1117 at 015-16 (1-800 Contacts 2014 Board Meeting Presentation); Murphy, Tr. 4155-57; CX8009 (Evans Rebuttal Expert Report at 060-061 ¶¶104-05)).

473. Using the estimates of profit margins in F. 459 and diversion ratios of 40%, Dr. Evans concluded that a hypothetical monopolist consisting of all online retailers of

contact lenses could profitably increase prices by 12.1%. (CX8006 (Evans Expert Report at 124 ¶ 269)).

474. The other surveys discussed by Dr. Evans (F. 464) suggest a diversion ratio from 1-800 Contacts to other online retailers of either 26% or 34%. (CX8009 (Evans Rebuttal Expert Report at 061-62 ¶ 106 n.143); RX0739 (Murphy Expert Report at 0078 ¶ 214 and Exhibit 15)).

475. Because both Dr. Evans and Dr. Murphy found that a diversion ratio of 23% or higher would support a finding that a SSNIP would be profitable (F. 460), accepting 26% or 34% as diversion ratios would lead to a conclusion that the critical loss test supports a relevant market consisting of online sellers of contact lenses. (CX8009 (Evans Rebuttal Report at 061-62 ¶ 106)).

6. Unilateral Pricing Policies

476. In 2014, major contact lens manufacturers prohibited retailers that bought their products from reselling certain of those products at prices below specified levels. This resale price maintenance is referred to within the industry as unilateral pricing policies ("UPP"). (CX8006 (Evans Expert Report at 125 ¶ 271); CX1336 at 130; *see also* Murphy Tr. 4172).

477. Johnson & Johnson introduced its UPP for its Acuvue Oasys contact lens line on July 1, 2014 and for its other products on August 1, 2014. Other manufacturers applied their respective UPPs in 2013 and 2014, largely to new products rather than to existing products. Johnson & Johnson terminated its UPP program on April 13, 2016, but other manufacturers have continued their programs. (CX8006 (Evans Expert Report at 125 ¶ 271); CX1336 at 130).

478. The manufacturers' intent and purpose with UPP was to help ECPs be more competitive against non-ECP retailers by increasing the prices of the online retailers and other contact lens discounters to the level of prices charged by

ECPs. (CX8006 (Evans Expert Report at 125-26 ¶ 272); Murphy, Tr. 4154-55, 4172).

479. Because UPP set a price floor for covered products, discount sellers (online retailers and club stores) had to increase their prices substantially, by roughly 20 to 25%, on many of the affected products. (CX8006 (Evans Expert Report at 125-26 ¶ 272); *see also* CX1346 at 018, *in camera* [redacted].

480. With the exception of club stores, brick and mortar sellers were already largely pricing close to or above the levels required by Johnson & Johnson's UPP, so their prices did not change substantially. The ECPs that were lower priced before the UPP went into effect may have had some price increases, but those increases would have been significantly less than those of the online retailers. (Evans, Tr. 1445; CX8006 (Evans Expert Report at 125-26 ¶ 272); *see also* CX1346 at 004, *in camera* [redacted].

481. Dr. Evans examined the change in profits on sales of Johnson & Johnson products at four discount online retailers that were forced to substantially increase their prices as a result of UPP. Dr. Evans found that profits increased by [redacted]% at Walgreens, [redacted]% at Vision Direct, [redacted]% at Coastal Contacts, and [redacted]% at AC Lens. (Evans, Tr. 1443-44; CX8006 (Evans Expert Report at 126-27, 194-200 ¶¶ 272-73, Appendix H), *in camera*).

482. 1-800 Contacts, which sets its prices at a small discount to ECPs (F. 433-435), did not need to increase its prices significantly in response to UPP. (Evans, Tr. 1445).

483. The UPP reduced 1-800 Contacts' ability to offer overall discounts, which had a favorable impact on the company's margins. (CX9025 (Osmond, Dep. at 81-82)).

484. A February 2015 marketing presentation for 1-800 Contacts states that [redacted]. (CX0296 at 008, *in camera*).

485. Because the discount sellers' (online retailers and club stores) price increases of roughly 20% following the UPP were profitable, "the physical retailers were not a sufficiently significant constraint to prevent the profits [of the discount sellers] from going up as a result of the price increase" and thus physical retailers are not in the relevant market. (Evans, Tr. 1445; (CX8006 (Evans Expert Report at 127 ¶ 274)).

486. Based on the "natural experiment" of the UPP-mandated price increase, a hypothetical monopolist consisting of online sellers and club stores could profitably increase its prices above the 5% threshold of the SSNIP test (F. 454), which implies that discount sellers represent a market. (CX8006 (Evans Expert Report at 127 ¶ 274); CX8009 (Evans Rebuttal Expert Report at 62 ¶ 107)).

487. Because the candidate market tested by the UPP natural experiment included club stores, the results of the UPP experiment, viewed alone, do not allow the exclusion of club stores from the relevant market, but do provide evidence that non-club store brick and mortar sellers are not close substitutes for online sellers of contact lenses. (Evans, Tr. 1445-46, 1571).

I. Relevant Geographic Market

488. The relevant geographic market is the United States. (RRCCFF 1623; CX8006 (Evans Expert Report at 019 n.5, 022-23 ¶ 54)).

489. The relevant geographic market does not extend to products sold to consumers outside the United States

because contact lenses are a medical device subject to regulation by federal law. (RRCCFF 1624; Holbrook, Tr. 1881-82; Coon, Tr. 2719-20; *see also* CX8007 (Athey Expert Report at 012 ¶ 27)).

490. The relevant geographic market extends to the entire United States because many online contact lens retailers ship their products nationally. (RRCCFF 1625; Clarkson, Tr. 183; Holbrook, Tr. 1860; Evans Tr. 1690, 1692; *see also* CX8006 (Evans Expert Report at 092 ¶ 199)).

J. Market Shares

491. The approximate shares for the four types of contact lens retailers (*supra* II.D) are: (1) independent ECPs, 40%; (2) optical retail chains, 20%; (3) mass merchants and club stores, 23%; and (4) online retailers, including 1-800 Contacts, 17%. (Bethers, Tr. 3551-56; RX0904 at 0039; CX0525 at 040; CX1446 at 009; RX1117 at 0024; RX0736 (Goodstein Expert Report at 009); RX0739 (Murphy Expert Report at 0086)).

492. 1-800 Contacts' sales account for about 10% of total contact lens sales in the United States. (Bethers, Tr. 3551-53; CX0526 at 007; RX0904 at 0039).

493. 1-800 Contacts' sales account for greater than 50% of online sales of contact lenses in the United States. (CX8007 (Athey Expert Report at 007 ¶ 17); CX8006 (Evans Expert Report at 007 ¶ 8)).

494. In 2015, 1-800 Contacts estimated that it had the number one position of market share of all sellers in all retail sales of contact lenses in the United States and more than 60% share of the online contact lens market in the United States. (CX1446 at 005; *see also* CX9001 (Bethers, IHT at 159-60) (1-800 Contacts CEO testifying that 1-800 Contacts' sales constituted approximately 62% of the online contact lens market)).

495. In 2015, the shares of online sales of contact lenses in the United States were as follows: 1-800 Contacts ([redacted]%);

Vision Direct ([redacted]%); Lens.com ([redacted]%); Walgreens ([redacted]%); Lens Discounters ([redacted]%); AC Lens ([redacted]%); Walmart ([redacted]%); Coastal ([redacted]%); WebEyeCare.com ([redacted]%); EZ Contacts USA ([redacted]%); Lensfast, LLC ([redacted]%); LensDirect ([redacted]%); Others ([redacted]%). (CX8006 (Evans Expert Report at 022-23 ¶ 54, Table 1, *in camera*)).

496. 1-800 Contacts and the 14 parties that have formal written agreements with 1-800 Contacts account for 79% of online sales of contact lenses in the United States. (Evans, Tr. 1376; CX8006 (Evans Expert Report at 130 ¶ 279)).

K. Anticompetitive Effects

1. Commercial Importance of Advertising in Response to Searches for 1-800 Contacts' Trademarks

a. Importance of paid search advertising in marketing contacts online

497. Paid search advertising (also referred to as "pay-per-click" advertising or "search advertising") is an important method for marketing contacts online, including for increasing brand awareness and obtaining new customers. (F. 499-564).

498. Search advertising is an important method for marketing contacts online, including because the advertising is presented to a consumer at a time when the consumer is more likely to be looking to buy. (F. 499-564).

i. AC Lens

499. Search advertising accounts for between 60 and 70% of AC Lens' advertising expenditures, not including search advertising that AC Lens' affiliates engage in on AC Lens' behalf. (Clarkson, Tr. 220).

500. The reason AC Lens spends a large portion of its advertising budget on pay-per-click search advertising is

that pay-per-click search advertising is "consistently the channel that [AC Lens] ha[s] found productive in terms of bringing in customers at an acquisition cost that [the company has determined] is consistent with [its] financial goals." (Clarkson, Tr. 220-21).

501. Among the marketing channels used by AC Lens, paid search advertising generates the most new customer orders and the most revenue. (CX9018 (Drumm, Dep. at 123-24); CX9039 (Clarkson, Dep. at 174)).

502. In the view of AC Lens, pay-per-click search advertising is the most effective and important marketing channel that AC Lens uses to grow its business. (Clarkson, Tr. 230 (pay-per-click "has been historically the lifeblood of [AC Lens'] growth."); CX9039 (Clarkson, Dep. at 175-76 (search advertising has played a "tremendous role" in AC Lens' success); CX9018 (Drumm, Dep. at 124-25); CX9018 (Drumm, Dep. at 124-25 (search advertising is particularly effective because it is high volume, in that it presents AC Lens with a high "[t]otal number of potential impressions." The "volume from search is massive, so that's why it's the most important probably.")).

503. To AC Lens, search advertising is a particularly valuable type of advertising because it can be used to target customers who are specifically looking to purchase contact lenses. (CX9039 (Clarkson, Dep. at 173-75) ("[B]road-based marketing that does not target is inherently far less efficient in reaching a target audience. Search is beautiful in the sense that you get right in front of the customer who's looking to buy your product, and you don't pay unless they click on your ad. It's a wonderful thing.")).

504. Pay-per-click advertising allows AC Lens to track performance "at the ad group level and the campaign level" and even "down to the keyword level." (CX9018 (Drumm, Dep. at 118-21); Clarkson, Tr. 230-31).

505. AC Lens' Director of Marketing views search advertising as "cost-effective" as compared to "other marketing channels." (CX9018 (Drumm, Dep. at 124-25)).

506. AC Lens does not advertise contact lenses through online marketplaces such as Amazon.com and eBay.com because [it is AC Lens' understanding that] an advertiser cannot list prescription items such as contacts on those marketplaces. (CX9039 (Clarkson, Dep. at 171-72)).

507. Some years ago, AC Lens attempted to market to new customers via "email blasts," whereby AC Lens purchased email lists of people who were not its customers. The attempt did not generate a lot of sales. AC Lens no longer purchases any external email lists. (CX9039 (Clarkson, Dep. at 212); Clarkson, Tr. 222).

508. AC Lens uses email for "retention marketing . . . to our own customers" and for prospecting to people who have already "visit[ed] the site," and "sign[ed] up [to] receive special offers." (Clarkson, Tr. 222-23; CX9039 (Clarkson, Dep. at 171)).

509. AC Lens also has a "fairly large affiliate program" through which it operates websites for its partners and fulfills customers' orders. (Clarkson, Tr. 218-19; CX9039 (Clarkson, Dep. at 171); CX9018 (Drumm, Dep. at 100) (estimating that AC Lens has approximately 8,000 affiliates)).

510. Affiliate advertising accounts for approximately 15% of AC Lens' advertising expenditures. (Clarkson, Tr. 221; CX9039 (Clarkson, Dep. at 171, 173); CX9018 (Drumm, Dep. at 100)).

511. AC Lens uses Product Listing Ads (F. 271) on Google, which AC Lens believes "are a very important piece of the puzzle." (CX9018 (Drumm, Dep. at 65)).

512. AC Lens has had "a limited presence" on Facebook, Twitter and Instagram. Social media marketing accounts for on average no more than 5% of AC Lens' advertising expenditures. Social media marketing has "[n]ot really" been a successful type of marketing for AC Lens. (Clarkson, Tr. 223).

513. AC Lens has placed advertisements on Facebook "off and on" over the past few years. (CX9018 (Drumm, Dep. at 24)).

514. AC Lens "tested Twitter," but does not currently use Twitter advertising because "[i]t didn't reach the acquisition cost that we needed to reach." (CX9018 (Drumm, Dep. at 24-25)).

515. AC Lens believes that display advertising is less effective than search advertising because display advertising is less targeted. However, one area where AC Lens uses display advertising is for retargeting (F. 249-251). (Clarkson, Tr. 228-30 ("[I]f you buy a banner [advertisement] on, say, the Yahoo health page, you're targeting a pretty broad section of the population, and only roughly 10 percent of people in America wear contact lenses. . . . If someone searches 'buy contact lenses,' that is a very, very targeted consumer.")).

516. The amount of business that AC Lens has been able to derive from comparison shopping engines has declined over time. (Clarkson, Tr. 224).

517. AC Lens has tested direct mail, Valpak, radio, and Google TV and concluded that these methods did not reach customers at an affordable price. (Clarkson, Tr. 219-20; CX9039 (Clarkson, Dep. at 210-11 (customer acquisition cost of magazine advertising was not consistent with company goals); CX9018 (Drumm, Dep. at 23-24 (AC Lens attempted radio advertising and found it to be unsuccessful); CX9039 (Clarkson, Dep. at 178 (AC Lens tested a Google TV ad that turned out to be "quite ineffective in terms of its acquisition cost.")).

518. AC Lens uses "email prospecting," which involves collecting emails from consumers who visit AC Lens' websites but who do not make an immediate purchase, and found it "surprisingly productive" for AC Lens. (Clarkson, Tr. 222-23).

519. Organic search has become less effective in driving business to AC Lens. AC Lens attributes this to search engines' "forcing all organic (free) ads down the search engine results page so [the search engines] can make more money," and to search engines' disfavoring AC Lens' use of multiple websites.[11] (CX9018 (Drumm, Dep. at 65); Clarkson, Tr. at 225; CX9039 (Clarkson, Dep. at 175-76)).

520. AC Lens has not used TV or billboard advertising because those methods are too expensive and target too broad of a population to be cost effective for AC Lens. (CX9039 (Clarkson, Dep. at 178-79, 210-14)).

ii. Empire Vision

521. "[M]ost of" of the Visionworks/Empire Vision's contact lens marketing budget is spent on keyword search advertising. (CX9036 (Duley, Dep. at 54)).

iii. LensDirect

522. Paid search advertising accounts for a significant majority of LensDirect's marketing expenditures. (CX9023 (Alovis, Dep. at 53 (in 2016, search advertising accounted for "the vast majority," approximately 85% to 90%, of LensDirect's marketing expenditures); Alovis, Tr. 992 (LensDirect spends more money on paid search advertising through Google than on any other marketing channel)).

523. LensDirect believes that paid search advertising through Google and Bing constitutes the most important of LensDirect's marketing channels, and has been effective in generating growth for LensDirect. (Alovis, Tr. 992-93).

524. LensDirect was able to assess data regarding the performance of LensDirect's search advertising on a daily basis, including information as to overall expenditures per

11 AC Lens uses multiple websites to provide "white label services" (F. 423) for its affiliates. (Clarkson, Tr. 176, 225).

day, conversion rate, cost per acquisition, and the number of conversions. (Alovis, Tr. 994-95).

525. LensDirect does some display advertising, including for remarketing. With remarketing, if a visitor comes to the LensDirect website and does not make a purchase, LensDirect can "follow" them on the internet and display banners and "remarket" to them. (Alovis, Tr. 1030).

526. During Mr. Alovis' tenure, LensDirect has not advertised on channels outside the internet, such as television, radio, billboards, magazines, or newspapers because, in Mr. Alovis' business judgment, these advertising channels are inefficient compared to internet advertising. (Alovis, Tr. 1029; CX9023 (Alovis, Dep. at 45-48)).

iv. Lens Discounters

527. "Online paid search advertising is the main form of advertising that Lens Discounters purchases." (CX8003 (Mitha, Decl. at 002 ¶ 6); *see also id*. ¶ 7 (Lens Discounters' "spend on online paid search advertising has gone up dramatically in the last several years. Today, we spend five times more on online paid search advertising than we did in 2010.")).

528. In the view of Lens Discounters, online paid search advertising is "essential" to Lens Discounters' ability to attract new customers because it allows the company to reach customers who are seeking to purchase contact lenses online. (CX8003 (Mitha, Decl. at 002 ¶ 6)).

529. Online paid search advertising is Lens Discounters' preferred method of acquiring new customers because it allows Lens Discounters to reach a large number of consumers who are seeking to learn about or purchase contact lenses online. (CX8003 (Mitha, Decl. at 002 ¶ 6)).

530. Online paid search advertising provided Lens Discounters with various metrics that are helpful for evaluating and controlling advertising costs. (CX8003 (Mitha, Decl. at 002 ¶ 6)).

v. Lenses for Less

531. Lenses for Less engages in no forms of internet advertising other than search advertising. (CX8000 (Studebaker, Decl. at 001 ¶ 8)).

532. To Lenses for Less, search advertising is the most important form of advertising for selling contact lenses over the internet. (CX8000 (Studebaker, Decl. at 001 ¶ 8)).

533. To Lenses for Less, search advertising is valuable because it displays Lenses for Less advertisements to potential customers at the time that they have expressed interest in the products that Lenses for Less sells. (CX8000 (Studebaker, Decl. at 001 ¶ 8)).

vi. Memorial Eye

534. Memorial Eye primarily used online search advertising for its online contact lens business. (Holbrook, Tr. 1903; *see also* CX9024 (Holbrook, Dep. at 27) ("online advertising, search advertising" was the "vast, vast, vast majority" of its spending on advertising)).

535. Memorial Eye has primarily relied on online search advertising for its online business because, in its view, such advertising was the most efficient and practical way to attract new customers. Online search advertising increased Memorial Eye's volume and Mr. Holbrook of Memorial Eye believes this was critical to Memorial Eye's growth. (Holbrook, Tr. 1903-04).

536. Memorial Eye ran direct mail advertisements for its online business "[f]or a very brief period of time," approximately "less than two months." Memorial Eye concluded that this direct mail campaign was not effective and did not run another direct mail campaign. (CX9024 (Holbrook, Dep. at 27-28)).

537. In the view of Mr. Holbrook of Memorial Eye, search advertising was "vital" for building its online contact lens

retail business. (CX9024 (Holbrook, Dep. at 30-31); Holbrook, Tr. 1903 (search advertising was critical for Memorial Eye's growth); CX9024 (Holbrook, Dep. at 39-40) (Memorial Eye built the brands of its online contact lens retail websites ShipMyContacts and IWantContacts "primarily through . . . online search advertising.")).

538. Memorial Eye saw value in having a consumer see an ad for a Memorial Eye website, even if the consumer did not click on the ad, because the ad helped build the brand and put the brand in the consumer's mind for the future. (Holbrook, Tr. 1904-05).

vii. Vision Direct

539. As Walgreens' senior manager for online marketing, Glen Hamilton was responsible for managing paid online search advertising for Vision Direct, which Walgreens acquired in 2011. (Hamilton, Tr. 389; CX8002 (Hamilton, Decl. at 002 ¶ 4)).

540. During Mr. Hamilton's tenure at Vision Direct since 2011, Vision Direct advertised "almost exclusively online." (CX9038 (Hamilton, Dep. at 23; *see also* Hamilton, Tr. 402-03 (most of Vision Direct's advertising budget was spent on search advertising)).

541. During Mr. Hamilton's tenure at Vision Direct, Vision Direct spent more on paid search advertising than on any other type of advertising. (Hamilton, Tr. 431-32; *see also* CX8002 (Hamilton, Decl. at 002 ¶ 6)).

542. Paid search advertising "was a major driver" of traffic to Vision Direct's online contact lens retail website and of sales to new and repeat customers. (Hamilton, Tr. 399).

543. Mr. Hamilton of Vision Direct believes that "online paid search advertising has been a major driver in building Vision Direct's business over the years" and is "an essential tool to a company that wants to become a significant online seller of contact lenses." (CX8002 (Hamilton, Decl. at 003 ¶¶ 8-9)).

544. During Mr. Hamilton's tenure, search advertising allowed Vision Direct to adjust its search advertising spending with respect to specific keywords. (Hamilton, Tr. 432).

viii. Walgreens

545. Paid search advertising "was a major driver" of traffic to Walgreens' online contact lens retail website and of sales to new and repeat customers. (Hamilton, Tr. 399).

546. Most of Walgreens' contact lens advertising budget was spent on paid search advertising, since Walgreens' contact lenses were only sold online. (Hamilton, Tr. 402-03; *see also* Hamilton, Tr. 400 (search advertising "was how Walgreens advertised the fact that it sold contact lenses. . . . [S]ince we only sold them online, no one would know about it unless we advertised it. And we advertised it online.")).

547. Paid search advertising helped Walgreens increase consumer awareness of its contact lens business. (Hamilton, Tr. 400).

548. It was important to Walgreens to reach consumers who are searching for the products it sells, who can then reach Walgreens' website and make a purchase with just "a few more clicks." (Hamilton, Tr. 400-01).

549. Search advertising was "[e]specially" important for Walgreens at the time that it began selling contact lenses online because it helped Walgreens let people know that Walgreens was a retailer that offered contacts and allowed Walgreens to "leverage" its existing brand and good will. (Hamilton, Tr. 401; *see also* CX8001 (Hamilton, Decl. at 003 ¶ 9)).

550. Mr. Hamilton of Walgreens believes that online paid search advertising "is an essential form of advertising for Walgreens in order to remain competitive with other online resellers of contact lenses, and grow its online contact lens retail market share." (CX8001 (Hamilton, Decl. at 003 ¶ 8)).

551. During Mr. Hamilton's tenure at Walgreens since 2011, the mechanics of online paid search advertising allowed Walgreens to adjust its spending with respect to specific keywords. (Hamilton, Tr. 432).

ix. Walmart

552. Search advertising is the only type of online advertising for contact lenses that Walmart has used. (CX9033 (Mohan, Dep. at 17-18)).

553. Walmart views search advertising as helpful in acquiring new contact lens customers because it targets people who have already decided to make a purchase, and are searching to buy. (CX9033 (Mohan, Dep. at 18-20)).

554. Walmart considered it useful to show its contact lens advertisements in search advertising results even when users did not click on the ads because showing ad impressions builds brand awareness and awareness that Walmart sells contact lenses. (CX9033 (Mohan, Dep. at 71-72)).

x. Web Eye Care

555. Web Eye Care does not engage in any advertising other than online advertising. (CX9014 (Batushansky, Dep. at 109)).

556. Web Eye Care devotes about [redacted]% of its online advertising expenditures to search advertising. Web Eye Care used search advertising from the company's beginning, and then expanded its use, having determined that it "worked," meaning that it "was within our cost-per-acquisition metrics." (CX9014 (Batushansky, Dep. at 110, 116, *in camera*)).

557. Web Eye Care believes that search advertising helps Web Eye Care get customers, including new customers, by making Web Eye Care visible when consumers are searching for products that Web Eye Care sells, and that

such advertising has helped Web Eye Care grow. (CX9014 (Batushansky, Dep. at 111-12, 115-16)).

558. Web Eye Care believes that search advertising is the advertising method that "drives the most traffic and then that traffic converts to orders, so also by default drives orders." (CX9014 (Batushansky, Dep. at 110-11)).

559. Web Eye Care has never attempted television, radio, or print advertising, because it has limited resources and prefers the ease and instantaneous feedback provided by search advertising. (CX9014 (Batushansky, Dep. at 117-18)).

560. One reason that Web Eye Care has not tried forms of advertising other than search advertising is that search advertising is "relatively easy to administer." (CX9014 (Batushansky, Dep. at 117-18)).

561. Web Eye Care also has not tried forms of advertising other than search advertising because search advertising provides "more instantaneous feedback," meaning that the advertiser "can get feedback regarding the viability of it relatively quickly," such that "you don't have to spend money over a long period of time before you know the success of it. . . . So if it's not working, you can turn it off," leading to "less risk of failure." (CX9014 (Batushansky, Dep. at 117-18)).

b. Expert opinion

562. Consumers "using search to look for products to buy online . . . are often ready to buy." If the company does not make a sale during that search session, it may not make the sale later. The company cannot readily substitute another type of advertising to reach that user at that time, such as bidding on a different search keyword, buying a Facebook Newsfeed ad, or buying a banner ad on the Yahoo! homepage, "because it is unlikely that the user will see that ad right before she buys." (CX8006 (Evans Expert Report at 033-34 ¶ 76)).

563. Search advertising is a particularly efficient method of marketing for small firms, because search engines provide all the necessary software for using paid search advertising for free, do not impose any entry or minimum fees for using the service, and charge advertisers only when internet users click on an ad. (CX8006 (Evans Expert Report at 028 ¶ 64)).

564. Online search is one of the key methods by which consumers discover and reach vendors, and compare products and services. (CX8006 (Evans Expert Report at 083)).

c. Importance of trademark paid search advertising in marketing contacts online

565. Displaying an ad in response to a search for 1-800 Contacts' brand name terms is an important method by which lower priced online contact lens retailers compete with 1-800 Contacts for customers. (F. 583-680).

i. 1-800 Contacts

566. Trademark paid search (that is, paid search advertising displayed in response to search queries for 1-800 Contacts' trademark terms and variations thereof) is a significant source of business for 1-800 Contacts. (F. 567-582).

567. 1-800 Contacts' trademark keywords, together with the three most common generic keywords, "contacts," "contact lens," and "contact lenses" are the "biggest contributors to orders" for 1-800 Contacts. (CX0732 at 004; Bethers, Tr. 3654-55; F. 658).

568. 1-800 Contacts monitored and reported its contribution margin, net revenue, gross profit, and marketing expenses separately for trademark and non-trademark terms. (CX0296 at 024 (2015 presentation titled, "1-800 Contacts Affiliate and Paid Search Overview"); CX0558; CX0616 at 001; CX0014 at 001-02).

569. 1-800 Contacts often refers to trademark paid search advertising as "TM paid search." (*See, e.g.*, CX0646; CX9030 (Powell, Dep. at 63-64)).

570. The trademark paid search channel accounts for the substantial majority of 1-800 Contacts' new customer orders attributable to paid search advertising. (CX0051 at 007 ("About 75% of all paid search orders come through our trademark terms"); CX0646 at 005 (in 1-800 Contacts' fiscal year 2011, 74.6% of 1-800 Contacts' NI ("new internet")[12] customer orders attributable to search advertising were generated by TM Paid Search; as reported in "FY 2011 Totals" row of "NI" (new internet) tab of Excel spreadsheet, 125,220 NI orders compared to 42,729 NI orders attributable to "Other Paid Search"); CX0646 at 005 (in 1-800 Contacts' fiscal year 2012, 72.5% of 1-800 Contacts' NI customer orders attributable to paid search attributable to TM Paid Search (138,951) compared to 52,771 NI orders attributable to "Other Paid Search"); CX0646 at 005 (in 1-800 Contacts' fiscal year 2013 through the end of the third quarter, 69.2% of 1-800 Contacts NI customer orders attributable to paid search attributable to TM Paid Search (85,648) compared to 38,129 NI orders attributable to "Other Paid Search"); CX0094 at 001, *in camera* (for the week ending May 31, 2014, trademark paid search orders represented [redacted] out of [redacted] total paid search orders for 1-800 Contacts)).

571. In 2015, between 20 and 31% of 1-800 Contacts' initial web orders came from users searching for 1-800 Contacts' trademark terms. ([redacted] at 030, *in camera* (showing that 20% of initial orders came from "Paid Search on 1-800 CONTACTS Trademark" and 11% of initial orders came from "Natural Search"); Bethers, Tr. 3802 (stating that orders from "Natural Search" could be orders resulting from a search for a 1-800 Contacts trademark);

12 In 1-800 Contacts' internal reports, "NI" refers to "new internet" customers, that is, customers who order via 1-800 Contacts' website who have not ordered from 1-800 Contacts in the past. (CX9015 (Galan, Dep. at 83); CX9017 (Blackwood, Dep. at 57-58)).

CX8006 (Evans Expert Report at 088-89 ¶ 193 and Figure 1)).

572. Each year for 2008, 2007, and 2006, 1-800 Contacts attributed far more orders to "TM Orders" than to "Non-TM Orders." (CX0423 (in 2008, annual totals through Google were 140,923 TM Orders and 47,933 Non-TM Orders; in 2007, annual totals through Google were 112,696 TM Orders and 44,138 Non-TM Orders; in 2006, annual totals through Google were 90,748 TM Orders and 40,035 Non-TM Orders)).

573. 1-800 Contacts' trademark terms have higher conversion rates for 1-800 Contacts than non-branded search terms. (CX9017 (Blackwood, Dep. at 34-35); CX0014 at 001-02).

574. In 2010, 1-800 Contacts' cost-per-click for clicks on advertisements appearing in response to 1-800 Contacts trademark queries was under $0.30. (CX0051 at 006 (Presentation titled, "Search Overview November 2010" ("Big Orders, Little Cost . . . TM CPCs are under $0.30."))).

575. 1-800 Contacts' strategy in search advertising was to spend as much as necessary when bidding on its trademark keywords to meet its goal of ensuring that 1-800 Contacts' advertisement was the first advertisement displayed in response to searches for its trademark. (CX9028 (Roundy Dep. at 86-88); CX9031 (C. Schmidt Dep. at 125-27); CX9020 (Craven at 123-25); Bethers, Tr. 3787-88; CX0296 at 035 (1-800 Contacts February 2015 Affiliate and Paid Search Overview Presentation); CX9032 (L. Schmidt, Dep. at 92)).

576. Laura Schmidt, 1-800 Contacts' marketing director, could not recall an instance in which a 1-800 Contacts' advertisement was not the first advertisement that appeared in response to a 1-800 Contacts trademark search query. (CX9032 (L. Schmidt, Dep. at 91-92)).

577. 1-800 Contacts considers direct traffic to its website to be "much less susceptible to competitive advertising or offers" than non-direct traffic. Sources of direct traffic identified by 1-800 Contacts include email, typed URL/Bookmark,[13] paid search on 1-800 Contacts trademark, and mobile applications. Direct traffic sources account for approximately 70 to 75% of orders. (CX0429 at 013 ("Management Presentation" dated November 2013); [redacted], *in camera* [redacted]).

578. On October 1, 2012, in reporting to 1-800 Contacts' marketing department on a prior week's results for various search advertising methods, 1-800 Contacts' employee Rick Galan noted that "trademark accounts for . . . a large percentage of our orders" and that "small decreases in TM can have large effects overall." (CX0863 at 001).

579. In an email dated August 13, 2012, 1-800 Contacts' then-marketing director Laura Schmidt referred to a decline in trademark paid search as "scary" and attributed it to "our broadcast message being tired and old . . . ." (CX0864 at 001; CX9032 (L. Schmidt, Dep. at 224-25); CX9029 (Bethers, Dep. at 98) (noting correlation between increasing or changing broad scale advertising and increase in customers coming to 1-800 Contacts through trademark search)).

580. 1-800 Contacts earns approximately [redacted]% of its sales from paid search advertising. (RX0739 (Murphy Expert Report at 0049), *in camera*; [redacted] at 0030, *in camera*).

581. [redacted], 1-800 Contacts stated that it had twenty times the unaided brand awareness of the next largest pure-play online competitor. ([redacted], *in camera*).

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13 A customer who wants to go directly to the 1-800 Contacts website can type the URL 1-800 Contacts.com into the browser. (Bethers, Tr. 3572-73).

582. In a 2013 management presentation, 1-800 Contacts stated that 1-800 Contacts' "$413 million cumulative advertising investment (as of 9/2013) has built the leading brand in contact lens retailing" with the result that 1-800 Contacts "has 30% unaided brand awareness," eight times that of the nearest online competitor. The stated result was based on a third-party survey where participants were asked on an unaided basis: "When you think about places to buy contact lenses, what places come to mind?" (CX0429 at 010).

ii. AC Lens

583. In 2002, AC Lens decided not to use 1-800 Contacts' trademarks as keywords for paid search advertising because of legal concerns. (Clarkson, Tr. 324-26; CX9039 (Clarkson, Dep at 196-97); CX9003 (Clarkson, IHT at 90-91)).

584. AC Lens decided to implement negative keywords related to 1-800 Contacts' trademarks in paid search advertising after communications from 1-800 Contacts. (CX9039 (Clarkson, Dep. at 135-36)).

585. AC Lens bids on trademarks of Lens.com, Vision Direct, and ShipMyContacts.
(CX9039 (Clarkson, Dep. at 197)).

586. AC Lens believes it could benefit from showing its advertisements to a person who entered a search query for "1-800 Contacts," "[b]ecause we sell the same products and we sell them at a lower price." (Clarkson, Tr. 378; CX9018 (Drumm, Dep. at 152) ("Bidding on their terms would provide us an opportunity to show those people that there's an alternative."); *id.* at 197 ("There are a lot of people that search for '1-800 Contacts' from what we can tell via the keyword tool and other sources. Those are people who are most likely looking for contact lenses to purchase, and it would be definitely relevant and helpful to advertise our sites in that location.")).

587. To AC Lens, it would be more valuable to show advertisements in response to search queries for 1-800 Contacts' brand name terms than in response to search queries for the brand names of other online contact lens retailers because of "the price advantage that [AC Lens] enjoy[s]" relative to 1-800 Contacts. (CX9039 (Clarkson, Dep. at 156); *see also* Clarkson, Tr. 253 ("Also, there's less value in advertising on, say a Vision Direct term because they're in roughly the same price point, so there isn't quite the same incentive for consumers to switch.")).

588. AC Lens believes its settlement agreement with 1-800 Contacts has kept it from getting sales that it "likely could have gotten by offering a lower price on the same product to consumers." (CX9039 (Clarkson, Dep. at 163-64); *see also* Clarkson, Tr. 260 (stating belief that "given the size of [1-800 Contacts] and the volume of monthly searches," the amount of such sales would have been "significant.")).

589. AC Lens believes that having its ad appear in response to a search for 1-800 Contacts helps to increase brand awareness without any cost for the view, even where a consumer does not click on the AC Lens ad. (CX9039 (Clarkson, Dep. at 158)).

590. Absent its settlement agreement with 1-800 Contacts, AC Lens would want to test using 1-800 Contacts' trademarks as keywords in paid search advertising, if it was "considered to be a legal practice." (Clarkson, Tr. 343; *see also* Clarkson, Tr. 253-54 (stating that if AC Lens were not subject to its agreement with 1-800 Contacts and "[s]ubject to blessing from my corporate counsel," AC Lens would bid on 1-800 Contacts related terms and remove the 1-800 Contacts related negative keywords that AC Lens uses)).

591. AC Lens believes that some portion of people who search for 1-800 Contacts "would be interested in an offer [from AC Lens] that said, '[w]e're 20 percent cheaper'" and that such message "would be a compelling proposition to consumers." (CX9039 (Clarkson, Dep. at 104)).

592. AC Lens believes it has a business interest in showing its advertisements to consumers who entered the search query "1-800 Contacts" even if the consumer's purpose was to navigate to 1-800 Contacts website, because AC Lens' "pricing is sufficiently attractive that we would have a decent shot at converting that customer to shop with us." (CX9039 (Clarkson, Dep. at 158)).

iii. Coastal Contacts

593. After achieving a share of the online contact sales market of over 12% in 2005, Coastal Contacts ceased trademark advertising as a result of its settlement agreement with 1-800 Contacts. At year-end 2007, Coastal Contact's share of the online contact sales market had fallen in half to just 6%. (CX0621 at 122 (agenda and attached documents for consideration at October 30, 2008 1-800 Contacts Board of Directors Meeting)).

iv. Empire Vision

594. Empire Vision is a subsidiary of Visionworks. (CX0943 (Duley, Decl. at 001 ¶ 5)).

595. In the opinion of Visionworks' Director of Marketing Mr. Duley, if the Settlement Agreement were terminated or otherwise invalidated, Visionworks would test to see if any of the keywords prohibited under the Settlement Agreement would be desirable for use, and would also cease using the negative keywords listed in the Settlement Agreement. (CX0943 (Duley, Decl. at 003 ¶¶ 17-18)).

v. LensDirect

596. Based on analysis of data from Google, Dr. Evans concluded that LensDirect advertisements have appeared in response to searches for 1-800 Contacts' brand name terms as a result of LensDirect directly bidding on 1-800 Contacts trademark keywords. (CX8006 (Evans Expert Report at 061 ¶ 132)).

597. Based on his analysis of data from Google, Dr. Evans determined that LensDirect advertisements have appeared in response to searches for 1-800 Contacts' brand name terms as a result of LensDirect bidding on non-trademark keywords and matching of the advertisements by Google. (CX8006 (Evans Expert Report at 061 ¶ 132)).

598. Based on his analysis of data from Google, Dr. Evans determined that in the 12 month time period ending September 2016, LensDirect's advertisements appearing in response to searches for 1-800 Contacts' brand name terms averaged over 90,000 per month. (CX8006 (Evans Expert Report at 061 ¶ 132)).

599. Based on his analysis of data from Google, Dr. Evans concluded that the volume of LensDirect ad impressions appearing in response to searches for 1-800 Contacts brand name terms in the year ending September 2016 was equal to more than one-fifth of the ad impressions of 1-800 Contacts' own advertisements shown in response to the same set of searches during the same time period. (CX8006 (Evans Expert Report at 061 ¶ 132)).

600. One reason LensDirect bids on 1-800 Contacts' trademark terms is LensDirect's belief that a large volume of searches are for these terms and that LensDirect offers a better solution for those customers. (CX9023 (Alovis, Dep. at 121-22); *see also* Alovis, Tr. 1006, 1014).

601. LensDirect has found "great value in bidding on '1-800 Contacts.'" (Alovis, Tr. 1014).

602. LensDirect believes there is value in showing an ad in response to a search for 1-800 Contacts, even if the ad is not clicked on, because it gives LensDirect brand visibility next to the larger players without any cost. (Alovis, Tr. 1006).

603. LensDirect believes its message "Same Contacts, Better Prices" is an appealing message to a consumer who searched for 1-800 Contacts. (Alovis, Tr. 993-94).

604. LensDirect has no plans to stop using 1-800 Contacts terms as search advertising keywords. (Alovis, Tr. 1015-16).

605. In 2016, according to LensDirect marketing reports, terms related to 1-800 Contacts performed well, which means that the terms generated revenue for LensDirect and had "high conversion rates." The term "1-800contacts coupon" has doubled LensDirect's average conversion rate and has a "very attractive" cost per conversion for LensDirect. (CX9023 (Alovis Dep. at 128)).

606. During Mr. Alovis' time as CEO of LensDirect, LensDirect's bidding on 1-800 Contacts terms "absolutely" drove a significant amount of business for LensDirect. (Alovis, Tr. 1014).

607. LensDirect believes that it makes business sense for LensDirect to show advertisements in response to a search for "1800contacts" because "[a] lot of people search for "1800contacts' and we want to be there when they do. . . . We hope to get those interested people to become customers of LensDirect because we believe we're offering . . . a better price for the same product." (Alovis, Tr. 1006).

608. In terms of overall conversions, bidding on 1-800 Contacts terms has been a successful strategy for LensDirect. (Alovis, Tr. 1014).

609. For LensDirect, having advertisements appear in responses to a search for 1-800 Contacts, even if the consumer does not click on the LensDirect ad, can improve LensDirect's brand visibility. This helps LensDirect because "the more times people see LensDirect, the better chance there is of them becoming a customer one day." (Alovis, Tr. 1006-07).

vi. Lens Discounters

610. Prior to receiving a cease and desist letter and other communications from 1-800 Contacts in 2005, Lens

Discounters was bidding on the term "1-800 Contacts" and variations thereof as keywords for search advertising. Beginning in 2005, after receiving a cease and desist letter and other communications from 1-800 Contacts, in order to avoid litigation expense, Lens Discounters "unilaterally decided to stop" such bidding. Lens Discounters also implemented negative keywords requested by 1-800 Contacts in a series of demand letters. (CX8003 (Mitha, Decl. at 002-03 ¶¶ 9, 11-14, 18-29 and exhibits thereto)).

611. During the time that Lens Discounters was bidding on 1-800 Contacts terms, "the cost per conversion for those terms was low, and [Lens Discounters'] conversion rates were good. [Lens Discounters] received a good amount of traffic, as well as resulting orders, from bidding on those keywords." Shaneef Mitha, chief operating officer of Lens Discounters, believes that Lens Discounters attracted customers who used 1-800 Contacts terms in their searches because Lens Discounters' prices were better than 1-800 Contacts' prices. (CX8003 (Mitha, Decl. at 002 ¶ 10)).

612. Bidding on 1-800 Contacts' terms enabled Lens Discounters to generate ad impressions, so that even if consumers did not purchase from Lens Discounters, Lens Discounters was "able to get the Lens Discounters' name in front of a large audience of potential customers." (CX8003 (Mitha, Decl. at 002 ¶ 9)).

613. In or around December 2016, Lens Discounters decided to remove negative keywords relating to 1-800 Contacts and to begin bidding on 1-800 Contacts related terms because it had been previously successful for Lens Discounters and it hoped that such terms would be successful again. (CX8003 (Mitha, Decl. at 005 ¶ 30)).

614. Lens Discounters has found that having its ads appear in response to searches for other online sellers of contact lenses is beneficial because such keywords are cost effective and have resulted in a strong enough return on investment to continue bidding on them. (CX8003 (Mitha, Decl. at 005-06 ¶ 31)).

vii. Lenses for Less

615. Lenses for Less has not entered into any agreement with any other company, including any other online contact lens retailer, similar to its agreement with 1-800 Contacts. (CX8000 (Studebaker, Decl. at 003 ¶ 19)).

616. If its settlement agreement with 1-800 Contacts were terminated and there was no threat of a lawsuit, Lenses for Less would "periodically test to see if it would be profitable to bid on the term '1-800 Contacts' or similar terms, and/or remove the negative keywords we have implemented as a result of our agreement with 1-800 Contacts." (CX8000 (Studebaker at 002 ¶¶ 16-17)).

viii. Memorial Eye

617. Memorial Eye did not bid on the keyword "1-800 Contacts" in search advertising auctions, but Memorial Eye ads were displayed in response to search queries for 1-800 Contacts' trademark terms as a result of Memorial Eye bidding on generic terms (such as "contacts") in broad match or phrase match (i.e., "matched ads" (*see* F. 655)). (Holbrook, Tr. 1905-07; *see also* CX8006 (Evans Expert Report at 093 ¶ 201, n.218) (Based on Google data analyzed by Dr. Evans, the only Memorial Eye ads that appeared in response to 1-800 Contacts branded queries were matched ads)).

618. Based on Google data analyzed by Dr. Evans, between January 2010 and December 2011, Google showed Memorial Eye text ads on approximately 6 million search results pages generated by queries related to 1-800 Contacts brand name keywords and that Memorial Eye's ads appeared on almost half of the search results pages generated by queries that included 1-800 Contacts' brand name between January 2010 and December 2011. The average position of a Memorial Eye ad was second, directly below the ad for 1-800 Contacts. (CX8006 (Evans Expert Report at 012, 095 ¶ 26, n.229)).

619. Memorial Eye found that its online businesses were getting a significant amount of conversions and new customers as a result of its ads appearing in response to generic keywords being broad-matched and phrase-matched to searches for 1-800 Contacts' trademark terms. (Holbrook, Tr. 1877 (referring to "vast amount" of conversions, yielding a "vast amount" of sales); 1907-08 (matched ads generated "a lot of conversions" for Memorial Eye); CX9024 (Holbrook, Dep. at 70-71) (ads appearing in response to a consumer search for 1-800 Contacts' trademark terms drove a "large amount of traffic" to Memorial Eye's website); CX8006 (Evans Expert Report at 012 ¶ 26) (between January 2010 and December 2011, clicks on Memorial Eye ads appearing on search results pages following queries that included 1-800 Contacts' branded queries accounted for 46% of Memorial Eye's search-advertising related sales)).

620. Based on Google data analyzed by Dr. Evans, Memorial Eye had a higher click-through rate on ads displayed for 1-800 Contacts brand queries than for other queries. People who clicked also were more likely to buy from Memorial Eye than people who reached its website by entering other queries. Memorial Eye converted, or made an initial sale on, 11.25% of the clicks on matched ads, which was "almost twice as high a rate of conversions on 1-800 queries than on non-1-800 queries." (Evans, Tr. 1605-06; CX8009 (Evans Rebuttal Expert Report at 084 n.193)).

621. Memorial Eye believes the ability to show advertisements in response to searches for 1-800 Contacts "was extremely important" and "critical" to Memorial Eye's online contact lens retail business. (CX9024 (Holbrook, Dep. at 74)).

622. Memorial Eye believes it benefitted from having ads appear in response to searches for 1-800 Contacts, even if the consumer intended to navigate to 1-800 Contacts' website, because doing so improved Memorial Eye's brand recognition. (Holbrook, Tr. 1910-11).

623. Memorial Eye believes that implementing the negative keywords for 1-800 Contacts terms that 1-800 Contacts

was asking Memorial Eye to implement "would destroy" its business because Memorial Eye obtained a large amount of sales from searches that included 1-800 Contacts related terms. (Holbrook, Tr. 1876-77).

ix. Vision Direct

624. Vision Direct has not implemented negative keywords with respect to any online contact lens retailer other than 1-800 Contacts. (Hamilton, Tr. 417; CX8002 (Hamilton, Decl. at 005 ¶ 17)).

625. Absent the settlement agreement with 1-800 Contacts, it is highly unlikely Vision Direct would have implemented any negative keywords related to 1-800 Contacts. (CX8002 (Hamilton, Decl. at 005 ¶ 16)).

626. Vision Direct believes that "the practice of bidding on, and having Vision Direct ads appear against, competing online sellers of contact lenses" has been "beneficial" to the company. (CX8002 (Hamilton, Decl. at 006 ¶ 20)).

627. Vision Direct has found that the keywords associated with competing online sellers of contact lenses have been "generally cost-effective and have resulted in a strong enough return on investment that [Vision Direct] continue[d] to bid on [those] keywords." (CX8002 (Hamilton, Decl. at 006 ¶ 20)).

628. Vision Direct uses Google's AdWords Keyword Planner (F. 229-230) to research new keywords to add to its account. Using Google's AdWords Keyword Planner, Vision Direct can input keywords and receive estimates of the number of ad impressions and clicks (as well as other information such as cost-per-click and at times, expected number of orders or conversions) that would result from bidding on those keywords. (Hamilton, Tr. 418; CX9038 (Hamilton, Dep. at 82-83); *see also* CX8002 (Hamilton, Decl. at 005-06 ¶ 18)).

629. Mr. Hamilton of Vision Direct input the keywords that were prohibited by Vision Direct's settlement agreement

with 1-800 Contacts into the Google AdWords Keyword Planner. (Hamilton, Tr. 418; CX9038 (Hamilton, Dep. at 81-82); *see also* CX8002 (Hamilton, Decl. at 005-06 ¶ 18)).

630. The results of Mr. Hamilton inputting the keywords prohibited by the Vision Direct 1-800 Contacts settlement agreement into the keyword planner tool "suggested that there would be a significant volume of clicks and that the cost-per-click and the conversion rate would be such that the cost per order would be lower than [Vision Direct's] average cost per order on the account." These results suggested to Mr. Hamilton that Vision Direct "should test these keywords and see if that in fact would be the case . . . ." (Hamilton, Tr. 427).

631. Even though, according to the Google AdWords Keyword Planner tool, bidding on 1-800 Contacts' trademark keywords would cost Vision Direct approximately [redacted] extra per month, Mr. Hamilton of Vision Direct concluded that the return on investment would justify that cost because "the cost per order . . . on those terms was lower than the average cost per order in our account." (Hamilton, Tr. 431, *in camera*; *see also* CX8002 (Hamilton, Decl. at 005-06 ¶¶ 18-19), *in camera*).

x. Walgreens

632. During Mr. Hamilton's tenure at Walgreens, Walgreens bid on trademark keywords of contact lens retailers other than 1-800 Contacts. (Hamilton, Tr. 429).

633. Walgreens has not implemented negative keywords with respect to any online contact lens retailer other than 1-800 Contacts. (Hamilton, Tr. 417; CX8001 (Hamilton, Decl. at 005 ¶ 17) ("I am not aware of Walgreens implementing negative keywords with respect to any online contact lens retailer other than 1-800 Contacts.")).

634. Mr. Hamilton of Walgreens input the 1-800 Contacts keyword terms that are prohibited by Walgreens' settlement agreement with 1-800 Contacts into the Google

AdWords Keyword Planner tool. (Hamilton, Tr. 418, CX8001 (Hamilton, Decl. at 006 ¶ 19)).

635. Based on the results from the Google AdWords Keyword Planner, Mr. Hamilton believes it would be beneficial to Walgreens to test the prohibited keywords in online paid search advertising in Google, Bing, and Yahoo! Gemini. (Hamilton, Tr. 418, 427; CX8001 (Hamilton, Decl. at 006 ¶ 19)).

636. Even though, according to the Google AdWords Keyword Planner tool, bidding on 1-800 Contacts' trademark keywords would cost Walgreens approximately [redacted] extra per month, Mr. Hamilton of Walgreens concluded that the return on investment would justify that cost. (Hamilton, Tr. 430, *in camera*; *see also* CX8001 (Hamilton, Decl. at 006-07 ¶¶ 19-20), *in camera*).

637. Walgreens believes it is beneficial for Walgreens to bid on a keyword even if other keywords have a lower cost per order, because, in Mr. Hamilton's view, a company needs to be able to bid on a range of search terms that cover a significant percentage of the consumer ad impressions that are generated through consumer search queries. "[I]f you only bid on the least expensive search terms, you would only be bidding on a small fraction of the available consumer search queries." (Hamilton, Tr. 430-31).

xi. Walmart

638. Based on data provided by Google, Dr. Evans concluded that advertisements for Walmart have appeared in response to searches for 1-800 Contacts brand name terms, as a result of both direct bidding on 1-800 Contacts trademark keywords and being matched to such searches when bidding on other keywords. (CX8006 (Evans Expert Report at 060 ¶ 130)).

639. Based on data provided by Google, between September 2015 and March 2016, Walmart showed approximately 174,000 advertisements each month in response to

searches for 1-800 Contacts brand name terms. (CX8006 (Evans Expert Report at 060 ¶ 130)).

640. Walmart considers bidding on the brand name terms of its contact lens retailer competitors as keywords to be "a general best practice" for several reasons, including because adding competitor terms helps to attract new traffic. (CX9033 (Mohan, Dep. at 54)).

641. Walmart has a search advertising campaign focused on bidding on the names of competing contact lens retailers as keywords, including 1-800 Contacts, Vision Direct, and AC Lens. Six percent of Walmart's contact lens orders currently come from its "Competitors" ad campaign. (CX9033 (Mohan, Dep. at 53-56)).

642. Walmart believes that using 1-800 Contacts keywords is valuable because "they bring us a lot of clicks" and "bring a lot of people who are looking in the market for contact lenses to our website." (CX9033 (Mohan, Dep. at 60-61)).

643. In May 2016, Walmart significantly lowered its bids in its "Competitors" ad campaign, reducing the average payment per click from around $4 to $0.31, because the cost per conversion using the trademark keywords was too high. (CX9033 (Mohan, Dep. at 152-56)).

xii. Web Eye Care

644. Prior to entering into the Settlement Agreement with 1-800 Contacts (F. 348), Web Eye Care bid on 1-800 Contacts' trademark terms for a "small window of time," which led to some traffic to Web Eye Care's website and to conversions. (CX9014 (Batushansky, Dep. at 161-63)).

645. During the time when Web Eye Care was bidding on 1-800 Contacts' trademark terms, Web Eye Care considered those terms to be "performing successfully." (CX9014 (Batushansky, Dep. at 162); CX9000 (Batushanksy, IHT at 64)).

646. During the time when Web Eye Care was bidding on 1-800 Contacts' trademark terms, Web Eye Care's click-through rates and conversion rates were higher on searches for 1-800 Contacts than its usual rates. Peter Batushansky, CEO of Web Eye Care explained: "1-800 Contacts is the biggest company out there [i]n the on-line space. They're also the most expensive company in the on-line space. . . . We offer the same great products and we feel that our service is on par with theirs. . . . [W]e feel that we can offer . . . a much better value to the customer from a pricing perspective." (CX9000 (Batushanksy, IHT at 65-66)).

647. In the view of Mr. Batushansky, Web Eye Care lost sales as a result of the Settlement Agreement with 1-800 Contacts (F. 348). (CX9014 (Batushansky, Dep. at 46)).

648. Web Eye Care did not increase advertising spending elsewhere in response to ending its advertising on 1-800 Contacts' trademark terms. (CX9014 (Batushansky, Dep. at 167)).

649. Web Eye Care has seen that ads of other contact lens retailers, Vision Direct and Lens.com, are displayed in response to a search request for Web Eye Care. (CX9014 (Batushansky, Dep. at 67)).

650. If there were no legal "cloud" surrounding use of a competitor's trademark terms, Web Eye Care would test bidding on "everybody's" terms, including 1-800 Contacts' trademark terms. (CX9000 (Batushansky, IHT at 110-11) (stating that test would involve "giv[ing] up all the negative keywords first, . . . so that our ads can run, and then [Web Eye Care] would specifically create new [keywords] that are specifically targeting all [Web Eye Care's] competitors, set up a test budget, run the ads, run different variations, different ad copy, see what performs, and whichever ones perform, I would scale up and do as much as I can as long as it performs.")).

d. Expert opinion

651. Based on data provided by Google and analyzed by Dr. Evans, it is common for companies to pay search engines to enable people who search for one brand to see ads for their own brands, as a result of direct keyword bidding or by matched ads (F. 655), and this "suggests that it's an efficient practice." (Evans, Tr. 1475-79; CX8009 (Evans Rebuttal Expert Report at 028-30, 032 ¶¶ 44-45, Table 1 and ¶ 49)).

652. Based on data provided by Google and analyzed by Dr. Evans, significant online competitors of 1-800 Contacts have chosen to pay to place text ads in front of consumers who have searched on terms that include 1-800 Contacts brand name keywords, when not restricted from doing so. (CX8006 (Evans Expert Report at 007 ¶ 10)).

653. During the time period from 2002 through 2016, Google served advertisements for nine of the fourteen contact lens retailers based on those firms directly bidding on 1-800 Contacts' trademark terms before they entered into the Challenged Agreements. This suggests that these nine firms believed such keyword bidding to be worth the cost and that Google determined the advertisements were sufficiently relevant. (CX8006 (Evans Expert Report at 056-57 ¶ 122 and Table 3)).

654. Dr. Evans used the term "Brand Name Keywords" ("BKWs") to refer to keywords that include trademarks, or variants on those trademarks for which the search engine would treat the query as if it corresponded to the trademark. (CX8006 (Evans Expert Report at 030 ¶ 77)).

655. Dr. Evans defined the terms "direct bid ads" as ads that are served by a search engine as a result of a rival advertiser bidding directly on a keyword that is a 1-800 Contacts BKW; and the term "matched ads" as ads that result from the search engine making a decision to serve an ad, in response to a user typing in a search query that includes a 1-800 Contacts BKW, through phrase match (e.g., if the keyword is "contacts") or broad match (e.g., if the

keyword is "contact lens"), even though the rival advertiser did not bid on a keyword that is a 1-800 Contacts BKW. (CX8006 (Evans Expert Report at 051 ¶ 111)).

656. During the time period for which data on matched ads is available (January 2010 through November 2016), Google served matched ads for five of the fourteen firms that entered into formal agreements with 1-800 Contacts regarding keyword bidding. This suggests that Google determined the advertisements were sufficiently relevant. (CX8006 (Evans Expert Report at 058 ¶¶ 123-24)).

657. Based on the comScore dataset of searches by users for the time period July 2013 through July 2016, (the "comScore dataset" (F. 699-701)) analyzed by Complaint Counsel's expert witness, Dr. Susan Athey, although generic search terms are the most common search terms for contacts, searches for 1-800 Contacts' trademark terms comprised approximately 17% of the search queries. (CX8007 (Athey Expert Report at 027, 028 ¶¶ 75, 81 and Table 1); RX0733 (Ghose Expert Report at 065 n.278)).

658. The top three generic search terms in the comScore dataset are "contact," "contact lenses," and "contacts." (CX8010 (Athey Rebuttal Expert Report at 033 ¶ 84); *see also* Bethers, Tr. 3654-55).

659. The volume of searches for the top three generic terms in the comScore dataset was collectively similar in size to the volume of searches for 1-800 Contacts terms in the comScore dataset. (Athey, Tr. 2107; CX8010 (Athey Rebuttal Expert Report at 056-57 Exhibit C and D)).

660. Search queries containing 1-800 Contacts brand name terms are "an extremely attractive place to bid" because, based on data analyzed by Dr. Athey, the 1-800 Contacts search term is the largest, single branded search term and it is a good opportunity for a lower-priced firm to make consumers aware of alternatives. (Athey, Tr. 764-65).

661. Based on data analyzed by Dr. Athey, firms that are currently bidding on "1-800 Contacts," have a higher conversion rate for those terms than for other search terms. This makes sense because any online retailer of contact lenses other than 1-800 Contacts is generally going to have lower prices and be a tougher competitor for the online consumer searching for 1-800 Contacts. (Athey, Tr. 765).

e. AdWords data

i. Memorial Eye

662. Based on data from Memorial Eye's AdWords account for the time period from January 1, 2005 through December 31, 2013, the three search queries that generated the most clicks and conversions for Memorial Eye (other than search terms that contained a variation of Memorial Eye's or 1-800 Contacts' brand names) were "contact lenses," "contacts," and "contact lens." (CX1626; CX1625; *see also* CX8012 (Nguon, Decl. at 001-04 ¶¶ 1-10)).

663. Based on data from Memorial Eye's AdWords account for the time period from January 1, 2005 through December 31, 2013, Memorial Eye's average cost per conversion for conversions associated with the search query "1800contacts" (based on broad match for the keyword "contacts") was $14.88, which is less than the average cost per conversion for conversions associated with the generic searches "contact lenses" ($18.98), "contacts" ($17.04), or "contact lens" ($20.60) during the same time period. (CX1626; CX1625; *see also* CX8012 (Nguon, Decl. at 001-04 ¶¶ 1-10)).

664. Based on data from Memorial Eye's AdWords account for the time period from January 1, 2005 through December 31, 2013, Memorial Eye's average conversion rate in Google AdWords for the search query "1800contacts" (based on broad match for the keyword "contacts") was 10.11%, which is greater than the average conversion rates for the generic search queries "contact lenses" (8.55%), "contacts" (8.9%), or "contact lens" (7.68%) during the same time period. Memorial Eye's average conversion

rate for "1800contacts" (based on broad match for the keyword "contacts") during the time period from January 1, 2005 through December 31, 2013 was also higher than Memorial Eye's overall average conversion rate for all search queries (7.9%) for the same time period. (CX1626; CX1625; *see also* CX8012 (Nguon, Decl. at 001-04 ¶¶ 1-10)).

665. Based on data from Memorial Eye's AdWords account for the time period from January 1, 2005 through December 31, 2013, Memorial Eye's click-through rate for the search query "1800contacts" (based on broad match for the keyword "contacts") was 0.98%, which is greater than the click-through rate for the generic search query "contacts" (0.77%) during the same time period. (CX1626; CX1625; *see also* CX8012 (Nguon, Decl. at 001-04 ¶¶ 1-10)).

666. Based on data from Memorial Eye's AdWords account for the time period from January 1, 2005 through December 31, 2013, the search query "1800 contacts" generated the second highest number of clicks and the third highest number of conversions for Memorial Eye. (CX1626; CX1625; *see also* CX8012 (Nguon, Decl. at 001-04 ¶¶ 1-10)).

667. Based on data from Memorial Eye's AdWords account for the time period from January 1, 2005 through December 31, 2013, Memorial Eye's average cost per conversion for conversions associated with the search query "1800 contacts" (in phrase match) was $18.36, which is less than the average costs per conversion for conversions associated with the generic searches "contact lenses" ($18.98) or "contact lens" ($20.60) during the same time period. (CX1626; CX1625; CX8012 (Nguon, Decl. at 001-04 ¶¶ 1-10)).

668. Based on data from Memorial Eye's AdWords account for the time period from January 1, 2005 through December 31, 2013, Memorial Eye's average conversion rate for the search query "1800 contacts" (in phrase match) was 10.74%, which is greater than the average conversion rates for the generic search queries "contact lenses" (8.55%),

"contacts" (8.9%), or "contact lens" (7.68%) during the same time period. Memorial Eye's average conversion rate for "1800 contacts" during the time period from January 1, 2005, through December 31, 2013 was also higher than Memorial Eye's overall average conversion rate for all search queries (7.9%) for the same time period. (CX1626; CX1625; *see also* CX8012 (Nguon, Decl. at 001-04 ¶¶ 1-10)).

669. Based on data from Memorial Eye's AdWords account for the time period from January 1, 2005 through December 31, 2013, Memorial Eye's click-through rate for the search query "1800 contacts" (in phrase match) was 1.39%, which is greater than the click-through rates for the generic search queries "contact lenses" (1.17%) or "contacts" (0.77%) during the same time period. (CX1626; CX1625; *see also* CX8012 (Nguon, Decl. at 001-04 ¶¶ 1-10)).

ii. LensDirect

670. Based on data from LensDirect's AdWords account for the time period from January 1, 2010 through December 31, 2016, the two search queries that generated the second highest number of conversions (other than search terms that contained a variation of LensDirect's or 1-800 Contacts' brand names) were "contacts" and "order contacts online." LensDirect's click-through rate for the search query "contacts" was 0.75% during the same time period. (Alovis, Tr. 1052-53; CX1641; CX1640; *see also* CX8012 (Nguon, Decl. at 001-02, 010 ¶¶ 1-6, 25-26)).

671. Based on data from LensDirect's AdWords account for the time period from January 1, 2010 through December 31, 2016, LensDirect's average cost per conversion for conversions associated with the search query "1800contacts" (as part of the LensDirect AdWords advertising campaign titled "Competitors – 1-800-Contacts") was $43.13, which is less than its average cost per conversion for conversions associated with the generic queries "contacts" ($46.06) or "order contacts online" ($48.62) during the same time period. A cost per

conversion of $43.13 is "in line with what [LensDirect was] spending in 2016" per conversion. (Alovis, Tr. 1010; CX1641; *see also* CX8012 (Nguon, Decl. at 001-02, 010 ¶¶ 1-6, 25-26)).

672. Based on data from LensDirect's AdWords account for the time period from January 1, 2010 through December 31, 2016, LensDirect's average conversion rate for the search query "1800contacts" (as part of the LensDirect AdWords advertising campaign titled "Competitors – 1-800-Contacts") was 7.88%, which is greater than its average conversion rate for the generic search query "contacts" (5.96%) during the same time period. The average conversion rate for "1800contacts" (as part of the LensDirect AdWords advertising campaign titled "Competitors – 1-800-Contacts") is also greater than LensDirect's overall average conversion rate for all search queries (5.89%) for the same time period. (Alovis, Tr. 1004, 1013; CX1641; *see also* CX8012 (Nguon, Decl. at 001-02, 010 ¶¶ 1-6, 25-26)).

673. Based on data from LensDirect's AdWords account for the time period from January 1, 2010 through December 31, 2016, LensDirect's average click-through rate for the search query "1800contacts" (as part of the LensDirect AdWords advertising campaign titled "Competitors – 1-800-Contacts") was 1.43%, which is higher than its average click-through rate for the generic search query "contacts" (0.75%) during the same time period. (Alovis, Tr. 1052-53; CX1640; *see also* CX8012 (Nguon, Decl. at 001-02, 010 ¶¶ 1-6, 25-26)).

674. Based on data from LensDirect's AdWords account for the time period from January 1, 2010 through December 31, 2016, LensDirect's average cost per conversion for conversions associated with the search query "1800contacts" (as part of the LensDirect AdWords advertising campaign titled "Competitors") was $39.97, which is less than its average cost per conversion for conversions associated with the generic queries "contacts" ($46.06) or "order contacts online" ($48.62) during the

same time period. (CX1641; *see also* CX8012 (Nguon, Decl. at 001-02, 010 ¶¶ 1-6, 25-26)).

675. Based on data from LensDirect's AdWords account for the time period from January 1, 2010 through December 31, 2016, LensDirect's average conversion rate for the search query "1800contacts" (as part of the LensDirect AdWords advertising campaign titled "Competitors") was 5.6%, which is similar to LensDirect's overall average conversion rate for all search queries (5.89%) for the same time period. (Alovis, Tr. 1004; CX1641; *see also* CX8012 (Nguon, Decl. at 001-02, 010 ¶¶ 1-6, 25-26)).

676. Based on data from LensDirect's AdWords account for the time period from January 1, 2010 through December 31, 2016, LensDirect's average cost per conversion for conversions associated with the search query "1800contacts coupon" in broad match was $18.73, which is less than its average cost per conversion for conversions associated with the generic queries "contacts" ($46.06) or "order contacts online" ($48.62) during the same time period. A cost per conversion of $18.73 "is a very attractive price for a new customer" and is below LensDirect's 2017 target customer acquisition cost. (CX1641; CX8012 (Nguon, Decl. at 001-02, 010 ¶¶ 1-6, 25-26); Alovis, Tr. 1009).

677. Based on data from LensDirect's AdWords account for the time period from January 1, 2010 through December 31, 2016, LensDirect's average cost per conversion for conversions associated with the search query "1800contacts coupon" in exact match was $9.92, which is less than its average cost per conversion for conversions associated with the generic queries "contacts" ($46.06) or "order contacts online" ($48.62) during the same time period. (CX1641; *see also* CX8012 (Nguon, Decl. at 001-02, 010 ¶¶ 1-6, 25-26)).

678. Based on data from LensDirect's AdWords account for the time period from January 1, 2010 through December 31, 2016, LensDirect's average conversion rate for the search query "1800contacts coupon" in broad match was 13.2%,

which is greater than its average conversion rates for the generic search queries "contacts" (5.96%) or "order contacts online" (11.2%) during the same time period. A conversion rate of 13.2% is "more than double" LensDirect's average conversion rate for all search terms for the period from January 1, 2010 through December 31, 2016. (Alovis, Tr. 1012; CX1641; *see also* CX8012 (Nguon, Decl. at 001-02, 010 ¶¶ 1-6, 25-26)).

679. Based on data from LensDirect's AdWords account for the time period from January 1, 2010 through December 31, 2016, LensDirect's average conversion rate for the search query "1800contacts coupon" in exact match was 13.63%, which is greater than its average conversion rates for the generic search queries "contacts" (5.96%) or "order contacts online" (11.2%) during the same time period. The average conversion rate for the search query "1800contacts coupon" in exact match is also greater than LensDirect's average conversion rate for all search terms (5.89%) for the same time period. (CX1641; *see also* CX8012 (Nguon, Decl. at 001-02, 010 ¶¶ 1-6, 25-26)); Alovis, Tr. 1004).

680. Based on data from LensDirect's AdWords account for the time period from January 1, 2010 through December 31, 2016, LensDirect's average click-through rate for the search query "1800contacts coupon" in both broad match (8.32%) and exact match (7.67%) was higher than its average click-through rate for common generic search queries such as "contacts" (0.75%) and "order contacts online" (4.3%). (CX1640; CX1641; *see also* CX8012 (Nguon, Decl. at 001-02, 010 ¶¶ 1-6, 25-26)).

2. Economic Theory as to Anticompetitive Effects of Advertising Restraints

681. The flow of information between buyers and sellers is an essential part of the market system. Buyers have to find out who they can buy from and on what terms. Sellers have to let consumers know how to find them and what they have to offer and on what terms. (CX8006 (Evans Expert Report at 080 ¶ 178)).

682. There is a consensus in economic literature that restrictions on advertising among rivals impair competition and result in harm to consumers. Nearly all the studies reviewed by Dr. Evans find that advertising restrictions result in higher prices. (Evans, Tr. 1422-23; 1651; CX8006 (Evans Expert Report at 081-82 and Appendix E)).

683. Restrictions on advertising are believed to impair competition and harm consumers by interfering with the flow of information from sellers to buyers and raising the costs to consumers of finding the most suitable offering, which, in turn, leads to higher transaction prices. (CX8006 (Evans Expert Report at 080-84)).

3. Restricted Advertising

684. The design of the Settlement Agreements was to prevent each party's advertisements from appearing in response to a search for the other party's trademark terms. (F. 307, 315, 361, 363-368).

685. 1-800 Contacts enforced the Settlement Agreements to prevent competitor advertisements from appearing in response to a search for 1-800 Contacts' trademark terms. (F. 371).

686. In order to assess the extent to which the Challenged Agreements restrict ads that result from either direct bidding on 1-800 Contacts BKWs or that result from the advertiser opting out of showing ads based on 1-800 Contacts BKWs by using negative keywords, Dr. Evans conducted an analysis of search advertising used by the parties to the Challenged Agreements (the "counterparties"), using Google AdWords data provided by Google (the "Google data") (F. 687-688). (CX8006 (Evans Expert Report at 050-53)).

687. The Google data includes a dataset, referred to as the 1-800 Contacts BKW dataset, consisting of data on each counterparty's ad impressions and related metrics generated by the most common 1-800 Contacts BKWs, for

the time period January 1, 2002 to September 30, 2016. (CX8006 (Evans Expert Report at 054)).

688. The Google data includes a dataset, referred to as the Google Matched Ad dataset, consisting of data on ad impressions and related metrics, by advertiser account, keyword, and query, for the time period January 1, 2010 to November 2016. (CX8006 (Evans Expert Report at 054-55)).

689. Based on an analysis of the Google data, the counterparties who had been bidding directly on 1-800 Contacts BKWs before the agreements ceased bidding almost entirely following the agreements. (Evans, Tr. 1413-15 ("the settlement agreements were effective"); CX8006 (Evans Expert Report at 061-62)).

690. Based on an analysis of Google data, matched ads (F. 655) for counterparties to the agreements declined substantially following the agreements. (Evans, Tr. 1410-11; CX8006 (Evans Expert Report at 056-57 Table 3)).

4. Price Information

691. 1-800 Contacts' prices are, on average, higher than the prices of its online competitors. (F. 692-693).

692. 1-800 Contacts' prices are approximately [redacted]% higher than other online retailers' prices. (CX8007 (Athey Expert Report at 013-14, 045-51 ¶¶ 31-32, Exhibit D-1 to D-7), *in camera* (calculating that 1-800 Contacts' prices were [redacted]% higher than online competitors' prices, on average, for its top ten selling products between 2010 and 2016). *E.g.*, CX0295 at 063, *in camera* (showing in January 2014, 1-800 Contacts' prices were higher than other online contact lens retailers by [redacted]% per box, [redacted]% for a six month supply, and [redacted]% for a twelve month supply); RX1228 at 036, *in camera* (2015 analysis showing that 1-800 Contacts' prices were higher than those of other online retailers: the net prices of Coastal Contacts, LensDirect, AC Lens, Vision Direct, and Lens.com were [redacted]% lower

than 1-800 Contacts' net prices); CX0547 at 032, *in camera* (1-800 document showing "[o]ver the last five years, the gap between our price and our web competitors has grown further apart"; prices from 1-800 Contacts' three major online rivals were [redacted]% lower than 1-800 Contacts' prices in 2006 and [redacted]% lower in 1-800 Contacts' prices in 2011)).

693. Online retailers generally offer lower prices than 1-800 Contacts. (Bethers, Tr. 3544-45; Murphy, Tr. 4119 ("There was a brand premium in this case; that is, typically we saw 1-800's prices higher than many of the pure-play online sellers."); CX0439 at 036 ("1-800 [Contacts] is the most expensive online retailer . . . ."); Alovis, Tr. 989 ("sometimes [1-800 Contacts is] selling something 20 percent over what [LensDirect is] selling, sometimes even more. It's usually a wow factor when people look at our price point versus 1-800 Contacts'"); Holbrook, Tr. 1901 ("[Memorial Eye's] prices were typically quite a bit less" than 1-800 Contacts' prices); CX8003 (Mitha, Decl. at 001 ¶ 4) ("In general, 1-800 Contacts' prices are higher than Lens Discounters' by a significant amount. In the past, we have found that 1-800 Contacts' prices were almost double Lens Discounters' prices for some products.")).

694. Many consumers are not aware of the price discrepancy between 1-800 Contacts and its online competitors. ([redacted]}, *in camera*; CX8007 (Athey Expert Report at 021 ¶ 56) ("Consumers are not aware in general of the price distribution among online contact lens sellers.")).

695. As part of the due diligence regarding its potential acquisition of 1-800 Contacts in 2012, Berkshire Partners retained a third party, Stax, Inc. ("Stax"), a global consulting firm, to perform some research, including a consumer survey, to inform Berkshire's decisions about the acquisition of 1-800 Contacts. (CX9039 (Clarkson, Dep. at 34-35)).

696. Stax concluded, based on its consumer survey results, that 1-800 Contacts' customers were less likely than customers of other online retailers to have comparison shopped before initially choosing their online retailer. (RX0041 at 0019 (reporting that 34.7% of 1-800 Contacts' customers comparison shopped across multiple websites and found 1-800 to be the most appealing, compared to 82.9% of Vision Direct's customers, and 63.1% of other online retailers' customers, who comparison shopped and found their retailer to be the most appealing; and reporting that "1-800 Customers Are Less Likely to Have Comparison Shopped Before Choosing 1-800 vs. Other Online Retailers")).

697. In the Stax consumer survey referred to in F. 695, 34.7% of respondents, when asked why they decided to initially purchase from 1-800 Contacts, responded: "It Was the Only Online Contacts Site of Which I Was Aware." (RX0041 at 0019; CX9039 (Clarkson, Dep. at 41-42)).

698. In conducting its due diligence regarding its potential acquisition of 1-800 Contacts in 2012, Berkshire Partners' investment analysis team concluded that "a sizeable segment" of consumers were uninformed about lower-priced options for purchasing contact lenses online. (CX1109 at 011 ("Investment Concern Summary . . . The team believes that 1-800 likely benefits from a sizable segment of uninformed buyers who are simply unaware of the other (and growing) low-priced choices on the internet.")).

699. Dr. Athey constructed a dataset using data from comScore Web Behavior Panel (the "comScore dataset"). (CX8007 (Athey Expert Report at 026-27 ¶ 74)).

700. ComScore is a company that collects data from a panel of internet users. Specifically, comScore installs software on consumers' devices to track their behavior, including collecting information on the screens that users see when they perform searches. (Athey, Tr. 852-53; *see also* Athey, Tr. 767 (describing comScore as "a leading provider of data about . . . consumer behavior")).

701. The data that Dr. Athey received from comScore consisted of detailed online search information from 377,002 internet users in the United States from July 11, 2013 through August 14, 2016, covering all the search queries those users performed on all major search engines and reported at a query-by-query level. The comScore data included the search queries that the users typed during the applicable time period, the paid search results that were displayed to the users (including the number of ads displayed, the text of the ads, and information about the ad position), and which paid or natural search results the users clicked on, if any. (CX8007 (Athey Expert Report at 026-29 ¶¶ 74-84); Athey Tr. 767-69, 2107).

702. Dr. Athey divided the search data into several categories of search queries: "branded" queries, which included the name of an online contact lens retailer (including 1-800 Contacts); "manufacturer" queries, which included the name of a contact lens manufacturer or brand; "generic" queries, which related to contact lenses but were not classified as branded or manufacturer queries; and "unrelated" queries, which did not relate to contact lenses and were removed from the dataset. (CX8007 (Athey Expert Report at 027 ¶ 77)).

703. Based on the comScore dataset, 55% of ads displayed in response to generic searches, 36% of ads displayed in response to searches for contact lens retailers' brand names, and 54% of ads displayed in response to searches for contact lens manufacturers, contained price information. (CX8010 (Athey Rebuttal Expert Report at 058)).

704. 1-800 Contacts recognized that consumers act on price information in advertisements. (CX1086 at 002-03 (August 7, 2012 email from Amber Powell to Laura Schmidt and Rick Galan stating "I think it's very likely" that "all the prices that are much lower than ours" in the paid search channel were responsible for "paid search experiencing a drop in NI [new internet] CR [conversion rate] that is disproportionate to other channels" and noting that, by contrast, "[t]yped/bookmarked customers aren't

exposed to other websites' pricing before coming to our site which likely makes them less sensitive to pricing.")).

705. A 2015 report [redacted] concluded that: "[O]nline shoppers are primarily focused on price." ([redacted], *in camera*).

706. A 2015 report [redacted] concluded that: "'Low prices' is the top purchasing criterion, but is more important to online shoppers" than to "B&M" (brick and mortar) shoppers. ([redacted], *in camera*).

707. A 2015 report [redacted] concluded that: "A significantly greater share of online shoppers compare prices than B&M shoppers." ([redacted], *in camera*).

708. A 2015 report [redacted] concluded that customers who refilled a contact lens prescription somewhere different than where they made the initial purchase typically did so to get a better price. ([redacted], *in camera*) (showing more than 60% of contact lens consumers surveyed identified "Better prices by refilling elsewhere" as the rationale for not purchasing from where they made their initial purchase).

709. Visitors to 1-800 Contacts' website are often interested in price information. (CX0852 at 103 (September 29, 2010 1-800 Contacts Board Meeting presentation, reporting results of an online survey showing that while most visitors to 1-800 Contacts' website are "considering purchase," about a quarter as many are "checking prices [with] no intent to buy")).

5. Relationship Between Restricting Advertising in Response to Searches for 1-800 Contacts' Trademark Terms and Sales

710. Reducing the appearance of competitor ads in response to a search for 1-800 Contacts' trademark terms tends to increase sales for 1-800 Contacts, while an increase in competitor ads in response to a search for 1-800 Contacts' trademark terms tends to decrease sales for 1-800 Contacts. (F. 712-731).

711. 1-800 Contacts recognized a clear relationship between its sales attributable to trademark search and the appearance of competitor advertising on those searches, with increased competitor advertising associated with decreased sales for 1-800 Contacts. (F. 712-731).

712. 1-800 Contacts believed that fewer competitors appearing on search engine results pages in response to searches for 1-800 Contacts' trademarks "always helps improve performance" of 1-800 Contacts' paid search. (CX0855 at 001).

713. In his instructions for preparing weekly paid search reports, Mr. Craven, 1-800 Contacts' paid search manager, identified "more competitors showing up on searches for our best TM words" as the first factor to consider as an explanation for paid search performance. (CX0732 at 004; Craven, Tr. 515).

714. In the week ending July 28, 2007, 1-800 Contacts received fewer orders than the previous week on its most popular trademark keyword, 1800contacts, which it attributed to "probably . . . [losing] some traffic to Lens.com, LensWorld, Vision Direct and a few other advertisers" who were "consistently showing up on" the term 1800contacts. (CX0606 at 002 ("Search Dashboard 073007.xls")).

715. An August 7, 2007 analysis by Mr. Craven estimated that 1-800 Contacts may have lost around $426,000 in revenue to Lens.com, year to date, as a result of Lens.com ads

appearing in response to searches for 1-800 Contacts' trademarks. (CX0613 at 001).

716. A September 19, 2007 email from Mr. Coon to the lead partner of the private equity firm that then owned 1-800 Contacts notes that Lens.com had grown to 5,000 orders per week from 1,000 orders per week three years earlier, which Mr. Coon suggested was connected to Lens.com's ability to display search advertising in response to searches for 1-800 Contacts' trademarks. (Coon, Tr. 2823-27; CX0300).

717. During the week ending September 22, 2007, 1-800 Contacts noted a 6% week over week drop in trademark paid search orders, relating this in part to competition from Vision Direct, which had been "advertising in the 2nd position on many of [1-800 Contacts'] branded terms in Google." (CX0616 at 001).

718. In a 1-800 Contacts internal report dated April 15, 2008, Mr. Craven of 1-800 Contacts reported that for the week ending April 11, 2008, 1-800 Contacts experienced a 9% week over week decline in new customer orders through Microsoft's search engine. Noting that this "could be a sign of increased affiliate and/or competitive trademark activity," Mr. Craven reported "[w]e'll step up our monitoring in this engine." (CX0931 at 001).

719. During the week of June 20, 2008, 1-800 Contacts attributed an increase in trademark orders as being helped in part by "LensWorld finally removing all their ads from all of [1-800 Contacts'] trademark keywords." (CX0558).

720. The Meeting Materials for the October 30, 2008 1-800 Contacts Board of Directors Meeting stated: "The fastest growing online seller, Lens.com is using 1-800 trademark triggered ads successfully to gain market share" and "Lens.com uses trademark advertising on 1-800 CONTACTS as their primary marketing tool for growth. Since 2004, their sales increased 475%, making them the third largest online seller." (CX0621 at 118, 121, (agenda

and attached documents for consideration at October 30, 2008 1-800 Contacts Board of Directors Meeting)).

721. The Meeting Materials for the October 30, 2008 1-800 Contacts Board of Directors Meeting contrasted Lens.com's growth (F. 720) with Coastal Contacts: "After achieving a market share of over 12% in 2005, Coastal Contacts ceased trademark advertising as a result of a settlement with 1-800. At year-end 2007, their market share had fallen in half to just 6%." (CX0621 at 122 (agenda and attached documents for consideration at October 30, 2008 1-800 Contacts Board of Directors Meeting)).

722. The Meeting Materials for the October 30, 2008 1-800 Contacts Board of Directors Meeting reported Lens.com's "ability to divert customers using our trademarks increases as we increase 1-800 brand awareness, and their infringement is directly correlated with our [television] advertising spending." (CX0621 at 123; Coon, Tr. 2763).

723. In a 1-800 Contacts internal report dated March 10, 2009, Mr. Craven of 1-800 Contacts reported that for the week of March 6, 2009, "[t]here are substantially less competitors showing up on our list of monitored TM words . . . in Google which is likely helping improve our TM [conversion rate] and TM order volume." (CX0914 at 001; Craven, Tr. 528-30).

724. In internal email correspondence dated December 15, 2009, referring to search activity on 1-800 Contacts' trademark terms plus "coupons" terms, Mr. Craven of 1-800 Contacts was told: "I don't know if we can kick competitors off of these terms, but it concerns me that customers may take the opportunity to order with our competitors, especially when their ad copy is so 'savings' driven." (CX0279 at 002).

725. In a 1-800 Contacts internal report dated January 11, 2010, Mr. Craven reported that for the week ending January 8, 2010, 1-800 Contacts achieved "an all-time record high" for orders through its trademark keywords, due in part to

the fact that fewer advertisers were appearing on searches for 1-800 Contacts' trademark terms that week, "which always helps improve performance." (CX0855 at 001).

726. In a 1-800 Contacts internal report dated March 15, 2010, Mr. Craven reported that for the week ending March 12, 2010, the click-through rate on trademark keywords was less strong than "the five weeks prior, which is likely a result of additional competitor's ads (Vision Direct, Standard Optical, ShipMyContacts) showing up on our best terms such as *1800contacts* and *1800 contacts*." (CX0510 at 001 (italics in original)).

727. In a 1-800 Contacts internal report dated June 14, 2010, Mr. Craven reported that for the week ending June 11, 2010, 1-800 Contacts' trademark paid search orders through Google, and click-through rates for trademark ads, "were slightly softer than [the preceding week] because of increased competition on [1-800 Contacts'] best branded terms. Google searches for our most profitable term, 1800-contacts, currently yield ads for six other advertisers." (CX0906 at 001).

728. In a 1-800 Contacts internal report dated June 21, 2010, Mr. Craven reported that for the week ending June 18, 2010, 1-800 Contacts' orders through its trademark paid search ads improved significantly, which Mr. Craven concluded was due to "the removal of a few competitors who had been showing up on [1-800 Contacts'] best TM terms." Among those competitors, "Walgreens was the most notable." (CX0564 at 001).

729. In a 1-800 Contacts internal report dated June 28, 2010, Mr. Craven reported that for the week ending June 25, 2010, 1-800 Contacts experienced "another very solid week" for trademark paid search orders, and "the highest TM CTRs (27.2%)" that 1-800 Contacts had ever seen, which Mr. Craven attributed to, among other factors, "[t]he removal of ShipMyContacts from [1-800 Contacts'] trademarks . . . . [This] contributed to [1-800 Contacts'] excellent TM CTR." (CX0927 at 001).

730. In late August 2010, orders from new customers coming through search ads on searches for 1-800 Contacts' trademarks "jumped to the highest level of the year," due in part to the appearance of "fewer competitors on [1-800 Contacts'] best TM words such as *1800contacts 1 800 contacts* and *1800 contacts*." (CX0836 at 001 (emphasis in original) (further stating that the removal of ads by Standard Optical "from the paid listings . . . was likely a big help" to 1-800 Contacts' paid search performance in late August 2010). *See also* CX0836 at 001; Craven, Tr. 534-35 ("I was trying to . . . connect the dots to provide an explanation behind not having [Standard Optical's] ad there could have potentially helped our – could have potentially helped our metrics for those keywords. . . . We had our own search engine data, we have the trademark monitoring reports, so that was offering up one explanation behind why orders potentially look better.").

731. In a 1-800 Contacts internal report dated August 8, 2011, Mr. Craven reported that for the week ending August 5, 2011, 1-800 Contacts' trademark paid search orders improved, as it "saw fewer instances of ShipMyContacts on [its] TM searches which may have helped . . . [the] CTR" for trademark paid search. (CX0918 at 001).

732. If 1-800 Contacts were not shielded from competitive advertising, and other online retailers could have purchased both matched ads and direct bid ads (F. 655) from the search engines, the competitive dynamics would have been different. (CX8009 (Evans Rebuttal Expert Report at 084-85 ¶ 156)).

6. Expert Opinion

733. Contact lenses are a commodity product. F. 24-27. "A commoditized market is characterized by standardized and similar products or services, as well as low switching costs across firms." (CX8007 (Athey Expert Report at 011); Athey, Tr. 746-48).

734. "[P]rice has more significance as a purchasing decision factor in commoditized markets than in non-commoditized

markets as there are few other sources of product differentiation." (CX8007 (Athey Expert Report at 011)).

735. The advertising restrictions contained in the Settlement Agreements significantly impair competition for selling online contact lenses by prohibiting a type of advertising that is especially important for price competition among online sellers of contact lenses and for potential new entrants. (CX8006 (Evans Expert Report at 078); *see also* F. 497-498; F. 565).

736. The fact that firms advertise price shows that sellers believe and have evidence that price information is important to consumers. (Athey, Tr. 761-62; CX8010 (Athey Rebuttal Expert Report at 026, 058 ¶ 63 and Exhibit E)).

737. Search advertising targeted towards consumers who have conducted queries on 1-800 Contacts BKWs is a cost-effective way of enabling competitors of 1-800 Contacts to provide information to a significant number of 1-800 Contacts' potential customers. Other advertising, such as advertising on generic keywords, social media ads, or other non-search advertising, would be inefficient since those would be unlikely to reach potential customers of 1-800 Contacts at the point of purchase. (CX8006 (Evans Expert Report at 087)).

738. When competitors are prohibited from bidding on 1-800 Contacts BKWs, the percentage of 1-800 Contacts' orders coming from trademark paid search is not significantly subject to competition. (CX8006 (Evans Expert Report at 088-89 ¶ 193 and Figure 1)).

739. The Challenged Agreements suppressed price transparency and impaired price competition among online contact lens sellers, and ultimately harmed consumers by restricting the flow of information between online contact lens retailers and consumers. (CX8009 (Evans Rebuttal Expert Report at 084-85 ¶¶ 156-59)).

740. Absent the restrictions on advertising, there would be more purchases from lower-priced competitors and more price-matching by 1-800 Contacts. (Athey, Tr. 711, 797-98 ("[D]irect facts and market data support that there is a price premium and that that price premium is not fully accounted for by service differentials and that the product is identical. In those circumstances, economic theory is clear that an increase in information makes the market more competitive. It's removing a friction. The exact way in which that plays out can depend on additional industry facts. We saw that information from 1-800 Contacts and investors of 1-800 Contacts agree that when – if consumers become more informed, it will be difficult to sustain a price premium and that they would thus face a choice, either lose market share in the online channel, and particularly in the search channel, or lower their price. What they would choose, I didn't reach a conclusion on that. But more likely than not, prices – prices would fall. It's also possible that they could keep their prices high and – but consumers would use more price match, which would lead to a reduction in the effective price by 1-800 even if the list price stayed high.").

741. The increased availability to consumers of price comparison and the rate of consumer switching from 1-800 Contacts to competitors would put downward pressure on prices. (CX8007 (Athey Expert Report at 036 ¶ 108)).

742. 1-800 Contacts' past practice of responding to competitive pressure by offering more generous discounts through its price matching program (F. 438) is consistent with the extensive economic literature which predicts that informative advertising leads to greater price competition. Competition for these additional sales would lead to greater competition generally, which benefits users who navigate directly to 1-800 Contacts' website. (Evans, Tr. 1615-16, 1719-20 ("[T]o the extent that there's an intensification of competition for consumers, then that leads 1-800 Contacts to lower its price and for more price competition to take place in the business. And the result of that is that even if you have a consumer who is never using search but is going directly to the website, once you

had that intensification of competition, they're then an indirect beneficiary of the opening of the competitive advertising.")).

7. Economic Modeling Facts

a. Dr. Athey's model

743. Dr. Athey constructed a model of a "counterfactual" world to assess what would happen in the absence of the Challenged Agreements. Dr. Athey first constructed counterfactual ad layouts, based on her prediction of what ads consumers would likely see in response to 1-800 Contacts brand queries, absent the Challenged Agreements. Second, Dr. Athey constructed a model of consumer click behavior which she applied to predict how many clicks the ads in each of the counterfactual ad layouts would receive. (Athey, Tr. 766-77, 774, 780-81; CX8007 (Athey Expert Report at 029 ¶ 85); CX8010 (Athey Rebuttal Expert Report at 032 ¶ 82)).

744. Dr. Athey's counterfactual ad layouts consisted of ad layouts observed in the comScore data (F. 699-701) as having been displayed in response to searches for generic terms related to contact lenses. Dr. Athey used searches for generic terms to estimate the likely counterfactual ad layouts because bidding on generic keywords is not restricted by the Challenged Agreements and because, based on the comScore data, the volume of generic searches (F. 658) is comparable to the volume of 1-800 Contacts brand searches. (Athey, Tr. 769-70; CX8007 (Athey Expert Report at 030 ¶ 90); CX8010 (Athey Rebuttal Expert Report at 032 ¶ 82)).

745. Dr. Athey modified the generic search ad layouts for the counterfactual world referred to in F. 744 by (1) discarding ad layouts that did not include an advertisement for 1-800 Contacts; and (2) moving the 1-800 Contacts advertisement to the top ad position in each of the remaining layouts. (Athey, Tr. 769-71; CX8007 (Athey Expert Report at 030-31 ¶ 91)).

746. Dr. Athey's model of consumer click behavior used a methodology referred to as "multinomial logistic regression" ("MNL"). (CX8007 (Athey Expert Report at 029-31 ¶¶ 85-88, 91)).

747. Dr. Athey's model first assessed the click-through statistics observed in the comScore data for searches for 1-800 Contacts' and other online contact lens retailers' brand name terms. Dr. Athey then estimated consumer click behavior by taking into account (i) the consumer appeal of the advertised brand, (ii) the position of the ad on the search results page, (iii) whether the ad was served by the firm searched for by the consumer, (iv) whether the ad is for 1-800 Contacts, and (v) the propensity of the consumer to click on any ad. (Athey, Tr. 775-80; CX8007 (Athey Expert Report at 030 ¶ 88)).

748. For her model, Dr. Athey applied the estimate of consumer click behavior referred to in F. 747 to the counterfactual ad layouts that she constructed (F. 744). (Athey, Tr. 780-82; CX8007 (Athey Expert Report at 030-31 ¶ 91)).

749. Dr. Athey's model predicted that, in the absence of the Challenged Agreements, the number of competitor ads appearing on searches for 1-800 Contacts trademarks would increase, from 0.54 to 1.85 per search. (Athey, Tr. 783-84; CX8007 (Athey Expert Report at 032 ¶ 92 and Table 2); CX8010 (Athey Rebuttal Expert Report at 072)).

750. Dr. Athey's model predicted that consumer clicks on the 1-800 Contacts ads would decline, by 2 clicks per hundred searches, and that consumer clicks on ads for competitors of 1-800 Contacts would increase, by 3.5 clicks per hundred searches. (CX8007 (Athey Expert Report at 033 ¶ 94 and Table 3); Athey, Tr. 784-85).

751. Dr. Athey's model predicts clicks per searches and makes no predictions as to sales per searches (conversions). Athey, Tr. 799-800.

b. Dr. Evans' model

752. Dr. Evans modeled the extent of reduced advertising caused by the Challenged Agreements by extrapolating from matched ads (F. 655) generated for Memorial Eye during the time period 2010 through 2011. (Evans, Tr. 1601-08; CX8006 (Evans Expert Report at 090-93)).

753. Dr. Evans' model assumed that Google would display up to five ads in response to a query for a 1-800 Contacts brand name term; that 1-800 Contacts would obtain first ad position; that there would be a click-through rate for an ad in the second position of 1.8%, based on data showing Memorial Eye's click-through rate in the second position of 1.84%, and that click-through rates for the third through fifth positions would be 1.5% for position 3, 1.1% for position 4, and 0.7% for position 5. (CX8006 (Evans Expert Report at 100-01 ¶¶ 216, 218)).

754. Based on the Memorial Eye data (F. 618), and additional assumptions regarding ad position, click-through rates, and level of advertising activity for other competitors, Dr. Evans predicted the number of additional advertisements that would be displayed by the competing retailers that are currently restricted under the Challenged Agreements, if they were not bound by the Challenged Agreements; the number of clicks these ads would receive; and the increased clicks and sales these competing retailers would receive. (Evans, Tr. 1618-20, 1624-25; CX8006 (Evans Expert Report at 098-103); CX8009 (Evans Rebuttal Expert Report at 083-85 ¶¶ 152-59)).

755. Dr. Evans' model estimates that, absent the Challenged Agreements, between January 2010 and June 2015, 114 million additional ads for competitors would have been displayed in response to queries containing 1-800 Contacts brand terms. (Evans, Tr. 1381, 1619; CX8009 (Evans Rebuttal Expert Report at 067 ¶ 117 and n.158)).

756. Dr. Evans' model estimates that in the first half of 2015 alone, based on assumptions of increased advertising activity by competitors to obtain repeat business, increased

clicks for competitors, and decreased clicks for 1-800 Contacts, clicks for competitor ads would increase by 145,000 clicks, and sales for competitors would increase by 12.3%. (CX8006 (Evans Expert Report at 101-03 and Table 6); CX8009 (Evans Rebuttal Expert Report at 084 ¶ 155); Evans, Tr. 1622).

L. Asserted Procompetitive Justifications

1. Dr. Van Liere's Survey

757. Respondent's expert witness, Dr. Kent Van Liere, conducted a survey for this case intended to measure the degree to which sponsored links that appear when consumers conduct an internet search for "1-800 Contacts" are likely to confuse consumers into believing that those links will take them to a 1-800 Contacts website or a website affiliated with 1-800 Contacts ("Dr. Van Liere's survey"). (RX0735 (Van Liere Expert Report at 0003); Van Liere, Tr. 2977).

758. Dr. Van Liere's survey defined the relevant population as adult consumers 18 years or older who reside in the United States "who either a) have purchased contact lenses online within the past 12 months; or b) would consider searching on the internet to purchase contact lenses in the next 12 months." (RX0735 (Van Liere Expert Report at 0009)).

759. Dr. Van Liere used a national online survey firm for Dr. Van Liere's survey, Critical Mix, which Dr. Van Liere has used before and described as well known. Critical Mix has demographic, occupational, and other information regarding the persons who agree to participate on its panels. Critical Mix provided Dr. Van Liere with an online panel of 689 consumers who met the qualifying criteria for the survey ("survey respondents"). (RX0735 (Van Liere Expert Report at 0006, 0009); Van Liere, Tr. 2980-81, 2986).

760. Of the 689 survey respondents in Dr. Van Liere's survey, half were assigned to perform a simulated internet search for "1-800 Contacts" as a keyword using the Yahoo!

search engine ("Yahoo! group") and half were assigned to perform a simulated internet search for "1-800 Contacts" as a keyword using the Google search engine ("Google group"). (RX0735 (Van Liere Expert Report at 0006)).

761. Dr. Van Liere undermined the reliability of the results of Dr. Van Liere's survey by failing to assign survey respondents to use a search engine that they had actually used or would use in the future. (Jacoby, Tr. 2243-47; CX8011 (Jacoby Rebuttal Expert Report at 013-14 ¶¶ 25-26)).

762. There was a programming error with Dr. Van Liere's survey that resulted in assigning survey respondents to the Yahoo! group, when such respondents had never used the Yahoo! search engine. Approximately 10 percent (32 of 342 individuals) of the survey respondents who were assigned to the Yahoo! group of Dr. Van Liere's survey were subject to this programming error. (Van Liere, Tr. 3126-27).

763. Dr. Van Liere attributed the percentage of searches performed on the top three search engines to be: Google (65%); Bing (25%); and Yahoo! (14%). (Van Liere, Tr. 3106; RX0735 (Van Liere Expert Report at 024 ¶ 45)).

764. Although Dr. Van Liere acknowledged that weighting is a commonly accepted statistical technique to adjust for overrepresented or underrepresented samples in a survey, Dr. Van Liere did not do any weighting to account for the percentages of searches conducted on Google and on Yahoo! in Dr. Van Liere's survey, in which 50% of the survey respondents were assigned to Google and 50% of the survey respondents were assigned to Yahoo!. (Van Liere, Tr. 3114-16).

765. If Dr. Van Liere had weighted the results from his survey questions (F. 763-764) to account for the percentages of searches conducted on Google and on Yahoo!, "the net confusion measured . . . across all of the study would reduce down to some degree." (Van Liere, Tr. 3120-21).

766. Survey respondents in both the Google group and the Yahoo! group of Dr. Van Liere's survey were randomly assigned to view either a test or a control stimulus. In the test condition, survey respondents were told to search for "1-800 Contacts" and then were shown either a Google or Yahoo! search engine results page ("SERP") that included sponsored ads with links to contact lens retailers other than 1-800 Contacts as well as some links to organic results (the "test SERP"). In the control condition, survey respondents were told to search for "1-800 Contacts" and then were shown a Google or Yahoo! SERP identical to the test SERP, with the same organic links, but without any sponsored links (the "control SERP"). (RX0735 (Van Liere Expert Report at 0006, 0013-16); Van Liere, Tr. 3010; RX0730 (Van Liere Expert Report Exhibit C at 0010) (Google test SERP)).

767. Dr. Van Liere did not include a sponsored link for 1-800 Contacts on the test SERPs in Dr. Van Liere's survey. (RX0730 (Van Liere Expert Report Exhibit C at 0009); Van Liere Tr. 3037).

768. Dr. Van Liere was instructed not to include ads for 1-800 Contacts on the test SERPs in Dr. Van Liere's survey, after discussion with counsel. (Van Liere, Tr. 3214 ("After discussion with counsel of my prior work and my understanding, ultimately the way we agreed to do it and therefore the way I was instructed to do it was to leave it off.")).

769. Survey respondents in the test condition in Dr. Van Liere's survey were shown the test SERPs and asked to "point and click on the link or links, if any, that you think will take you to the website of the company that you searched for. Please select all that you think apply." For any link selected, survey respondents were asked, "What makes you say that?" If no links were selected, survey respondents were shown the test SERP a second time and asked to "click on the link or links, if any, that you think will take you to the website of the company that is affiliated with the company that you searched for." As to any links selected, the survey respondent was asked,

"What makes you say that?" Survey respondents in the test condition were counted as confused as to source or affiliation if they identified any sponsored links, such as www.visiondirect.com or www.coastal.com, in response to the questions. (RX0735 (Van Liere Expert Report at 0012-13, 0017)).

770. Survey respondents in the control condition in Dr. Van Liere's survey were shown the control SERPs and asked to "point and click on the link or links, if any, that you think will take you to the website of the company that you searched for" and "click on the link or links, if any, that you think will take you to the website of the company that is affiliated with the company you searched for." Survey respondents in the control condition were counted as confused as to source or affiliation if they identified specified control links in organic search results, such as New York Times articles, or Wikipedia, in response to the survey questions. (RX0735 (Van Liere Expert Report at 0012-13, 0017-18)).

771. For a consumer confusion survey to be reliable, it is important that the test and control stimuli reasonably replicate what consumers would encounter in the marketplace. (Van Liere, Tr. 3004-05; Jacoby, Tr. 2263-64).

772. A consumer entering "1-800 Contacts" as a Google or a Yahoo! search query would at times see a SERP that has some sponsored advertisements, including a sponsored advertisement for 1-800 Contacts. (CX8008 (Jacoby Expert Report at 007-08); CX8011 (Jacoby Rebuttal Expert Report at 057, 059) (screen shots of actual Google and Yahoo! SERPs that appeared on March 7, 2017 in response to the search query "1-800 Contacts"); Van Liere, Tr. 3010 (acknowledging that when he entered searches for 1-800 Contacts, the 1-800 Contacts sponsored links were displayed sometimes). *See also* Ghose, Tr. 4033 (testifying that as a general proposition, a trademark owner's ad is almost always at the top of a SERP)).

773. By removing links to 1-800 Contacts from his test stimuli and all sponsored links from his control stimuli (F. 766 and F. 767), Dr. Van Liere's survey did not reasonably replicate what consumers would encounter in the marketplace. (Jacoby, Tr. 2230-31; CX8011 (Jacoby Rebuttal Expert Report at 0010-11 ¶¶ 20-21)).

774. Dr. Van Liere's survey did not provide an "I don't know" or an "I don't have an opinion" option for survey respondents. (Van Liere, Tr. 3179-80; RX0730 (Van Liere Expert Report Exhibit C at 0018)).

775. The removal of links to 1-800 Contacts from Dr. Van Liere's survey "stacked the deck" to find consumer confusion. As Dr. Jacoby explained, Dr. Van Liere's survey:

> . . . is essentially equivalent to a multiple-choice question. What you're doing is you're saying which of the following is the answer to my question. If you take out the right answer and you only leave in wrong answers, and you ask people which of the following is the answer to my question, and all they have left is not the right answer but the wrong answer, many are going to give you the wrong answer.
>
> If I ask you in which year did Columbus discover America, 1418, 1412, 1467 or 1593, no or no opinion, . . . you're going to get people a lot saying no opinion, but you're going to get a lot of people saying, oh, one of these other wrong answers because they wouldn't ask me this question if there wasn't a right answer in here. And that's equivalent to what he did.

(Jacoby, Tr. 2232-34).

776. Survey respondents who viewed the test SERPs in Dr. Van Liere's survey were presented with more links than participants who viewed the control SERP (six more for

those assigned to the Google group and eight more for those assigned to the Yahoo! group). (CX8011 (Jacoby Rebuttal Expert Report at 006-07, 009-10, 016 ¶¶ 9, 16-19, 30); Van Liere, Tr. at 3225-26).

777. Having a test group that contained between six and eight more links than the control group necessarily increases the opportunity for error in the test group. As Dr. Jacoby explained:

> It's analogous to a basketball player going up to the line and shooting baskets, and if he shoots 20 baskets, you count the misses, and then he goes and shoots ten minutes later 14 baskets and you count the misses, and you're comparing these two. That's ridiculous. You['ve] got to compare 20 to 20. You can't say, oh, he made fewer misses when he was only shooting 14 baskets. Yes . . . he was making fewer because he only shot 14 baskets. I mean, this is so fundamental.

(Jacoby, Tr. 2225-26; CX8011 (Jacoby Rebuttal Expert Report at 019-21 ¶ 33b)).

778. Dr. Van Liere's survey results were inflated because Dr. Van Liere failed to remove nonresponsive "verbatim" responses provided by survey participants, a standard practice in consumer surveys that show nontrivial levels of confusion. (Jacoby, Tr. 2234-38; CX8011 (Jacoby Rebuttal Expert Report at 019-20 ¶ 33a)).

2. Dr. Goodstein's Opinion

779. Dr. Goodstein based his opinion that "consumer confusion as to the source, affiliation, or sponsorship is reasonably expected from sponsored ads by other contact lens retailers that appear in response to an Internet search for '1-800 Contacts'" (RX0736 (Goodstein Expert Report at 004) on numerous subsidiary opinions and assertions, including:

a. many consumers do not recognize that sponsored ads are actually paid advertisements, and therefore confuse the sponsored ads for unbiased, impartial organic links (Goodstein, Tr. 2404-14; RX0736 (Goodstein Expert Report at 023-28));

b. various changes that search engines made to SERPs between 2002 and 2013 have made it more difficult for internet users to distinguish paid ads from organic search results, including by eliminating color distinctions and moving more ads to the top of the page (RX0736 (Goodstein Expert Report at 026-28); Goodstein, Tr. 2413-14; *see, e.g.*, RX0597 at 0001; RX1697 at 0020);

c. when a search is "navigational" (which Dr. Goodstein defined as a search where the user's immediate intent is to reach a particular website), consumers are more likely to rely on the first link and spend less time viewing the SERP before clicking a link (RX0736 (Goodstein Expert Report at 029-31); Goodstein, Tr. 2415-17);

d. consumer surveys conducted in 2008 and 2009, in connection with American Airlines' trademark litigation with Google and Yahoo! ("American Airline surveys"), which, according to Dr. Goodstein, found that a significant number of users performing a navigational search could be confused as to the source, affiliation, or sponsorship of ads by other companies that appear in response to a trademark search (Goodstein, Tr. 2417-22; RX0736 (Goodstein Expert Report at 031-32)); and

e. the survey conducted by Dr. Van Liere for 1-800 Contacts in this matter (*see* Section II.L.1) (Goodstein, Tr. 2417-21; RX0736 (Goldstein Expert Report at 033)).

780. Dr. Goodstein did not base his opinion (F. 779) on any independent study and analysis conducted by him of consumer behavior relating to search queries using "1-800 Contacts," but relied instead on data collected by third parties in studies that Dr. Goodstein summarized and reiterated in his expert report and on the witness stand. (Goodstein, Tr. 2404-05 (referring to reliance on "studies that have been done both in the science community and by the search engines looking at eye-tracking studies as to where people look"); Goodstein, Tr. 2406-07 (testifying that his opinion that many consumers do not recognize that sponsored ads are actually paid advertisements is based "on science done both within the science of my field as well as by the search engine companies themselves, their own research"); RX0736 (Goodstein Expert Report at 020-29 ¶¶ 43-64) (describing and relying on numerous third-party studies); CX9045 (Goodstein, Dep. at 15-17) (testifying that he "did an analysis of the secondary research that exists," which "is relevant research that someone else conducted," and reviewed "primary research that was made available in this case," which is "data that's collected particularly for this issue" and includes the study conducted by Dr. Van Liere (Section II.L.1)).

781. The American Airlines cases, referenced in F. 779, were settled. (Goodstein, Tr. 2439).

782. When a consumer's search query is "1-800 Contacts cheaper," one cannot determine if that is a navigational search with intent to go only to 1-800 Contacts' website. (Goodstein, Tr. 2453-54).

783. There are studies finding that survey respondents have diverse preferences and expectations when they use brand names as search terms and finding that not everybody who uses a brand name as a search term is looking only for

information about that brand. (Goodstein, Tr. 2428, 2431).

3. Increased Search Costs

784. Dr. Ghose's opinion that "consumers who search for a specific retailer's trademark are typically attempting to reach the retailer's website," relies mainly on "*A Taxonomy of Web Search*," Broder, A. (2002), ACM Sigir Forum, 36(2). This work states that "there is no assumption" that intent can be inferred "with any certitude from the query'" and further states that "inferring user intent from the query is at best an inexact science, but usually a wild guess." (RX0733 (Ghose Expert Report at 031-32 ¶ 75); CX8010 (Athey Rebuttal Expert Report at 006-07 ¶¶ 16-17)).

785. Advertising has the capacity to change the consumer's commercial intent. (Ghose, Tr. 3962; *see also* Ghose, Tr. 3964 (the consumer's intent to purchase one product can be changed by lower prices of an alternative product)).

786. If a consumer is engaged in comparative shopping, the consumer can benefit from seeing rival companies' ads. (Ghose, Tr. 3968-70 (noting that among the benefits of targeted advertising is that consumers can make better and more informed decisions)).

787. Dr. Ghose did not conclude that any consumers who entered a search query that included a 1-800 Contacts' trademark term suffered (or would suffer) harm as a result of seeing rival companies' ads. (Ghose, Tr. 3929 ("I haven't, you know, quantified the specific proportion of people who would be harmed. All I'm saying is, based on the analysis, that a large fraction of people would not find these competing ads relevant given the trademark search.").

788. Dr. Ghose did not conclude that by eliminating competitors' ads, the Challenged Agreements create benefits for consumers. (Ghose, Tr. 3995-96 (testifying, "[A]ll I've said is that when consumers get to see these

additional ads that may not be very relevant, their search costs can go up, and that's about it.").

789. If consumers are looking for a product and they do not know which retailer they want to purchase from, then those consumers may be willing to trade higher search costs in return for receiving a deeper discount. (Ghose, Tr. 3964; *see also* Ghose, Tr. 3969 ("as a general proposition, is it possible that some consumers benefit from seeing a price-comparative rival ad? Yes. I don't think . . . I have argued . . . against that.")).

4. Increased Sales

790. Dr. Athey's model predicted that in a "counterfactual" world without the Challenged Agreements, consumer clicks on the 1-800 Contacts ads would decline, by 2 clicks per hundred searches; and consumer clicks on ads for competitors of 1-800 Contacts would increase, by 3.5 clicks per hundred searches. (Athey, Tr. 784-85; *see* F. 743-751).

791. Respondent's expert witness, Dr. Murphy, using the predictions about consumer clicks from Dr. Athey's model (F. 790), input data from Google regarding the rate at which consumers who click on an ad for a company convert into a sale, to predict that in the counterfactual world without the Challenged Agreements, 1-800 Contacts would have a loss of sales of 0.54 customers per 100 searches and the online competitors would have a gain in sales of 0.35 customers per 100 searches. (RX0739 (Murphy Expert Report at 0083-84 ¶ 231)).

792. Dr. Murphy explained that he performed the calculations in F. 791 to make the point that, although Dr. Athey's model showed that if the Challenged Agreements were not in place, there would be more clicks on ads for online competitors, Dr. Athey's model does not necessarily show that there would be more online sales of contact lenses in the counterfactual world:

> [O]nce you tell me these things are going in opposite directions [(referring to Dr. Athey's model showing a decline by 2 clicks on 1-800 Contacts ads and an increase by 3.5 clicks on competitors of 1-800 Contacts ads)], … then the net effect of that is ambiguous because it is going to tend to reduce the propensity to buy things on 1-800 [Contacts' website] and maybe increase the propensity to buy somewhere else, but the net effect could easily be to lower the overall propensity.

(CX9048 (Murphy, Dep. at 266-67)).

793. Dr. Murphy's analysis (F. 791-792) was not intended to show that the Challenged Agreements increased the sales of contact lenses. (CX9048 (Murphy, Dep. at 265-66) ("I am not saying this proves sales would go down in a but-for world"; "the effect on sales could go either way . . .")).

794. Dr. Murphy's analysis (F. 791-792) was not intended to show that without the Challenged Agreements, fewer people are going to buy contact lenses. As Dr. Murphy testified:

> I don't think that's the way you would interpret this [analysis]. I think you would interpret this as saying these searches were less effective in helping these people purchase contacts. . . . [People are] going to have to go get their contacts somewhere else, maybe go back to the ECP, maybe do something else.

(Murphy, Tr. 4235).

795. Contact lenses are not typically a discretionary product and a consumer has significant incentive not to abandon his or her purchase. (CX8010 (Athey Rebuttal Expert Report at 055 ¶ 133); *see also* Coon, Tr. 2791-93).

III. ANALYSIS

A. Summary of Facts

The Complaint charges Respondent 1-800 Contacts, Inc. ("Respondent" or "1-800 Contacts") with violating Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. Section 5(a)(2) of the FTC Act gives the Commission jurisdiction "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce . . . ." 15 U.S.C. § 45(a)(2); *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1327 n.2 (7th Cir. 1981).

Respondent 1-800 Contacts sells contact lenses to consumers throughout the United States. F. 3. Respondent is a corporation, as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. F. 2. Respondent's challenged activities relating to the sale of contact lenses 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. F. 3. Thus, the Commission has jurisdiction over Respondent and the subject matter of this proceeding, pursuant to Section 5 of the FTC Act.

1. Contact Lenses Generally

Contact lenses are a billion dollar industry. F. 4. In 2015, sales of contact lenses in the United States were estimated to be approximately $4.7 billion. F. 4. Nearly 40 million people in the United States use contact lenses to correct their vision. F. 6.

To purchase contact lenses, one must first go to an eye care practitioner ("ECP") such as an optometrist or ophthalmologist who performs an eye examination to determine the correct power, base curve, and the specific brand of contact lens. F. 8-10, 23. After conducting the contact lens fitting, the ECP writes a prescription that enables the patient to purchase the specified contact lenses. F. 9, 10, 12.

When contact lenses were first introduced, they were made of rigid material that required an ECP to custom fit each pair. F. 13. Beginning in the late 1980s, contact lens manufacturers began to make disposable contact lenses that were designed to be replaced

on a daily, weekly, or monthly basis. F. 14. Further technological improvements in the manufacture of contact lenses eliminated the need for an ECP to fit each pair of contact lenses during the contact lens fitting process. F. 15.

On December 6, 2003, Congress passed the Fairness to Contact Lens Consumers Act, 15 U.S.C. § 7601, which requires ECPs to provide contact lens prescriptions to their patients upon completion of a contact lens fitting. F. 17. With the evolution in contact lens technology and the change in the regulatory landscape, consumers were no longer required to purchase their contact lenses only from their ECPs. F. 16.

2. The Start of the Company 1-800 Contacts

Jonathan Coon started the business that became 1-800 Contacts from his college dormitory room in February 1992. F. 30. Based on his own contact lens purchasing experience, Mr. Coon believed that the process of buying contact lenses was inconvenient, the service was not very good, and the prices were high. F. 31. Mr. Coon began a mail order contact lens business, and, along with his business partner, set up a call center and inventory and distribution center. F. 33. In 1995, Mr. Coon acquired the "1-800 Contacts" phone number and changed the name of the company to 1-800 Contacts. F. 36. Once the company began advertising the 1-800 Contacts name and phone number, it saw a 20% to 25% increase in customer acquisition and customer retention. F. 51.

In 1996, 1-800 Contacts launched the 1-800 Contacts website. F. 38. 1-800 Contacts designed its website to be a simple and efficient way for consumers to purchase contact lenses. F. 39. 1-800 Contacts began advertising on television in or about June 1998 and experienced 50% growth within a few months thereafter. F. 52-53. 1-800 Contacts' advertising message, which it repeated in many of its television advertisements, was that the consumer could get the exact same contact lenses delivered to their door for less than they would pay to drive to their doctor's office and pick them up. F. 58.

In 1999, 1-800 Contacts opened a distribution center that it believed had the largest inventory of contact lenses in terms of the

number and variety of Stock Keeping Units ("SKUs") in one location and began promoting itself as "The World's Largest Contact Lens Store." F. 54. 1-800 Contacts has more inventory in stock than any other contact lens retailer, allowing 1-800 Contacts to fill 98% of all orders with inventory on hand. F. 44.

In 2004, 1-800 Contacts' internet sales surpassed its phone sales. F. 67. By 2015, less than a quarter of 1-800 Contacts' total customer orders were by phone, with the remainder of its orders via the internet. F. 70. 1-800 Contacts' sales account for about 10% of total contact lens sales in the United States and for about 60% of online sales of contact lenses in the United States. F. 492, 494.

3. Sources for Purchasing Contact Lenses

Contact lenses are medical devices and a consumer must have a prescription in order to purchase them. F. 8-9. In most states, contact lens prescriptions expire within one year; thus a contact lens wearer must visit his or her ECP to get a new prescription on a yearly basis. F. 18-19. Once a consumer has obtained a prescription, he or she can either purchase directly from the ECP or purchase contact lenses through mail order, through telephone order or over the internet. F. 16.

a. Eye care practitioners

Eye care practitioners operate in doctors' offices as "independent ECPs," with optical retail chains, or in conjunction with mass merchants and club stores. F. 76. There are roughly 16,000 independent ECP practices in the United States. F. 79. Independent ECPs make 40% of the sales of contact lenses in the United States. F. 491. Most independent ECPs sell contact lenses from their physical locations and some independent ECPs sell contact lenses online through, or in conjunction with, services provided by contact lens manufacturers, contact lens wholesale distributors, or vision insurance providers. F. 75-78, 80.

National and regional optical retail chains provide eye care professionals on location and sell contact lenses. F. 82-83. Optical retail chains make 20% of the sales of contact lenses in the United States. F. 491. National optical retail chains include

LensCrafters, Pearle Vision, Visionworks, America's Best Contacts and Glasses, and MyEyeDr. F. 84. Luxottica Retail North America ("Luxottica") sells and distributes optical products, including contact lenses, through the brands LensCrafters, Pearle Vision, Sears Optical, and Target Optical, among others, and also operates internet websites for these stores. F. 86. For many optical retail chains, a consumer can purchase contact lenses in the store, by phone, or through the chain's website. F. 88.

Many mass merchant and club stores that sell contact lenses typically have an onsite optometrist and a separate optical department located within the store. F. 89. Mass merchant and club stores make 23% of the sales of contact lenses in the United States. F. 491. Mass merchants, such as Target, Sears, and JCPenny, sell contact lenses in their stores. F. 90. Walmart sells contact lenses in its stores, over the phone, and through its own website. F. 92. Club stores, such as Costco, Sam's Club, and BJ's Wholesale Club, sell contact lenses in their stores and online through their own websites. F. 93. Costco began selling contact lenses online to its members in October 2016. F. 96.

Regardless of whether they operate in independent doctors' offices, national or regional optical retail chains, or out of mass merchant or club stores, ECPs can be generally categorized as operating out of physical, i.e., "brick and mortar," stores. F. 77.

b. Online retailers of contact lenses

Contact lens retailers who sell online but do not have a physical store are often referred to as "pure-play" online retailers. F. 98. 1-800 Contacts is generally categorized as a pure-play online retailer. F. 99. Other online retailers of contact lenses include AC Lens, Coastal Contacts, Lens.com, LensDirect, Lens Discounters, Web Eye Care and Vision Direct. Section II.D.2. Online retailers, including 1-800 Contacts, make 17% of the sales of contact lenses in the United States. F. 495. 1-800 Contacts makes about 60% of the sales of contact lenses sold online. F. 494.

To purchase contact lenses from an online retailer, a consumer must first obtain a prescription from his or her ECP and then go

on the internet to find a retailer that sells the particular contact lenses that the consumer needs. Online retailers try to reach consumers through many different channels, including television or radio advertising, social media advertising, comparison shopping engines, product listing advertisements, and paid search advertising. Section II.E.5. As discussed in greater detail in Section III.E.2.a, the most effective method of reaching consumers who wish to purchase contact lenses over the internet is paid search advertising. The mechanics of paid search advertising are summarized next.

4. Paid Search Advertising on the Internet

Internet search engines, such as Google and Bing, organize information to allow their users to access the vast amount of information on the internet. F. 135. Search engines employ complex algorithms to match the user's request with parts of the web that may contain relevant responses. F. 136. Search engines are free for users. F. 140. The search engines derive the majority of their revenue through advertisements ("ads" or "sponsored links"). F. 140.

When a user enters a search query, the internet search engine generally displays two types of results on the search engine results page: (1) "organic" or "natural" search results; and (2) search results that are paid advertisements. F. 141. Organic or natural search results are links to websites that the search engine has determined are relevant to the user's search terms. F. 143. In general, organic results are ranked in order of relevance, with the most relevant result at the top of the list. F. 143.

Search results that are paid advertising are links to websites that the search engine has determined should be presented to the user based on a complex algorithm, discussed below. The format by which these advertisements are presented to consumers has varied over the years. F. 149. Currently, search engine advertisements consist of a blue headline, followed by the word "Ad" (for Google, in a green box; for Bing, in gray bold text) and the web address (Uniform Resource Locator ("URL")) of the site being advertised by the ad copy, which is text the advertiser provides to the search engine provider. F. 150.

Paid search advertising refers to a method of advertising where the advertiser pays the search engine to place its advertisement on the search engine results page, based on an advertiser's selected "keywords." F. 148. Paid search advertising is sometimes referred to as "pay-per-click" or "cost-per-click" advertising. F. 154. Advertisers do not pay the search engines any money for their ads to be displayed unless a user clicks on their ad. F. 140, 236. A cost-per-click is the price that an advertiser pays to the search engine each time its advertisement is clicked by an internet user. F. 155.

Google and Bing both have complex algorithms for determining how to display paid search advertisements in response to a user query, which take into account many factors, including (1) the amount of money bid by the advertiser, (2) the search engine's determination of the relevance of the advertisement to the user query, (3) the search engine's determination of the relevance of the advertiser's website to the user query, and (4) [redacted]. E.g., F. 136, 190, 195, 223, 238-240, *in camera*.

Google's program through which it presents paid search advertisements is called AdWords. F. 160. For each user query on which ads are shown, Google runs a real-time auction based on advertiser bids. F. 158-159. Advertisers indicate which auctions they would like to enter so that their ads will be presented by Google by using "keywords." F. 148, 161-162. Keywords are words or phrases the advertiser believes potential customers are likely to use when searching for products or services provided by the advertiser. F. 162.

An advertiser's ad may be shown when the advertiser has bid on keywords that are determined to "match" a user's search query. F. 163. Advertisers frequently bid on hundreds or thousands of keywords. F. 164. Keywords may consist of a single word (e.g., "contacts," "Accuview," or "coupon"), a phrase (e.g., "contact lens"), or a combination of words and phrases. F. 165.

There are several "match types" in AdWords. F. 166. "Broad match" allows an ad to be matched to relevant variations of the advertiser's selected keywords (referred to as the "ad's

keywords"), including synonyms, singular or plural forms, possible misspellings, stemmings (such as floor and flooring), related searches, and other relevant variations. F. 167-168. "Phrase match" allows an ad to be matched to searches that include the ad's exact keyword and close variants of the exact keyword, with additional words before or after. F. 171. "Exact match" allows an ad to be matched to searches that include the ad's exact keyword, or close variants of the exact keyword, exclusively. F. 173.

Advertisers can indicate which auctions they do not want to enter by using "negative keywords." F. 175. A negative keyword is a type of keyword that prevents an ad from being triggered by a certain word or phrase. F. 175. For example, a retailer that sells eyeglasses may add the negative keyword "wine glasses" to prevent its ads from being shown in response to searches for that term. F. 175.

5. Summary of the Challenged Agreements

The Complaint alleges that Respondent's 14 agreements with other online sellers of contact lenses violated Section 5 of the FTC Act (the "Challenged Agreements").[14] The Challenged Agreements consist of 13 settlement agreements, and certain provisions of one contact lens sourcing and services agreement between Respondent and Luxottica (the "Luxottica Sourcing and Services Agreement"). As summarized below and detailed in F. 359-370, the Challenged Agreements contain restraints designed to prevent each party's advertisements from appearing in response to an internet search for the other party's trademark terms.

a. The Settlement Agreements

During the time period 2004 through 2013, 1-800 Contacts entered into settlement agreements with 13 contact lens retailers

14 Although Complaint Counsel's brief refers to additional "informal" or "unwritten" agreements, Complaint Counsel states that the existence of those additional agreements does not materially change the analysis of competitive harm and that "Complaint Counsel need not specifically prove their existence." CCB at 71 n.269. Accordingly, this Initial Decision need not, and does not, determine whether or not such additional agreements were made.

to resolve the then-pending trademark litigation brought against them by 1-800 Contacts (the "Settlement Agreements"), as follows: Vision Direct (2004); Coastal Contacts (2004); EZ Contacts (2008); Vision Direct (2009);[15] Lensfast (2009); AC Lens (2010); Empire Vision (2010); Lenses for Less (2010); Tram Data (d/b/a replacemycontacts.com) (2010); Walgreens (2010); Contact Lens King (2010); Web Eye Care (2010); Standard Optical (2011); and Memorial Eye (2013). F. 306, 314, 343-345, 348, 351, 359-360.

In general, the Settlement Agreements set forth a series of "prohibited acts" that prohibit each party from causing advertisements to appear in response to an internet search for the other party's trademarks or URLs, or variations thereof, although some agreements more broadly encompass internet searches that "include" the other party's trademarks or URLs, or variations thereof (for shorthand purposes, at times collectively referred to herein as "trademark terms"). F. 361, 363. Although the specific language may vary, the Settlement Agreements also require the parties to implement as negative keywords those trademark and URL terms and variations thereof listed on an attached exhibit, in order to prevent the display of advertisements in response to an internet search for, or as stated in some agreements, an internet search that "includes" or "contains," the other party's trademarks or URLs. F. 364.

The Settlement Agreements do not prohibit the purchase of generic keyword terms, such as "contacts," or "contact lenses," provided that the parties implement the required negative keywords to prevent advertisements from appearing in response to a search for the designated trademark terms. F. 366. Absent the implementation of negative keywords, a retailer that bids on the generic keyword "contacts" in broad match, for example, might cause its ads to appear in response to a search for 1-800 Contacts. F. 368. The Settlement Agreements do not state whether or not the required negative keywords are to be implemented in broad match, phrase match, or exact match. F. 365.

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15 In 2007, a dispute arose between the parties over the correct scope of the advertising prohibitions in the 2004 settlement agreement. F. 311. Respondent thereafter sued Vision Direct and the parties reached a second settlement agreement. F. 328-329.

Ten of the thirteen Settlement Agreements exclude from the scope of "prohibited acts" "use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in an non-Internet context, e.g., the use on the Internet of comparative advertising, parodies, and similar non-Infringing, uses." F. 369.

b. Luxottica Sourcing and Services Agreement

The Luxottica Sourcing and Services Agreement was entered into on December 23, 2013. F. 393. Pursuant to this agreement, 1-800 Contacts provides fulfillment services to Luxottica by shipping contact lenses to Luxottica's retail chain stores, which include LensCrafters, Pearle Vision, Sears Optical, and Target Optical, among others. The agreement further provides for other services including assistance with sourcing contact lenses from the four major contact lens manufacturers.[16] F. 394.

Within the Luxottica Sourcing and Services Agreement is a section that contains provisions prohibiting the parties, and their affiliates (including retailers such as EyeMed, LensCrafters, Pearle Vision, Sears Optical, and Target Optical), from purchasing or using the other party's trademarks or confusingly similar variations thereof "as triggering keywords in any internet search engine advertising campaign" and requiring each party to enter the other party's trademarks, and variations thereof, as listed in the agreement, as "exact match" negative keywords in all advertising campaigns. F. 396.

B. Overview of Applicable Law

The FTC Act's prohibition of unfair methods of competition encompasses violations of Section 1 of the Sherman Act. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999). "[T]he analysis under § 5 of the FTC Act is the same . . . as it would be under § 1 of the Sherman Act." *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005); *see also FTC v. Indiana Fed'n*

16 The four major manufacturers of contact lenses that account for about 95% of the United States market are Johnson & Johnson, Alcon, CooperVision, and Bausch & Lomb. F. 7.

of Dentists, 476 U.S. 447, 451-52 (1986). Accordingly, Sherman Act jurisprudence is appropriately relied upon in determining whether the challenged conduct violates Section 5 of the FTC Act. *Cal. Dental Ass'n*, 526 U.S. at 762 n.3; *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011) (noting that the same analysis applies to both violations of Section 1 of the Sherman Act and Section 5 of the FTC Act).

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . ." 15 U.S.C. § 1. Despite its broad language, the ban on contracts in restraint of trade extends only to unreasonable restraints of trade, i.e., restraints that impair competition. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Thus, a Section 1 violation requires a determination of "(1) whether there was a contract, combination, or conspiracy – or, more simply, an agreement; and, if so, (2) whether the contract, combination, or conspiracy 'unreasonably restrained trade in the relevant market.'" *Realcomp*, 635 F.2d at 824 (citations omitted); *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

There is no dispute in this case that there was a contract, combination, or conspiracy. RRB at 10-14. During the time period 2004 through 2013, 1-800 Contacts, an online seller of contact lenses, entered into 14 written agreements with other online sellers of contact lenses. F. 343, 393. "[C]oncerted action may be amply demonstrated by an express agreement." *United States v. Delta Dental*, 943 F. Supp. 172, 175 (D.R.I. 1996).

The evaluation of whether a particular horizontal agreement unreasonably restrains trade "takes place along an analytical continuum in which a challenged practice is examined in the detail necessary to understand its competitive effect." *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 336 (2003), *aff'd*, *Polygram*, 416 F.3d at 29."[17]

17 Complaint Counsel does not contend that the Challenged Agreements are "per se" unlawful.

Under a "quick look" rule of reason analysis, also referred to as "inherently suspect" analysis, certain types of restraints are presumed to have anticompetitive effects. *Polygram*, 416 F.3d at 36 ("If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm."); *In re Realcomp II, Ltd.*, 2009 FTC LEXIS 250, at *55-56 (Oct. 30, 2009) ("[B]oth accepted economic theory and past judicial experience with analogous restrictions support our finding that 'the experience of the market has been so clear about the principal tendency' of [the challenged] restrictions so as to enable us to draw 'a confident conclusion' that – absent any legitimate justification . . . competition and consumers are harmed by [the] challenged Policies.")). However, as the Supreme Court reiterated in *FTC v. Actavis*, 133 S. Ct. 2223, 2237 (2013), "abandonment of the 'rule of reason' in favor of presumptive rules (or a 'quick-look' approach) is appropriate only where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'" *Id.* (citing *Cal. Dental Ass'n*, 526 U.S. at 770, 781). Because application of the "inherently suspect" presumption, in effect, shifts the burden to the defendant to provide empirical evidence of procompetitive effects, "[r]eviewing courts must be attentive . . . to the actual application of the burden-shifting." *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 361 (5th Cir. 2008). *See Cal. Dental Ass'n*, 526 U.S. at 775 n.12 (Where "the circumstances of the restriction are somewhat complex, assumption alone will not do.").

A full rule of reason approach requires courts to engage in a thorough analysis of the relevant market and the effects of the restraint in that market. *Realcomp*, 635 F.3d at 825 (citing *Indiana Fed'n*, 476 U.S. at 461). As the court explained in *Realcomp*, this "may extend to a 'plenary market examination,'" which may include an analysis of "'the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.'" *Realcomp*, 635 F.3d at 825 (citations omitted).

Ultimately, however, "no categorical line" separates those "restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment." *Cal. Dental Ass'n*, 526 U.S. at 780-81. Accordingly, the Supreme Court has moved "away from . . . reliance upon fixed categories and toward a continuum," *Polygram*, 416 F.3d at 35, within which "the extent of the inquiry is tailored to the suspect conduct in each particular case." *Id*. at 34. Thus, the proper analysis is "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Cal. Dental Ass'n*, 526 U.S. at 781. As the Supreme Court stated in *Actavis*: "As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question – that of the presence of significant unjustified anticompetitive consequences." *Actavis*, 133 S. Ct. at 2238. "[T]he Court's decisions, particularly *California Dental,* also make clear that all of these forms of analysis are simply different means to pursue the same 'essential inquiry . . . whether or not the challenged restraint enhances competition.'" *Realcomp*, 2009 FTC LEXIS 250, at *52 (citing *Cal. Dental Ass'n*, 526 U.S. at 780). *See also Am. Needle, Inc. v. NFL*, 560 U.S. 183, 203 n.10 (2010) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.") (quoting *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918)).

If a restraint is demonstrated to be "inherently suspect" and has not been justified, it may be condemned "without proof of market power or actual effects." *Realcomp*, 2009 FTC LEXIS 250, at *51. Otherwise, "a plaintiff must show that the challenged restraints have resulted in, or are likely to result in, anticompetitive effects, in the form of higher prices, reduced output, degraded quality of products or services, retarded innovation, or other manifestations of harm to consumer welfare." *Realcomp*, 2009 FTC LEXIS 250, at *90. This may be accomplished by demonstrating actual anticompetitive effects in the relevant market, or by "an indirect showing based on a demonstration of defendant's market power, which when combined with the anticompetitive nature of the restraints, provides the necessary confidence to predict the likelihood of

anticompetitive effects." *Id.* (citing *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (plaintiff has "two independent means by which to satisfy the adverse-effect requirement" – direct proof of "actual adverse effect on competition" or "indirectly by establishing . . . sufficient market power to cause an adverse effect on competition"); *Law*, 134 F.3d at 1019 ("plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects"); *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) (same)). Affirming this approach, the Sixth Circuit held that if actual anticompetitive effects are shown, then proof of market power is unnecessary, because "an inquiry into market power . . . is . . . a surrogate for detrimental effects." *Realcomp*, 635 F.3d at 827 (quoting *Indiana Fed'n*, 476 U.S. at 461).

If the plaintiff meets its burden of demonstrating actual effects, or likely effects based on proof of market power, the burden shifts to the defendant to prove procompetitive justifications for the challenged restraint. *Realcomp*, 635 F.3d at 825; *Polygram*, 416 F.3d at 36. "If the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner." *Law*, 134 F.3d at 1019.

C. Immunity Under *Actavis*

As an initial matter, Respondent argues that under *Actavis*, the Settlement Agreements are not subject to antitrust scrutiny because they are "commonplace" settlement agreements. Respondent further argues that even if the Settlement Agreements are not deemed commonplace, *Actavis* requires proof of additional factors in order to justify subjecting the Settlement Agreements to antitrust scrutiny. RB at 15-16.

In *Actavis*, a brand-name drug owner sued two generic drug manufacturers for patent infringement. In settlement of these claims, (i) the brand-name drug company agreed to pay the generic drug companies millions of dollars, and (ii) the generic drug companies agreed to refrain from launching competing

products for nine years, but were allowed entry five years before the expiration of the patent. 133 S. Ct. at 2227. The Court of Appeals for the Eleventh Circuit had affirmed a lower court's dismissal of the FTC's case, concluding that, "absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent." *FTC v. Watson Pharms., Inc.*, 677 F.3d 1298, 1312 (11th Cir. 2012). The Supreme Court reversed, holding that reverse payment settlements of patent litigation are not immune from antitrust scrutiny and that the FTC may prove such agreements violate the antitrust laws, as in any other rule of reason case. 133 S. Ct. at 2230, 2234-37.

In its analysis, the Supreme Court contrasted a reverse payment patent settlement with a particular type of settlement agreement that is more common: "[a patentee] with a claim (or counterclaim) for damages receives [from the accused infringer] a sum equal to or less than the value of its claim." 133 S. Ct. at 2233. The Supreme Court referred to this "traditional example" as taking a "commonplace form" and stated "[i]nsofar as the dissent urges that settlements taking these commonplace forms have not been thought for that reason alone subject to antitrust liability, we agree, and do not intend to alter that understanding." *Id.*

Respondent interprets the foregoing statement to mean that *Actavis* immunizes "commonplace" forms of trademark settlements from antitrust scrutiny, noting that the Court referenced *Metro-Goldwyn Mayer, Inc. v. 007 Safety Products, Inc.*, 183 F.3d 10, 13 (1st Cir. 1999), which involved a trademark dispute and settlement where the plaintiff paid a defendant to settle the defendant's counterclaim. RB at 21. *See* 133 S. Ct. at 2233. Respondent also interprets the Court's reference to "five sets of considerations" that led the Court to conclude that the reverse payment patent settlements at issue were not immune, to require proof of these factors before settlement agreements may be subjected to antitrust scrutiny. RB 27-34. *See* 133 S. Ct. at 2234 ("We recognize the value of settlements and the patent litigation problem. But we nonetheless conclude that this patent-related factor should not determine the result here. Rather, five

sets of considerations lead us to conclude that the FTC should have been given the opportunity to prove its antitrust claim.").

Respondent's interpretation of *Actavis* as providing immunity for commonplace settlement agreements is overly broad and contrary to authorities cited with approval by the *Actavis* court. Indeed, the Court directly stated that "this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws." 133 S. Ct. at 2232. Among the authorities cited are *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963) (emphasizing that the Sherman Act "imposes strict limitations on the concerted activities in which patent owners may lawfully engage," and holding that although settling patent disputes, the agreements violated the antitrust laws); *United States v. New Wrinkle, Inc.,* 342 U.S. 371, 378 (1952) (applying antitrust scrutiny to patent settlement); and *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163 (1931) (same). 133 S. Ct. at 2232-33.

The lower court, post-*Actavis* cases cited by Respondent (RB at 20) likewise do not hold that commonplace settlements are immune from antitrust immunity. None of the cited cases analyze a "commonplace" form of settlement; they all analyzed reverse payment settlements of patent disputes, and, like *Actavis*, contrasted a reverse payment settlement with more traditional settlements of patent disputes. *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538, 544 (1st Cir. 2016); *King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp.*, 791 F.3d 388, 402 (3d Cir. 2015); *In re Lipitor Antitrust Litig.*, 46 F. Supp. 3d 523, 537 (D.N.J. 2014); *In re Lamictal Direct Purchaser Antitrust Litig.*, 18 F. Supp. 3d 560, 567 (D.N.J. 2014).

Because Respondent's interpretation of *Actavis* is without merit, Respondent's contention that the Settlement Agreements are immune from antitrust scrutiny is rejected.[18]

18 Accordingly, whether or not the Settlement Agreements are in fact "commonplace" settlements and whether or not the evidence proves the five factors that the Supreme Court cited as justifying antitrust scrutiny of reverse-payment patent settlements need not be determined.

D. Relevant Market

"Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition." *Southeast Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 613 (8th Cir. 2011); *see also Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 320 (7th Cir. 2006). An antitrust market is comprised of a relevant geographic market and a relevant product market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

Complaint Counsel contends that the relevant market is the online sale of contact lenses in the United States. CCB at 101.[19] Respondent contends that the relevant market is all retail sales of contact lenses in the United States, which encompasses sales by online retailers and by physical, or "brick and mortar" retailers, including independent ECPs, optical chains, and mass merchants. RB at 76; RFF at 63.

1. Relevant Geographic Market

A relevant geographic market is the "area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (citing *Tampa Elec. Co. v. Nashville Coal Co*., 365 U.S. 320, 327 (1960)). *See also* U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines, § 4.2.2 (Market Definition) (Aug. 19, 2010) *available at* https://www.justice.gov/atr/horizontal-merger-guidelines-

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19 The Complaint alleges as relevant markets in which to analyze the competitive effects of the Challenged Agreements: (1) a market no larger than the sale of search advertising by auction in response to user queries, or smaller relevant markets therein; and (2) a market no larger than the retail sale of contact lenses, or smaller relevant markets therein, including the online retail sale of contact lenses. Complaint ¶¶ 28, 29. Notwithstanding the foregoing relevant market allegations, in its Post-Trial Brief, Complaint Counsel argues that the relevant market is the online retail sale of contact lenses, and does not argue that there is a relevant market for the sale of search advertising by auction. Complaint Counsel's proffered economic expert witnesses were not asked to assess, and did not opine on, the existence of the alleged market for the sale of search advertising by auction. CX8006 (Evans Expert Report); CX8007 (Athey Expert Report); Evans, Tr. 1818.

08192010 (hereinafter "Merger Guidelines § __") (example 15, describing that, where "[c]ustomers in the United States must use products approved by U.S. regulators . . . [t]he relevant product market consists of products approved by U.S. regulators [and] [t]he geographic market is defined around U.S. customers.").[20]

Contact lenses are regulated by the U.S. Food and Drug Administration, and no contact lens retailer may legally sell contact lenses in the United States without proof of a valid prescription, or compliance with the federal prescription verification program. F. 9, 20-22. This law applies to any entity wishing to sell contact lenses in the United States, including any non-U.S. seller that sells contact lenses within the United States. 16 C.F.R. § 315.5(a); 16 C.F.R. § 315.5(e). With a valid prescription, consumers can purchase contact lenses from any seller operating anywhere in the United States. *See* F. 16, 72. Respondent does not dispute that the United States is the relevant geographic market. Hearing Tr. 103; RRCCFF 1623-1626. Accordingly, the relevant geographic market in this case is the United States.

2. Relevant Product Market

The "outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325; *see also United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). While the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it, "within [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe*, 370 U.S. at 325 (citing *E. I. du Pont de Nemours*, 353 U.S. 586, 593-95 (1957)).

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20 Courts routinely rely on the Merger Guidelines to define the relevant market. *See, e.g., FTC v. H.J. Heinz, Co.*, 246 F.3d 708, 716 n.9 (D.C. Cir. 2001); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 52 n.10 (D.D.C. 2011); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 38 (D.D.C. 2015).

"The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe*, 370 U.S. at 325. Courts routinely rely on these *Brown Shoe* factors to define the relevant product market. *See, e.g., FTC v. Staples*, 970 F. Supp. 1066, 1075-80 (D.D.C. 1997); *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 46-48 (D.D.C. 1998); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 159-64 (D.D.C. 2000).

Market definition "must take into account the realities of competition." *FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1039 (D.C. Cir. 2008). Ordinary course of business documents reveal the contours of competition from the perspective of the parties, who may be presumed to "have accurate perceptions of economic realities." *Whole Foods*, 548 F.3d at 1045 (concurring op.) (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986)). Thus, in applying the *Brown Shoe* factors, courts pay "close attention to the defendants' ordinary course of business documents." *H&R Block*, 833 F. Supp. 2d at 52.

Finally, in addition to the practical indicia and ordinary course of business documents, courts rely on testimony from experts in the field of economics. *United States v. Aetna Inc.*, 2017 U.S. Dist. LEXIS 8490, at *42-43 (D.D.C. Jan. 23, 2017); *Sysco*, 113 F. Supp. 3d at 27. Expert testimony is used to analyze the approach set forth in the Merger Guidelines, which instruct that a relevant market may be defined by asking whether a hypothetical monopolist of the proposed market could impose a small but significant and nontransitory increase in price ("SSNIP") without losing sufficient sales to render the price increase unprofitable. Merger Guidelines § 4.1.1; *see also Whole Foods*, 548 F.3d at 1038; *Swedish Match*, 131 F. Supp. 2d at 160-61 & n.8. "Under the [hypothetical monopolist test], [a] market is any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level." *United States v. Am. Express Co.*, 838 F.3d 179, 198-99 (2d Cir. 2016) (internal quotations omitted). "If a small price increase would drive consumers to an alternative product, then

that product must be reasonably substitutable for those in the proposed market and must therefore be part of the market, properly defined." *Whole Foods*, 548 F.3d at 1038 (citing Merger Guidelines).

These approaches for defining the relevant market are addressed, in turn, below.

a. Interchangeability and cross-elasticity

A contact lens prescription specifies the power, base curve, and the specific brand of contact lens. F. 23. Contact lenses will be identical, regardless of whether the consumer purchases the contact lenses from his or her prescribing ECP or from another seller. F. 24. Contact lenses are a commodity product, F. 24-27, and thus are functionally interchangeable. *Staples*, 970 F. Supp. at 1074.

As Complaint Counsel acknowledges, all retailers of contact lenses are, to some degree, in competition for the same pool of customers. CCB at 101. "However, the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." *Staples*, 970 F. Supp. at 1075. This general rule applies even to functionally interchangeable products, i.e., those products that can be used for the same purpose as the product at issue. *H&R Block*, 833 F. Supp. 2d at 54-60 (excluding assisted tax preparation and pen-and-paper do-it-yourself tax preparation from the market for digital do-it-yourself tax preparation software, even though all provide ways to complete a tax return); *Staples*, 970 F. Supp. at 1074-81 (excluding consumable office supplies sold outside office supply superstores from the market, even though those supplies were functionally interchangeable with office supplies sold inside the superstores).

Respondent's main argument for a relevant market including all physical retailers of contact lenses is that, because every contact lens customer must go to an ECP for a prescription, 1-800 Contacts has always considered ECPs to be its principal competitors and has always focused its marketing efforts on offering consumers a better alternative to buying from their ECPs.

RB at 79-80. While the evidence does show that all retailers of contact lenses generally compete with each other for the same pool of potential customers, that does not necessarily mean that online retailers are not a distinct submarket. As Judge Tatel explained in *Whole Foods:*

> [W]hen the automobile was first invented, competing auto manufacturers obviously took customers primarily from companies selling horses and buggies, not from other auto manufacturers, but that hardly shows that cars and horse-drawn carriages should be treated as the same product market. That Whole Foods and Wild Oats have attracted many customers away from conventional grocery stores by offering extensive selections of natural and organic products thus tells us nothing about whether Whole Foods and Wild Oats should be treated as operating in the same market as conventional grocery stores. Indeed, courts have often found that sufficiently innovative retailers can constitute a distinct product market even when they take customers from existing retailers.

Whole Foods, 548 F.3d at 1048; *see also Staples*, 970 F. Supp. at 1074-80 (finding a distinct market of office supply superstores despite competition from mail-order catalogues and stores carrying a broader range of merchandise). Thus, even though 1-800 Contacts' strategy has been to lure customers away from traditional physical retailers through offering a faster and more convenient way to buy contact lenses, this does not compel a finding that the relevant market is the broader market of all retail sales of contact lenses. Accordingly, to determine whether online retailers of contact lenses is a submarket within a broader market of all retailers of contact lenses, other evidence relevant to the *Brown Shoe* factors is analyzed next.

b. *Brown Shoe* factors

In addition to the cross-elasticity of demand and supply, *Brown Shoe* sets forth additional "practical indicia" as guides for defining the appropriate market. Since the Supreme Court "described [the *Brown Shoe*] factors as 'practical indicia' rather

than requirements, subsequent cases have found that submarkets can exist even if only some of these factors are present." *Staples*, 970 F. Supp. at 1075 (citations omitted).

i. Industry recognition

One factor for consideration in determining whether a submarket exists is industry or public recognition of the submarket as a separate economic entity. *Brown Shoe*, 370 U.S. at 325; *Rothery Storage*, 792 F.2d at 218-19 n.4 ("The industry or public recognition of the submarket as a separate economic unit matters because we assume that economic actors usually have accurate perceptions of economic realities.").

Online retailers uniformly identify other online retailers as their closest competitors. For example, Vision Direct, Walgreens.com, and LensDirect each testified that they view online competitors as the "primary competitors for contact lens sales." F. 416, 417. AC Lens, Memorial Eye, and other online retailers also testified that their "main competitors" and "closest competitors" consist exclusively of online retailers. F. 416.

1-800 Contacts has also acknowledged that it views online retailers as its major competitors. 1-800 Contacts' CEO and president Mr. Bethers, in an October 2016 radio interview, referred to online retailers as 1-800 Contacts' "major competitors." F. 415. Documents from 1-800 Contacts, addressed in the following section, also show that 1-800 Contacts recognizes the online retail market as a separate economic entity. Thus, the evidence shows widespread industry recognition of a distinct market for the online sale of contact lenses.

ii. Peculiar characteristics and distinct customers

Other factors for consideration in determining whether a submarket exists are "the product's peculiar characteristics" and "distinct customers." *Brown Shoe*, 370 U.S. at 325. An important "peculiar characteristic" of the contact lens retail market is that customers must go to an ECP's office to get an eye exam to obtain a prescription for contact lenses and often buy their initial purchase of contact lenses from their ECP during their annual eye

examination. F. 10, 404.[21] These customers are in a different situation from customers who are purchasing refill contact lenses and thus are no longer in the physical store. F. 404, 465. Online retailers typically compete only for that "refill" portion of the market. F. 403.

In contrast to customers who typically purchase at a brick and mortar site, customers who tend to shop online for contact lenses place a high premium on the convenience of online shopping, home delivery, low prices, and fast (and often free) shipping. F. 400. Online purchasing is more convenient than purchasing from brick and mortar sites because the customer does not need to return to the store to pick up his or her purchase.[22] F. 401. However, even those customers who tend to shop online must return to an ECP for a new prescription, and often, while there, will purchase an initial set of contact lenses. F. 404. Customers' changing behavior (purchasing from an ECP, then purchasing online, and then purchasing from an ECP again) reflects that customers "are choosing the different types of stores under different circumstances." F. 404.

An additional "peculiar characteristic" of the contact lens retail market is the impact of vision insurance on consumers' purchasing decisions. Customers with vision insurance are typically able to get in-network benefits at ECPs, but not from online retailers. F. 409. Thus, online providers, including 1-800 Contacts, are not well-positioned to capture sales made to customers with vision insurance who prefer to purchase from in-network retailers, further demonstrating there are distinct customers within the broader market of all retailers of contact lenses. F. 408.

Finally, other than 1-800 Contacts, online retailers typically rely almost exclusively on search advertising to reach potential

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21 In most states, a contact lens prescription expires in one year. In seven states, a contact lens prescription expires in two years. F. 18.

22 ECPs are generally not able to fill a patient's prescription with on-hand inventory. ECPs typically carry only a small assortment of retail products. Those ECPs that maintain an inventory are able to fill a patient's prescription about 25% of the time from the on-site inventory. F. 405, 425.

new customers. F. 428. By contrast, brick and mortar retailers, including club stores, tend not to engage in substantial online advertising, including search advertising. F. 429. The fact that online retailers promote themselves to potential customers in a different manner than brick and mortar stores further supports a conclusion that customers of each channel tend to be distinct.

iii. Distinct prices

Distinct pricing is also a consideration in determining whether a submarket exists. *Brown Shoe*, 370 U.S. at 325. *See*, *e.g.*, *Swedish Match*, 131 F. Supp. 2d at 165 (product market for loose leaf tobacco did not include moist snuff where, among other factors, "loose leaf pricing is determined upon the basis of competition with other loose leaf products, not moist snuff."); *cf. Beatrice Foods Co. v. FTC*, 540 F.2d 303, 309 (7th Cir. 1976) (excluding items from the product market when manufacturers did not consider them when setting their prices).

The online retail market for contact lenses exhibits distinct prices. Online retailers generally offer significantly lower prices – ranging roughly from 20 to 30% less – than physical retailers, other than membership warehouse club stores. F. 431-432, 435, 442. Although 1-800 Contacts' business model has been to attract customers from ECPs and thus it sets its prices by looking primarily at independent ECPs' and optical retail chains' prices (F. 55-58, 433), other online retailers do not consider prices charged by physical retailers when setting their prices. F. 442-445. As Mr. Clarkson of AC Lens explained, AC Lens' prices are not based on prices charged by ECPs because "[t]hose prices are typically so much higher that they're not going to be relevant in the [pricing] decision." F. 444. During the period that Memorial Eye sold contact lenses both online and in physical stores, it charged significantly lower prices online than it did in its physical stores. F. 446. In setting its online prices, Memorial Eye considered only the prices of other online retailers, while disregarding prices of ECPs and physical retailers because those prices were not "relevant" to its online business. F. 447.

When 1-800 Contacts implemented a price matching policy, it did so in response to competition from "aggressive price messaging" by other online retailers, and not in response to

competition from ECPs. F. 436 (1-800 Contacts' online advertising copy stating, "We Beat Any Online Price."); F. 440 (1-800 Contacts' decision to implement the price matching policy was not influenced by the prices charged by physical retailers.).

While club stores such as Costco or Sam's Club typically offer lower prices than online retailers, online retailers do not consider club stores to be close competitors because the club stores require a membership, operate under a different pricing model, and appeal to an entirely "different category" of customers. F. 449. As Mr. Clarkson of AC Lens explained: "[E]ven though club stores have very competitive pricing, they're not a big part of . . . [the] analysis to figure out where to put prices because, for one thing, it's a very different category of customer. They've paid a membership fee and in some cases, especially Costco, they're incredibly loyal to Costco." F. 449. Consistent with this difference, 1-800 Contacts' price matching policy explicitly excludes club stores. F. 450 ("[O]ur price matching has typically excluded clubs as a policy. And the reason for that is pretty simple, and that is that there's a fee, a membership fee that's associated with clubs, and so you have to pay that fee.").

iv. Specialized vendors

The "specialized vendor" factor, *Brown Shoe*, 370 U.S. at 325, typically "looks to whether a product or service is sold or marketed by a unique class of vendor." *Moore Corp. v. Wallace Computer Servs.*, 907 F. Supp. 1545, 1578 (D. Del. 1995). *E.g.*, *United States v. Healthco, Inc.*, 387 F. Supp. 258, 261, 265 (S.D.N.Y.), *aff'd*, 535 F.2d 1243 (2d Cir. 1975) (distinguishing between submarkets for dental equipment and dental sundries based in part on the two industries' different methods for distributing and marketing those products). In this case, the relevant inquiry is whether the methods used for selling and marketing contact lenses online are sufficiently specialized to distinguish online retailers from physical retailers.

Online retailers must invest in unique assets that differ significantly from those of physical retailers. As an initial matter, online retailers must invest in, build out, and maintain sophisticated websites that allow customers to easily and efficiently navigate the websites, and order their products from

home. F. 426. While ECPs and other physical retailers may maintain websites, this is not their primary means of attracting customers or selling contact lenses.

Further, larger online retailers invest significantly in a wide variety and large quantity of contact lenses, in contrast to physical retailers. For example, 1-800 Contacts has specialized facilities, including a 130,000 square foot distribution center, which reflect a "[s]ignificant amount of dollars invested in technology and distribution infrastructure." F. 419. 1-800 Contacts has an inventory of over 60,000 SKUs worth millions of dollars. F. 424. AC Lens has 37,000 SKUs in stock. F. 424. *See also* F. 424 (Memorial Eye made "a huge investment" in purchasing inventory, which was significantly larger than the inventory carried by its brick and mortar stores). By contrast, independent ECPs and brick and mortar retail stores do not carry nearly as extensive inventories of contact lenses as online retailers. F. 425 (Costco could fill at most 30% of its prescriptions from inventory, which was higher than most eye doctors); F. 425 (Walmart and Sam's Club have a selection of maybe four different lenses, perhaps a total of 400 SKUs in the store. "A doctor usually would have even less [than Walmart and Sam's Club], and many doctors don't carry any inventory.")).

In addition, online contact lens retailers must invest in increasingly sophisticated prescription verification systems. F. 427. By contrast, the ECP, as the prescribing optometrist, does not need to make this investment.

The fact that online contact lens retailers are specialized vendors distinct from physical retailers is supported by the fact that many well-known brick and mortar retailers have elected to outsource their online operations. For example, Walmart contracted with 1-800 Contacts for its online operations, including prescription verification, distribution, customer service, and marketing from January 2008 until December 31, 2012. F. 422. After that alliance ended, rather than developing in-house capabilities to perform these specialized services, Walmart contracted with AC Lens to provide "white label services" to

Walmart.[23] F. 423. Additionally, 1-800 Contacts performs fulfillment services for multiple brick and mortar retailers, including LensCrafters, Pearle, Sears, and Target Optical. F. 420. These partnerships confirm the observations made in a 2015 report prepared for AEA Investors prior to its acquisition of 1-800 Contacts that while "[f]ulfillment and distribution capabilities [are] critical for online entrant[s]," "[l]arge scale B&M [brick and mortar] players even have issues managing this part of the business." F. 420. Indeed, 1-800 Contacts has recognized that its specialized assets created a "growth opportunity" to provide "e-commerce, fulfillment, distribution and sourcing services" to brick and mortar retailers. F. 421.

c. Ordinary course of business documents

"Analysis of the market is a matter of business reality – a matter of how the market is perceived by those who strive for profit in it." *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987); *H&R Block*, 833 F. Supp. 2d at 52. 1-800 Contacts' ordinary course of business documents recognize a distinction between the online retail market and the broader retail market for contact lenses.

Documents prepared and presented by 1-800 Contacts refer to the online market as a separate economic entity, including by stating that 1-800 Contacts has a "60%+ share of [the] online contact lens market." F. 412. In addition, a September 2015 1-800 Contacts' Management Presentation focused on 1-800 Contacts' competitive position compared to its online rivals. F. 414 (noting "20x the unaided brand recognition of the next largest online competitor"; analyzing 1-800 Contacts' share of the online contact lens market; stating, 1-800 Contacts is the "[o]nly online player with scale to conduct broad advertising such as TV."). 1-800 Contacts' September 2015 Management Presentation also

23 White label service allows rebranding and is an e-commerce service that entails building a website for a partner, providing customer service such as answering telephone calls on the partner's behalf, fulfilling orders, providing prescription verification, and providing customer retention services such as sending emails to existing customers. Under the arrangement between AC Lens and Walmart, AC Lens fulfilled orders placed on Walmart's websites and handled customer retention efforts for Walmart customers. F. 423.

recognized that 1-800 Contacts and its online rivals compete on the basis of convenience and price. F. 407 ("Online penetration within the contact lens industry continues to increase steadily due to superior convenience and price. Strong secular trends toward smartphones and ease of re-ordering via mobile enhance the value proposition of online's convenience.").

Respondent contends that its business documents support the conclusion that 1-800 Contacts focuses on its share of and competition in the overall contact lens market and on 1-800 Contacts' objective of luring customers away from ECPs. *E.g.*, RX0428 at 0010 ("1-800 CONTACTS provides a value proposition driven by convenience and superior customer services at prices that are below independent doctors"); RX0428 at 0026 ("1-800 CONTACTS is built on a simple promise: customers can conveniently order the exact same contacts, delivered to their door, for less than buying them at their doctor's office."). However, the fact that 1-800 Contacts sees itself competing in two markets – the broader market of all retail sales of contact lenses and a narrower market of online retail sales of contact lenses – does not undermine the conclusion, reached after a review of all the evidence, that there is a submarket for online retail sales of contact lenses.

d. Economic expert testimony

i. Critical loss analysis

To help determine the relevant market, Complaint Counsel's expert witness, Dr. David Evans, analyzed whether the proposed market for the online sale of contact lenses would satisfy the hypothetical monopolist test. As set forth in the Merger Guidelines, that test asks:

> [Whether] a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms.

Merger Guidelines § 4.1.1. If so, the candidate market may be the relevant product market. *Sysco*, 113 F. Supp. 3d at 33-34; *H&R Block*, 833 F. Supp. 2d at 51-52.

To implement the SSNIP test, Dr. Evans performed a "critical loss analysis." F. 454, 456. "[T]he critical loss analysis is specifically endorsed by the Merger Guidelines as a method for implementing the SSNIP test, *see* Merger Guidelines § 4.1.3, and has been accepted by courts as a standard methodology." *H&R Block*, 833 F. Supp. 2d at 64 n.19 (citing *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 40 n.16 (D.D.C. 2009) ("Critical loss analysis is a standard tool used by economists to study potentially relevant markets.")). To perform a critical loss analysis requires a determination of profit margins and diversion ratios. F. 457.

Respondent's expert witness, Dr. Kevin Murphy, did not criticize the model or profit margins used by Dr. Evans in Dr. Evans' critical loss analysis. *See* F. 456-457. However, Dr. Murphy and Respondent have challenged Dr. Evans' diversion ratio for (1) using data that reflects "switching," rather than "diversion"; and for (2) arbitrarily using a diversion ratio of 40%. RB at 85-86; RX0739 (Murphy Expert Report at 0076-78 ¶¶ 211-15).

"Switching refers to the number of consumers who switch between different products for any reason. . . . As opposed to switching, diversion refers to a consumer's response to a measured increase in the price of a product. In other words, diversion measures to what extent consumers of a given product will switch (or be 'diverted') to other products in response to a price increase in the given product." *H&R Block*, 833 F. Supp. 2d at 62. In *H&R Block*, the plaintiff's expert witness relied upon IRS data showing the methods of tax preparation that tax payers used from year to year. The court found the data to be highly reliable because (1) the sample size was enormous and (2) the data reflected actual historical tax return filing patterns as opposed to predicted behavior. The court noted that although the switching data relied upon by the plaintiff's expert witness did not directly measure diversion, it was "at least somewhat indicative of likely diversion ratios" and held that "it was reasonable to use switching data as a proxy for diversion, especially since no more refined historical data apparently exists." *Id.* at 62, 65.

Based on survey evidence assembled in the ordinary course of 1-800 Contacts' business, Dr. Evans determined that 40% of customers who would leave 1-800 Contacts in response to a price increase would go to other online retailers. F. 461, 464. The principal data relied upon by Dr. Evans to derive this number as his diversion ratio was from a January 2013 1-800 Contacts presentation titled, "Where's the love? Deadfile Customer Survey." This survey reported that, of those customers who are unlikely to buy from 1-800 Contacts for their next purchase, 40% reported they would purchase from an online retailer other than 1-800 Contacts. F. 462. Dr. Evans bolstered his selection of 40% as the most reasonable estimate of a diversion ratio from 1-800 Contacts to other online retailers after reviewing other evidence regarding lost sales and concluding that other data provided consistent estimates. F. 464 (citing data indicating 26% or 34% switched from 1-800 Contacts to other online retailers; presentation reporting "[p]rice-driven lapsers are more likely to move to another online player" and showing 50% of price-driven lapsers shifting to other online retailers; survey reporting that of former customers who have purchased elsewhere and self-report that they will not make their next purchase from 1-800 Contacts, 38% say they will make their next purchase from another online supplier).

Respondent correctly argues that consumers can switch between firms for reasons other than price, including service and convenience, and that the data relied upon by Dr. Evans did not convey what consumers would do in response to a price increase. RB at 85-86. Indeed, Dr. Evans did not know if the survey on which he relied asked consumers what they would do if 1-800 Contacts raised prices. F. 463. Thus, Dr. Evans relied upon switching data that did not directly measure diversion from 1-800 Contacts to other online retailers.

Based on evidence that suggested that a large share of customers at other online retailers previously shifted from 1-800 Contacts to those retailers to get better prices, and his assumption that those customers would presumably shift back to 1-800 Contacts if prices at all other online retailers rose, Dr. Evans assumed that 40% of customers who would leave other online retailers in response to a price increase would go to 1-800 Contacts. F. 466.

Using 40% as his diversion ratio, Dr. Evans calculated that a hypothetical monopolist would find it profitable to impose a SSNIP of 12.1% (F. 473), which is well in excess of the 5% threshold that the antitrust agencies typically use in identifying a relevant market. Merger Guidelines § 4.1.2. Dr. Evans further opined that because a hypothetical monopolist consisting of all online retailers of contact lenses could profitably increase prices by more than 5%, this indicates that physical retailers of contact lenses do not provide sufficiently strong substitutes to prevent a SSNIP. CX8006 (Evans Expert Report at 124 ¶ 269).

Respondent's expert, Dr. Murphy, acknowledged that documents provided by 1-800 Contacts show a wide range of lost sales diverted from 1-800 Contacts to other online retailers, with some documents reporting that as few as 17% of 1-800 Contacts' former customers have substituted to other online suppliers, but other documents reporting as many as 40% or 50% of 1-800 Contacts' former customers would purchase from an online retailer other than 1-800 Contacts. F. 469. Dr. Murphy contended that the appropriate diversion ratio is 17%, based on a different slide in the presentation titled, "Where's the love? Deadfile Customer Survey," which reported that for those customers whose last purchase was not from 1-800 Contacts, 49% reported their most recent contact lens purchase was from an eye doctor and 17% reported their most recent contact lens purchase was from another online supplier. F. 468, 470. Dr. Murphy's reliance on a high percentage of 1-800 Contacts' customers who made purchases from ECPs compared to those who switch to other online sellers is not an appropriate diversion ratio because it does not rely on customers who are actually lost – i.e., those customers who cycle between buying from ECPs when they require a new prescription and buying from 1-800 Contacts when they need a refill. F. 471-472. Furthermore, Dr. Murphy acknowledged that using some of the other surveys discussed by Dr. Evans, which suggested a diversion ratio of either 26% or 34%, would support a finding that a SSNIP would be profitable. F. 460.

Respondent also tries to impeach Dr. Evans' critical loss analysis by asserting that a hypothetical monopolist consisting of 1-800 Contacts and all ECPs could also profitably raise prices by more than the 5% threshold set forth in the Merger Guidelines. RFF 572 (citing RX0739 (Murphy Expert Report at 0079, 0110);

Murphy, Tr. 4164-65). The relevance of this conclusion is questionable, as such a candidate market does not include any of the parties to the Challenged Agreements other than 1-800 Contacts, and thus would not enable an assessment of whether 1-800 Contacts and the parties to the Challenged Agreements could profitably raise prices by suppressing advertising. *See* CX8009 (Evans Rebuttal Expert Report at 056-57 ¶¶ 94-96). As explained in *H&R Block*, "courts correctly search for a 'relevant market' – that is a market relevant to the particular legal issue being litigated." *H&R Block*, 833 F. Supp. 2d at 64 (citing 5c Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law (hereinafter, "Areeda & Hovenkamp"), ¶ 533c, at 254 (3d ed. 2007)). Furthermore, even if a critical loss analysis confirms multiple relevant markets, this does not undermine an expert's reliance on a critical loss analysis to validate a narrower market. *See H&R Block*, 833 F. Supp. 2d at 64.

In light of the shortcomings of the switching data and the fact that the SSNIP test can confirm multiple relevant markets, Dr. Evans' critical loss analysis is not deemed to be conclusive. However, it is another data point that tends to confirm the evidence in this case that the proper relevant market is online retailers of contact lenses.

ii. Unilateral pricing policies

Dr. Evans supported his relevant market definition by analyzing data obtained from a real-world "natural experiment," in which online retailers were forced to raise their prices as a result of several manufacturers' implementation of unilateral pricing policies ("UPPs"). *See* F. 476-487. In 2014, major contact lens manufacturers prohibited retailers from reselling certain of their products at prices below specified levels. F. 476. Because UPPs set a price floor for covered products, discount sellers (online and club stores) had to increase their prices substantially, by roughly 20 to 25%, on many of the affected products. F. 479. With the exception of club stores, physical retailers were already largely pricing close to or above the levels required by Johnson & Johnson's UPP, so their prices did not change substantially. F. 480.

Dr. Evans explained that because the discount sellers' (online and club stores) price increases above the 5% threshold of the SSNIP test following the UPP were profitable, "the physical retailers were not a sufficiently significant constraint to prevent the profits [of the discount sellers] from going up as a result of the price increase" and thus the physical retailers are not in the relevant market. F. 485. Dr. Evans concluded that the "natural experiment" of the UPP-mandated price increase is evidence that a hypothetical monopolist consisting of online sellers and club stores could profitably increase its prices above the 5% threshold of the SSNIP test and this implies that discount sellers represent a relevant market. F. 486.

Dr. Murphy criticized Dr. Evans' conclusions on the bases that (1) the UPP affected the prices charged by online retailers other than 1-800 Contacts more than it affected the prices charged by 1-800 Contacts; and (2) the UPP affected the prices charged by online retailers and also by club stores. Murphy, Tr. 4172-73. Dr. Murphy's first criticism, that the UPP mandated price increases are uninformative because they did not apply uniformly to all online contact lens sellers, ignores standard economic practice for defining a market. Merger Guidelines § 4.1.1 ("[The hypothetical monopolist] test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms.")). Dr. Murphy's second criticism, that the UPP mandated price increases are uninformative because they affected prices of not only online retailers, but also of club stores, ignores the evidence that there is little substitution between online sellers of contact lenses and club stores. CX8006 (Evans Expert Report at 127-28 ¶ 276); F. 449-450.

As Dr. Evans explained, the candidate market tested by the UPP natural experiment included club stores; thus the results of the experiment, viewed alone, did not allow the exclusion of club stores from the relevant market. F. 487. Nevertheless, the UPP does further demonstrate that physical retailers, other than club

stores,[24] are not close substitutes for online sellers of contact lenses.

e. Summary

Considering all the evidence collectively, Complaint Counsel has established that the relevant market in which to analyze the effects of the challenged conduct in this case is the online sale of contact lenses in the United States. The analysis next turns to anticompetitive effects in this market.

E. Anticompetitive Effects

1. Overview

Complaint Counsel contends it has established a *prima facie* case that the Challenged Agreements are anticompetitive in three alternative ways. First, Complaint Counsel argues that the Challenged Agreements are presumptively anticompetitive as "inherently suspect" advertising restraints and/or bid rigging agreements. Second, Complaint Counsel argues that it has demonstrated actual anticompetitive effects in the form of direct evidence of harm to consumers and harm to search engines. Third, Complaint Counsel argues that the parties to the Challenged Agreements collectively have market power in the relevant market and that the nature of the restraints makes it likely that the Challenged Agreements will result in anticompetitive effects.

As set forth below, the preponderance of the evidence in this case supports a finding of actual anticompetitive effects in the relevant market for the sale of contact lenses online. Accordingly, this Initial Decision need not, and does not, determine whether Complaint Counsel has established a *prima facie* case under its alternative theories of presumed anticompetitive effects or market power. *See Realcomp*, 635 F.3d at 827-28 (declining to rule on

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24 As described above, club stores such as Costco do not significantly constrain online contact lens retailers. F. 449 (online retailers do not price against club stores); F. 450 (1-800 Contacts excludes club stores from its price matching).

the Commission's application of inherently suspect analysis, and affirming the Commission's holding that where anticompetitive effects are proven, market power need not be shown).

2. Context for the Challenged Agreements

A rule of reason analysis includes "looking to the circumstances, details, and logic of a restraint." *Cal. Dental Ass'n*, 526 U.S. at 781. *See also Realcomp*, 635 F.3d at 825 (noting that a rule of reason analysis may include an analysis of "'the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed'") (citations omitted). The context and circumstances surrounding a restraint are examined, "not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Am. Needle*, 560 U.S. at 203 n.10 (quoting *Board of Trade of Chicago*, 246 U.S. at 238). Moreover, there is a "well-established pattern of the Supreme Court to examine intent only in those close cases where the plaintiff falls short of proving that the defendant's actions were anticompetitive. *See, e.g.*, *Times Picayune Publ'g Co. v. United States*, 345 U.S. 594, 614, 97 L. Ed. 1277, 73 S. Ct. 872 (1953); *United States v. Griffith*, 334 U.S. 100, 105, 92 L. Ed. 1236, 68 S. Ct. 941 (1948)." *Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 948 (9th Cir. 2000). Because the evidence in this case proves anticompetitive effects, as shown in Section III.E.3, this Initial Decision need not, and does not, decide whether or not Respondent's motives for the Challenged Agreements were anticompetitive.

As set forth above in Section III.A.5, the Challenged Agreements prohibit each party from bidding on each other's trademark terms as keywords and further require each party to implement negative keywords based on the other party's trademark terms, in order to prevent ads from being matched to a bid on a generic keyword. Thus, the design of the agreements was to prevent the appearance of ads for competitors whenever an internet user entered a search query for a party's company brand name. F. 684. The evidence further proves that 1-800 Contacts enforced the agreements in accordance with their design. F. 685. In addition, as the following section explains, these agreements

arose within a competitive and legal context that exposes their anticompetitive nature.

a. Competitive significance

Paid search advertising in general, and paid search advertising generated by keywords containing 1-800 Contacts' trademark terms in particular ("trademark paid search"), are competitively significant in the sale of contact lenses online, as explained below.

i. Paid search advertising generally

Paid search advertising is an important method for marketing contact lenses online, including for increasing brand awareness and obtaining new customers. F. 497. It is a particularly important method for marketing contact lenses online because the advertising is presented to a consumer at a time when the consumer is more likely to be looking to buy. F. 498.

A consumer using search to look for products to buy online is often ready to buy. F. 562. If a company is unable to reach that consumer during that search session, it may not make the sale later. The company cannot readily substitute another type of advertising to reach that user at that time, such as bidding on a different search keyword, buying a Facebook Newsfeed ad, or buying a banner ad on the Yahoo homepage, "because it is unlikely that the user will see that ad right before she buys." F. 562. Search advertising is a particularly efficient method of marketing for small firms because search engines provide all the necessary software for using paid search advertising for free, do not impose any entry or minimum fees for using the service, and charge advertisers only when consumers click on their ad. F. 563. Online search is one of the key methods by which consumers discover and reach vendors and compare products and services. F. 564.

Search advertising is important to 1-800 Contacts in seeking to sell contact lenses online. 1-800 Contacts earns approximately 20% of its sales from paid search advertising. F. 580. From 2004 to 2014, between [redacted]% of 1-800 Contacts' internet advertising budget was spent on paid search advertising each year. F. 66.

As detailed in Section II.K.1, search advertising is also important to 1-800 Contacts' competitors. The facts demonstrate that, although online contact lens retailers may use other forms of advertising, retailers deem search advertising to be much more effective in reaching potential buyers. For example, AC Lens has found that search advertising, as opposed to other marketing channels it has used, generates the most new customer orders and the most revenue, at a cost that is consistent with AC Lens' financial goals. F. 500-501. AC Lens considers search advertising the most effective and important marketing channel that AC Lens uses to grow its business. F. 502. To AC Lens, search advertising is a particularly valuable type of advertising because it can be used to target customers who are specifically looking to purchase contact lenses. F. 503 (Mr. Clarkson of AC Lens testifying: "Search is beautiful in the sense that you get right in front of the customer who's looking to buy your product, and you don't pay unless they click on your ad. It's a wonderful thing.").

Similarly, Vision Direct advertised almost exclusively online. F. 540. Search advertising "was a major driver" in building Vision Direct's business over the years, including driving traffic to Vision Direct's website and driving new and repeat sales. F. 542-543. Web Eye Care has also used search advertising from its inception. F. 556. Web Eye Care does not engage in any advertising other than paid search advertising, including because it has determined that search advertising "drives the most traffic" and orders, and at an acceptable cost. F. 556-558. *See also* F. 523 (paid search advertising through Google and Bing constitutes the most important of LensDirect's marketing channels, and has been effective in generating growth for LensDirect); F. 528 (paid search advertising is "essential" to Lens Discounters' ability to attract new customers because it allows the company to reach customers who are seeking to purchase contact lenses online); F. 535, 537 (search advertising was the "most efficient," form of advertising for Memorial Eye, and was "critical" and "vital" to Memorial Eye's growth); F. 549-550 (search advertising was "[e]specially" important" for Walgreens at the time that it began selling contact lenses online because it helped Walgreens let people know that Walgreens sold contact lenses and was "an essential form" of advertising for Walgreens to remain competitive with other online resellers of contact lenses).

Accordingly, the facts in this case support the conclusion that search advertising is a competitively significant activity.

ii. Trademark paid search

Trademark paid search has particular competitive significance in the marketing and sale of contact lenses online, as detailed in Section II.K.2, and further explained below.

Based on data provided by Google and analyzed by Complaint Counsel's expert witness, Dr. Evans, it is common for companies to pay search engines to present their ads in response to a consumer's entering the name of another company's brand as a search request. Companies indicate to Google that they would like their ads to be presented by bidding directly on the keywords ("direct keyword bidding" or "direct bidding") or and/or bidding on generic keywords, in broad or phrase match, to allow their ads to be "matched" to a search for the other company's brand name, even though the advertiser did not bid on trademark keywords ("matched ads"). F. 651, 654-655.

During the time period from 2002 through 2016, Google served advertisements for 9 of the 14 contact lens retailers that are parties to the Challenged Agreements, as a result of those companies' direct bidding on 1-800 Contacts' trademark terms prior to entering into the agreements. F. 653. This suggests that these nine firms believed such keyword bidding to be worth the cost and that Google determined their advertisements were sufficiently relevant. F. 653. During the time period for which data on matched ads is available (January 2010 through November 2016), Google served matched ads for 5 of the 14 firms that entered into the Challenged Agreements, which suggests that Google determined the advertisements were sufficiently relevant. F. 656. Parties to the Challenged Agreements consistently testified that, absent the agreements, they would bid, or test bidding, on 1-800 Contacts' trademark terms and/or remove negative keywords from their advertising accounts, which would enable matched ads to appear in response to a search for 1-800 Contacts' trademark terms. F. 590, 595, 616, 630, 634, 635, 650.

Trademark paid search is a significant source of business for 1-800 Contacts, accounting for a large percentage of orders. F. 566. 1-800 Contacts' trademark keywords, together with the three most common generic keywords, "contacts," "contact lens," and "contact lenses," have been the largest contributors to orders for 1-800 Contacts. F. 567. Trademark paid search accounts for the substantial majority of 1-800 Contacts' new customer orders attributable to paid search advertising. F. 570. In 2015, for example, between 20 and 31% of 1-800 Contacts' initial web orders came from users searching for 1-800 Contacts' trademark terms. F. 571. 1-800 Contacts' trademark terms have higher conversion rates[25] than non-branded search terms. F. 573. In 2006, 2007, and 2008, trademark search generated far more orders than non-trademark searches. F. 572. Moreover, trademark paid search generates direct traffic to the 1-800 Contacts website, which accounts for approximately 70 to 75% of 1-800 Contacts' orders. F. 577.[26] Furthermore, 1-800 Contacts sees direct traffic to 1-800 Contacts' website as much less susceptible to competing advertising or offers by other retailers. F. 577. Accordingly, 1-800 Contacts had an interest in preventing advertisements for competing retailers from appearing in response to a search for 1-800 Contacts' trademark terms.

Indeed, as explained further in Section III.E.3.b, 1-800 Contacts clearly recognized a pattern of decreased sales when competitor ads appeared in response to an internet search for 1-800 Contacts' trademark terms. F. 711. For example, an August 7, 2007 analysis by 1-800 Contacts' marketing manager Bryce Craven estimated that 1-800 Contacts may have lost around $426,000 in revenue to Lens.com, year to date, as a result of Lens.com ads appearing in response to searches for 1-800 Contacts' trademarks. F. 715. Similarly, 1-800 Contacts noted that, for the week ending July 28, 2007, it received fewer orders than the previous week on its most popular trademark keyword,

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25 A "conversion" refers to a sale made over the internet. The conversion rate is the number of times a conversion occurs divided by the total number of ad clicks. F. 156.

26 Sources of direct traffic identified by 1-800 Contacts include email, typed URL/Bookmark, paid search on 1-800 Contacts trademark, and mobile applications. F. 577.

1800contacts, which Mr. Craven attributed to "probably . . . [losing] some traffic to Lens.com, LensWorld, Vision Direct and a few other advertisers" who were "consistently showing up on" the term 1800contacts. F. 714.

Moreover, displaying an ad in response to a search for 1-800 Contacts' trademark terms is an important method by which lower-priced online contact lens retailers compete with 1-800 Contacts for customers. F. 565. Based on the comScore dataset of searches by users for the time period July 2013 through July 2016 (the "comScore dataset"[27]) analyzed by Complaint Counsel's expert witness, Dr. Susan Athey, 17% of search queries were for 1-800 Contacts' trademark terms. F. 657. The volume of searches for 1-800 Contacts terms in the comScore dataset was similar in size to the collective volume of searches for the top three generic terms ("contact," "contact lenses," and "contacts"). F. 658-659. The 1-800 Contacts search term is the largest, single brand name search term, according to the comScore data analyzed by Dr. Athey. F. 660. This makes bidding on 1-800 Contacts' trademark terms extremely attractive to lower-priced competitors, as an opportunity to make consumers aware of lower-priced alternatives. F. 660. In addition, based on data analyzed by Dr. Athey, firms that are currently bidding on "1-800 Contacts," have a higher conversion rate than for other search terms. F. 661. As Dr. Athey opined: "This makes sense because any online retailer of contact lenses other than 1-800 Contacts is generally going to have lower prices and be a tougher competitor for the online consumer searching for 1-800 Contacts." F. 661.

Testimony and documents from online contact lens sellers, detailed in Section II.K.1.c, confirm Dr. Athey's opinions as to the value of advertising in response to search queries for 1-800 Contacts' trademark terms. For example, according to

27 ComScore is a company that collects data from a panel of internet users through installing software on consumers' devices to track their behavior, including collecting information on the screens that users see when they perform searches. F. 700. The data that Dr. Athey received from comScore consisted of detailed online search information from 377,002 internet users in the United States from July 11, 2013 through August 14, 2016, covering all the search queries those users performed on all major search engines and reported at a query-by-query level. F. 701.

LensDirect's chief executive officer, Ryan Alovis, bidding on 1-800 Contacts terms "absolutely" drove a significant amount of business, given the large volume of searches for 1-800 Contacts. F. 606. As Mr. Alovis explained: "A lot of people search for '1800contacts' and we want to be there when they do. . . . We hope to get those interested people to become customers of LensDirect because we believe we're offering . . . a better price for the same product." F. 607; *see also* F. 603 (LensDirect believes that its message of "Same Contacts, Better Prices" will appeal to someone searching for 1-800 Contacts). In 2016, keyword terms related to 1-800 Contacts generated revenue for LensDirect and had "high conversion rates." F. 605. Bidding on 1-800 Contacts' trademark terms has value for LensDirect, even if the consumer does not click on the LensDirect ad, because appearing can improve LensDirect's brand visibility. F. 609. As LensDirect's chief executive officer stated: "[T]he more times people see LensDirect, the better chance there is of them becoming a customer one day." F. 609.

During the time when Web Eye Care was bidding on 1-800 Contacts' trademark terms, Web Eye Care's click-through rates and conversion rates were higher on searches for 1-800 Contacts than its usual rates. The chief executive officer of Web Eye Care explained: "1-800 Contacts is the biggest company out there [i]n the on-line space. They're also the most expensive company in the online space. . . . [W]e feel that we can offer . . . a much better value to the customer from a pricing perspective." F. 646. Similarly, Lens Discounters found that bidding on 1-800 Contacts' terms generated a good amount of traffic and orders, and that "the cost per conversion for those terms was low, and [Lens Discounters'] conversion rates were good." F. 611. According to its chief operating officer, Lens Discounters attracted customers who used 1-800 Contacts terms in their searches because Lens Discounters' prices were better than 1-800 Contacts' prices. F. 611. *See also* F. 641-642 (bidding on 1-800 Contacts' trademark terms brings "a lot of people" to Walmart's contact lens website and, together with bidding on the terms of other competitors, generated 6% of Walmart's contact lens orders).

Furthermore, 1-800 Contacts recognized in its internal documents that the display of competitor ads in response to a

search for 1-800 Contacts' trademark terms enabled its competitors to gain sales and market share. *E.g.*, F. 720 (Board of Directors Meeting materials noting that Lens.com was "using 1-800 trademark triggered ads successfully to gain market share, as their primary marketing tool for growth. Since 2004, their sales increased 475%, making Lens.com the third largest online seller."). *See also* F. 713-731.

It is valuable for a lower-priced competitor to display an advertisement in response to a search for 1-800 Contacts' trademark terms via matched ads, apart from whether a competitor directly bids on 1-800 Contacts' trademark terms. For example, Memorial Eye did not bid on the keyword "1-800 Contacts" in search advertising auctions. Nevertheless, ads for Memorial Eye were displayed in response to search queries for 1-800 Contacts' trademark terms as a result of Memorial Eye's bidding on generic terms (such as "contacts") in broad match or phrase match. F. 617. Based on Google data analyzed by Dr. Evans, between January 2010 and December 2011, Google showed Memorial Eye's text ads on approximately 6 million search results pages generated by search queries related to 1-800 Contacts brand name keywords and Memorial Eye's ads appeared on almost half of the search results pages generated by search queries that included 1-800 Contacts brand name. F. 618. Memorial Eye found that its online businesses received a significant number of conversions and new customers as a result of its ads appearing in response to generic keywords being broad-matched and phrase-matched to searches for 1-800 Contacts' trademark terms. F. 619. This is consistent with Google data analyzed by Dr. Evans, which showed that Memorial Eye had a higher click-through rate on ads displayed for 1-800 Contacts search queries than for other search queries and that Memorial Eye's conversion rate was almost twice as high for 1-800 Contacts' search queries than non-1-800 Contacts search queries. F. 620.

The conclusion that advertising in response to search queries for 1-800 Contacts' trademark terms is competitively significant is further reinforced by data from the Google AdWords, including the AdWords keyword planner tool ("Google AdWords Keyword Planner"). The Google AdWords Keyword Planner is a tool that Google provides, which companies engaged in search advertising

can use to research new keywords to add to their account. F. 229. The Google AdWords Keyword Planner allows an advertiser to input keywords and then provides the advertiser with estimates of the upper limit of the number of ad impressions and clicks (as well as other information such as cost-per-click and, at times, expected number of orders or conversions) that would result from that advertiser bidding on those keywords. F. 230. When Glen Hamilton, senior manager of Walgreens, input the keywords that were prohibited by Walgreens' settlement agreement with 1-800 Contacts, he concluded from the results that the return on investment in bidding on those keywords would justify a cost of approximately [redacted] extra per month. F. 634-635. Similarly, when Mr. Hamilton input the keywords that were prohibited by Vision Direct's settlement agreement with 1-800 Contacts into the Google AdWords Keyword Planner, the results indicated that such keywords would generate a significant volume of clicks and that both the cost-per-click and the conversion rate would be lower than Vision Direct's average cost per order. F. 629-631.[28] *See also* F. 662-680 (data from Google AdWords accounts of Lens Direct for the time period from January 1, 2010 through December 31, 2016, and of Memorial Eye for the time period from January 1, 2005 through December 31, 2013, showing that search queries for 1-800 Contacts' trademark terms led to clicks and conversions for these companies).[29]

b. Trademark litigation

Prior to 2004, Google permitted a trademark owner to prevent other companies from using their trademark as keywords in

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28 As Walgreens' senior manager for online marketing, Mr. Hamilton was responsible for managing paid online search advertising for Walgreens and for Vision Direct, which Walgreens acquired in 2011. F. 539.

29 Respondent contends that the court excluded Google AdsWords account data as inadmissible. *See, e.g.*, RRCCFF 643. This is incorrect. Eric Holbrook of Memorial Eye was not permitted to read statistics from a spreadsheet of data from Memorial Eye's Google AdWords account, which he did not himself generate, because Complaint Counsel could not provide a proper evidentiary foundation for his testifying from the spreadsheet. Tr. 1989-90. This ruling did not exclude the Google AdWords spreadsheets themselves, CX1625-1661, which are in evidence by stipulation of the Parties, for all purposes. JX0002 (Joint Stipulations on Admissibility of Exhibits, May 12, 2017).

AdWords advertising auctions and in the text of advertisements. F. 287. In early 2004, Google determined that its trademark policy, by restricting the AdWords auction, had prevented users from seeing relevant ads. F. 288. Google concluded that users who conducted an internet search for the trademark terms of one trademark owner may be interested in information from competing firms. F. 289. Thus, in April 2004, Google changed its U.S. trademark policy to allow third parties to bid on trademarks, including on competitors' trademarks, as keywords in AdWords advertising auctions. F. 290.

At the time that Microsoft launched the Bing Network in 2009, Microsoft did not permit advertisers to bid on keywords consisting of a trademark owned by a third party. F. 296. In 2011, Bing changed its policy and began permitting advertisers to bid on competitors' trademarks as keywords. F. 298.

In 2006, 1-800 Contacts' internal marketing personnel began regularly monitoring competitors' advertisements appearing in response to searches for 1-800 Contacts' trademark terms. F. 319. 1-800 Contacts provided this information to 1-800 Contacts' legal personnel and outside counsel in trademark monitoring reports ("trademark monitoring reports"). F. 319. 1-800 Contacts' outside counsel for trademark matters, Bryan Pratt and Mark Miller, reviewed trademark monitoring reports to evaluate potential infringement, potential misappropriation of goodwill, and similar issues, for the purpose of providing legal guidance to 1-800 Contacts. F. 320-321. Mr. Pratt and/or Mr. Miller would conduct an analysis of pertinent factors to determine if there was a good faith basis for 1-800 Contacts to allege that its competitors were engaged in trademark infringement. F. 324.

Between 2005 and 2010, 1-800 Contacts sent cease and desist letters to multiple online contact lens retailers whose advertisements appeared in response to a search for 1-800 Contacts' trademarks. F. 325. In these letters, Respondent took the position that purchasing one of 1-800 Contacts' trademarks, or what it called a "confusingly similar variation thereof," or to otherwise trigger a link to a "directly competitive" website, when an internet user had entered a search query for 1-800 Contacts' trademark terms, "may constitute trademark infringement under state and federal law in that it is likely to cause initial interest

confusion, or likely to cause the public to mistakenly assume that your business activities originate from, are sponsored by, or are in some way associated with [1-800 Contacts]." F. 326. Cease and desist letters went to, among others, AC Lens, Contact Lens King, Lensfast, Lens.com, Lens Discounters, and Memorial Eye. F. 325.

Between 2007 and 2010, 1-800 Contacts filed complaints in federal court against AC Lens, Contact Lens King, Empire Vision, EZ Contacts USA, Lensfast, Lenses for Less, Lens.com, LensWorld, Memorial Eye, Standard Optical, Tram Data (d/b/a ReplaceMyContacts.com), Vision Direct,[30] Walgreens, and Web Eye Care, asserting claims for trademark infringement under 15 U.S.C. § 1114.[31] F. 328-330. The Settlement Agreements at issue in this proceeding grew out of the foregoing litigation. F. 343. *See* Section III.A.5.[32] In general, the complaints alleged that the

30 On October 9, 2002, 1-800 Contacts filed a complaint in federal court against Vision Direct and WhenU.com, Inc., alleging trademark infringement, among other causes of action, in connection with alleged "pop-up" advertisements for Vision Direct appearing when internet users visited the www.1800contacts.com website. F. 301. Pop-up ads are triggered by software in response to specific keywords or types of websites by which an ad will pop-up in front of another website when the consumer browses to that website. F. 301 n.7. That complaint did not contain any allegations regarding the use of 1-800 Contacts' trademarks as keywords to trigger search engine advertisements. F. 301. However, in June 2004, after negotiations, 1-800 Contacts and Vision Direct resolved their dispute by executing a settlement agreement that included provisions related to pop-up advertising and use of trademark keywords. F. 306. Between June 2004 and September 2007, 1-800 Contacts and Vision Direct had an "established practice" of using negative keywords to ensure no ads would show up on branded queries, as a result of matched ads for bids on generic keywords. F. 310. In October 2007, Vision Direct represented to 1-800 Contacts that Vision Direct did not believe that the 2004 Vision Direct settlement agreement required Vision Direct to use negative keywords to prevent its ads from appearing on searches for 1-800 Contacts' trademarks. F. 311. 1-800 Contacts sued Vision Direct shortly thereafter, and reached a settlement in 2009. F. 328-329, 345-346.

31 The complaints typically included additional causes of action, such as state and common law unfair competition (Utah Code Ann. § 13-5-1 *et seq*.), misappropriation, and unjust enrichment. F. 330.

32 The settlement agreement with Coastal Contacts arose in connection with a federal court complaint filed by 1-800 Contacts on March 18, 2004. F. 312-314. That complaint alleged trademark infringement, among other causes of action, in connection with alleged pop-up advertisements for Coastal Contacts

defendant contact lens seller had purchased 1-800 Contacts' trademarks "and/or confusingly similar variations or misspellings thereof" as keywords to trigger the defendant's paid search advertising and/or failed to implement negative keywords to prevent the triggering of defendant's advertisements in response to an internet search query for 1-800 Contacts; and that the defendant's use of the trademarks "caused, and will continue to cause, confusion and mistake, including initial interest confusion, as to the source or origin" of the defendant's products, and "is likely to falsely suggest a sponsorship, connection, license, endorsement or association" by or with 1-800 Contacts. F. 331.[33] Thus, 1-800 Contacts took the position, consistent with that which it took in its cease and desist letters, that it was a violation of 1-800 Contacts' trademark rights for a competitor to cause its ad to appear when a user entered a search query for 1-800 Contacts' trademark terms, because such appearance, regardless of the text of the ad, is likely to confuse the public as to "sponsorship" or "affiliation."

By way of background, the elements of a trademark infringement claim under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), are:

> (1) that the plaintiff has a protectable interest in the mark; (2) that the defendant has used 'an identical or similar mark' in commerce; and (3) that the defendant's use is likely to confuse consumers. . . . An infringement claim under § 32 [15 U.S.C. § 1114(1)(a)], has nearly identical elements . . . . The central question in a typical infringement action under either § 32 or § 43(a) is whether the

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appearing when internet users visited the www.1800contacts.com website. Like the 2002 complaint against Vision Direct, the complaint against Coastal Contacts did not contain any allegations regarding the use of 1-800 Contacts' trademarks as keywords to trigger search engine advertisements. F. 312. In October 2004, the parties settled the litigation. F. 314.

33 Some of the lawsuits contained additional allegations of other infringing conduct. F. 332 (allegations against EZ Contacts USA and LensWorld included "wholesale copying of portions of [1-800 Contacts'] website, including [1-800 Contacts'] Marks"; allegations against Lens.com included using 1-800 Contacts marks in Lens.com ads).

> defendant's use of the plaintiff's mark is likely to cause consumer confusion.

1-800 Contacts, Inc. v. Lens.Com, Inc., 722 F.3d 1229, 1238 (10th Cir. 2013). *See also Scott Fetzer Co. v. House of Vacuums, Inc.*, 381 F.3d 477, 483 (5th Cir. 2004) (holding that to prove trademark infringement, plaintiff must show use is "likely to cause confusion among consumers as to the source, affiliation, or sponsorship" of products or services, citing 15 U.S.C.A. § 1114(1); *id*. § 1125(a)).

In the initial years of paid search advertising litigation, which began in 2004, the issue of whether the purchase of trademark keywords to generate paid search advertising constituted a "use in commerce" for trademark law purposes was unsettled. F. 333. Eventually, after the 2009 decision by the Second Circuit Court of Appeals in *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 127 (2d Cir. 2009), the circuit courts came to agree that keyword advertising programs constitute a "use in commerce" under trademark law, because search engines make trademarks available for purchase and display them in search results. The focus of infringement analysis shifted to the issue of the likelihood of consumer confusion from that use, including in particular, a type of confusion known as initial interest confusion. F. 333.[34] However, Respondent's expert witness on trademark law, Howard Hogan, is unaware of any United States court holding one way or the other as to whether the appearance of an ad in response to a trademark search due to broad matching to the advertiser's purchase of a generic keyword constitutes a use in commerce. F. 336. Moreover, determining whether a use creates a likelihood of confusion is a question of fact, requiring a determination of multiple factors. F. 335. These factors may include: "(1) similarity of the marks, (2) intent of the alleged infringer, (3) evidence of actual confusion, (4) similarity of the competing

34 Initial interest confusion "occurs when the defendant uses the plaintiff's trademark in a manner calculated to capture initial consumer attention, even though no actual sale is finally completed as a result of the confusion." *Network Automation, Inc. v. Advanced Sys. Concepts*, 638 F.3d 1137, 1144 (9th Cir. 2011) (quoting *Nissan Motor Co. v. Nissan Computer Co.,* 378 F.3d 1002, 1018 (9th Cir. 2004)).

parties' services and manner of marketing, (5) degree of consumer care, and (6) strength of the marks." *Lens.com*, 722 F.3d at 1243.

Respondent had the opportunity to test its trademark litigation position in its lawsuit against Lens.com, filed on August 13, 2007. F. 330. However, on Lens.com's motion for summary judgment in that case, the district court held that, as to the advertisements in evidence that did not use 1-800 Contacts' trademark terms in ad text, 1-800 Contacts failed to raise a triable issue as to likelihood of confusion. *1-800 Contacts, Inc. v. Lens.com*, 755 F. Supp. 2d 1151, 1181-82 (D. Utah Dec. 14, 2010). As to 1-800 Contacts' additional claim that Lens.com breached an oral argument not to use 1-800 Contacts' trademark terms as keywords and to implement negative keywords, it is noteworthy that the district court concluded that no enforceable agreement was entered into between the parties in this regard, as a matter of law. *Id.* at 1189. The court reasoned, in part:

> Were this actually an agreement entered into by the parties, the court questions whether it would survive an antitrust challenge. [1-800 Contacts] does not seek merely to preclude usage of its trademark. Instead, it wants to obliterate any other competitor advertisement from appearing on a search-results page when a consumer types in '1800Contacts' as a search term or some variation of it. This is disturbing given that broad matching of the generic term 'contacts' could trigger an advertisement if a consumer enters the search term '1800Contacts.' A trademark right does not grant its owner the right to stamp out every competitor advertisement.

Lens.com, 755 F. Supp. 2d at 1188.

On July 16, 2013, the Tenth Circuit Court of Appeals upheld the district court's decision granting Lens.com's summary judgment motion except with respect to issues regarding Lens.com's potential secondary liability for its affiliates. The appellate court did not resolve whether or not initial interest confusion could arise, as a matter of law, from an ad triggered by a trademark keyword where the trademark was not used in the ad

text. *Lens.com*, 722 F.3d 1229. However, the court was skeptical of the notion that displaying competing advertisements when a consumer has searched for 1-800 Contacts is likely to confuse consumers, within the meaning of trademark law. The court stated:

> Perhaps in the abstract, one who searches for a particular business with a strong mark and sees an entry on the results page will naturally infer that the entry is for that business. But that inference is an unnatural one when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for.

Id. at 1245.

c. Summary of context

Trademark owners are often advised to obtain information as to how their marks are being used and to prepare appropriate steps to enforce their rights and that the failure to police third-party use of a trademark could lead to a finding by a court that the mark is no longer enforceable. F. 317. However, 1-800 Contacts engaged in its trademark enforcement efforts with full awareness of the competitive significance of advertising in response to a user's search query for 1-800 Contacts' brand name, and the negative effect that the appearance of competitors' advertisements had on Respondent's "bottom line." F. 317-324, 710-732. *See also* Section III.E.3.b. The analysis turns next to anticompetitive effects in the relevant market.[35]

3. Actual Anticompetitive Effects

a. Introduction

Advertising "serves to inform the public of the availability, nature, and prices of products and services." *Bates v. State Bar of*

35 Respondent's argument that its trademark rights justify the Challenged Agreements is addressed in Section III.F.3.

Arizona, 433 U.S. 350, 364 (1977). As explained below, the Challenged Agreements restricted advertisements for the sale of contact lenses on the internet by prohibiting competitors from presenting paid advertisements on the search engine results page in response to searches for 1-800 Contacts' trademarks.

Restricting the availability of information in the marketplace is an anticompetitive harm. *Indiana Fed'n*, 476 U.S. at 461-62. As the Supreme Court explained in *Indiana Federation*:

> A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or . . . the purchase of higher priced services, than would occur in its absence.

Indiana Fed'n, 476 U.S. at 461-62; *see also id.* at 459 (noting that an agreement to withhold information from consumers impedes the ordinary "give and take" of the marketplace) (quoting *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978)).

Thus, in *Indiana Federation,* proof that concerted action by dentists to deny requests from patients' insurers to submit patient x-rays resulted in insurers being unable to obtain compliance with their requests in two counties where the Federation dentists predominated was held to constitute sufficient proof of actual adverse effects. *Id.* at 461. In *Realcomp*, policies restricting the dissemination of discount broker listings to public websites were found to have actual anticompetitive effects where the evidence showed significantly fewer discount listings in the Realcomp Multiple Listing Service ("MLS") after the policies went into effect. *Realcomp*, 2009 FTC LEXIS 250, at *92-93. *See also Realcomp*, 635 F.3d at 831-32 (holding that reduction in discount listings constituted "substantial consumer harm"); *In re Massachusetts Board of Registration in Optometry*, 1988 FTC LEXIS 34, at *15 (1988) ("Restraints on truthful advertising for professional services are inherently likely to produce

anticompetitive effects. '[T]he nature or character of these restrictions is sufficient alone to establish their anticompetitive quality.'") (quoting *Am. Med. Ass'n*, 94 F.T.C. 701, 1030 (1979)).

It is clear from the foregoing authorities that, contrary to Respondent's arguments (RB at 98-105), restricting advertising can constitute a consumer harm and form the basis for a finding of anticompetitive effects, and it is not necessary to also prove that prices increased (*Indiana Fed'n*, 476 U.S. at 461) and/or that output decreased.[36] As the Court of Appeals for the Ninth Circuit has held, a defendant's "contention that the plaintiffs' claim fails because they did not show a decrease in output in the [relevant] market is simply incorrect. . . . Although output reductions are one common kind of anticompetitive effect in antitrust cases, a 'reduction in output is not the only measure of anticompetitive effect.'" *O'Bannon v. NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015) (quoting Areeda & Hovenkamp ¶ 1503b(1)).

In any event, as further discussed below, the evidence in this case proves that the Challenged Agreements significantly restricted advertising and also that at least some consumers have paid, or will pay, prices that are higher than they would otherwise be, absent the Challenged Agreements. *See NCAA v. Bd. of Regents*, 468 U.S. 85, 107 (1984) (the appropriate question is whether prices are higher "than they would otherwise be" absent the restraint).

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36 Respondent asserts that *California Dental* rejected the argument that anticompetitive effects can be based on a decline in advertising, when the Court stated, "[t]he question is not whether the universe of possible advertisements has been limited." The Supreme Court made this comment in the context of criticizing the Court of Appeals' assertion that the advertising restrictions at issue were a "form of output limitation." *Cal. Dental Ass'n*, 526 U.S. at 776 ("[T]he relevant output for antitrust purposes here is presumably not information or advertising, but dental services themselves. The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of dental services."). This language does not support the proposition that advertising reductions cannot constitute a consumer harm for purposes of determining anticompetitive effects. In addition, Complaint Counsel does not contend that the Challenged Agreements reduced the output of contact lenses.

b. Harm to consumers and competition

The flow of information between buyers and sellers is an essential part of the market system. Buyers have to find out who they can buy from and on what terms. F. 681. Sellers have to let consumers know how to find them and what they have to offer and on what terms. F. 681. Restrictions on advertising among rivals impair competition and result in harm to consumers by interfering with the flow of information from sellers to buyers and raising the costs to consumers of finding the most suitable offering, which, in turn, leads to higher transaction prices. F. 682.

Contact lenses are a commodity product, and in commoditized markets, price takes on more significance in the purchasing decision. F. 24-27, 733-734. Data from comScore regarding the text of advertisements displayed in response to particular search queries between 2013 and 2016, analyzed by Dr. Athey, shows that 36% of ads displayed in response to searches for contact lens retailers' brand names contained price information. F. 701-703. The fact that firms advertise price indicates that sellers believe and have evidence that price information is important to consumers. F. 736. Indeed, 1-800 Contacts was aware that contact lens purchasers act on price information contained in internet advertisements, including by purchasing from lower-priced competitors (F. 704-709), as discussed further below.

The Challenged Agreements disrupted the ordinary give and take of the marketplace by restricting competing advertisements from appearing in response to an internet search for the trademark terms of the parties to the Challenged Agreements. The Challenged Agreements interfere with the flow of material information between buyers and sellers, including price information, which "disrupt[s] the proper functioning of the price-setting mechanism." *Indiana Fed'n*, 476 U.S. at 461-62. Furthermore, as further detailed in Section III.E.2, paid search advertising is an important method of competing for the sales of contact lenses online, including for increasing brand awareness and obtaining new customers. F. 497. Search advertising is an important method for marketing contact lenses online, because, among other reasons, the advertising is presented to a consumer at a time when the consumer is more likely to be looking to buy. F. 498. However, as noted above, the design of the advertising

restrictions in the Challenged Agreements was to prevent competing advertisements from appearing in response to a search for a party's trademark terms. F. 684. Furthermore, 1-800 Contacts enforced the restrictions in the Challenged Agreements to prevent such advertisements from appearing in response to consumers' searches for 1-800 Contacts' trademark terms. F. 685.

Moreover, the evidence shows that the Challenged Agreements were effective in restricting advertisements from competitors from appearing in response to a search for 1-800 Contacts' trademark terms. Data provided by Google reflecting keyword bidding and ad impressions triggered thereby during the relevant time periods, analyzed by Complaint Counsel's expert witness, Dr. Evans, shows that the competitors who had been bidding directly on 1-800 Contacts' trademark terms before entering into the Challenged Agreements ceased bidding almost entirely after entering into the Challenged Agreements. F. 687, 689. Similarly, "matched ads" for parties to the Challenged Agreements (i.e., advertisements that are triggered in response to search that includes a 1-800 Contacts' trademark term, through "phrase match" to a generic term such as "contacts," even though the advertiser did not bid on a 1-800 Contacts' trademark term) declined substantially following the agreements. F. 688, 690.

It is more likely than not that the advertising restrictions in the Challenged Agreements have caused at least some consumers to pay more for contact lenses than they would have absent the restrictions. 1-800 Contacts' prices are, on average, higher than its online competitors, by approximately [redacted]%. F. 691-693. Yet, many consumers are not aware of the price discrepancy between 1-800 Contacts and its online competitors. F. 694. When competitors are prohibited from bidding on 1-800 Contacts' trademark terms, the percentage of 1-800 Contacts' orders coming from trademark paid search is not significantly subject to competition. F. 738.

Unsurprisingly, and as admissions in 1-800 Contacts' internal documents make clear, reducing the appearance of competitor ads appearing in response to a search for 1-800 Contacts' trademark terms tends to increase sales for 1-800 Contacts, the higher-priced competitor. F. 710. For example, in a report regarding the week

of June 20, 2008, 1-800 Contacts attributed an increase in orders derived from trademark paid search as being helped in part by "LensWorld finally removing all their ads from all of [1-800 Contacts'] trademark keywords." F. 719. *See also* F. 725 (In a 1-800 Contacts internal report, 1-800 Contacts' senior marketing manager reported that for the week ending January 8, 2010, 1-800 Contacts achieved "an all-time record high" for orders obtained through searches for its trademark keywords, due in part to the fact that fewer advertisers were appearing on searches for 1-800 Contacts' trademark terms that week, "which always helps improve performance."); F. 730 (Reporting that in late August 2010, orders from new customers coming through search ads on searches for 1-800 Contacts' trademarks "jumped to the highest level of the year," due in part to the appearance of "fewer competitors on [1-800 Contacts'] best TM words such as *1800contacts 1 800 contacts* and *1800 contacts*."); F. 723 (1-800 Contacts internal report stating that for the week of March 6, 2009, "[t]here are substantially less competitors showing up on our list of monitored TM words . . . in Google[,] which is likely helping improve our TM [conversion rate] and TM order volume.").

Similarly, as 1-800 Contacts also observed, an increase in competitor ads appearing in response to a search for 1-800 Contacts' trademark terms tends to decrease sales for 1-800 Contacts. F. 711. For example, in a report concerning the week ending September 22, 2007, 1-800 Contacts noted a 6% week over week drop in trademark paid search orders, relating this in part to competition from Vision Direct, which had been "advertising in the 2nd position on many of [1-800 Contacts'] branded terms in Google." F. 717. *See also* F. 718 (Reporting for the week ending April 11, 2008, that 1-800 Contacts experienced a 9% week over week decline in new customer orders through Microsoft's search engine, and noting that this "could be a sign of increased affiliate and/or competitive trademark activity."); F. 727 (Reporting for the week ending June 11, 2010, that 1-800 Contacts' trademark paid search orders through Google, and click-through rates for trademark ads, "were slightly softer than [the preceding week] because of increased competition on [1-800 Contacts'] best branded terms.").

The foregoing facts support the conclusion that the advertising restraints at issue significantly reduced informative advertising for lower-priced competitors of 1-800 Contacts and more likely than not resulted in consumers purchasing from 1-800 Contacts at higher prices than they would have paid to lower-priced competitors. This conclusion is bolstered by expert opinion of Complaint Counsel's expert witness, Dr. Evans, that the Challenged Agreements suppressed price transparency and impaired price competition among online contact lens sellers, and ultimately harmed consumers. F. 739. *See also* F. 740 (Dr. Athey's opinion that absent the restrictions on advertising in the Challenged Agreements, there would be more purchases from lower-priced competitors and more price-matching by 1-800 Contacts).[37] The greater weight of the evidence further supports Dr. Evans' opinion that the advertising restrictions contained in the Challenged Agreements significantly impair competition for the sale of contact lenses online by prohibiting a type of advertising that is especially important for price competition among online sellers of contact lenses and for potential new entrants. F. 735. Moreover, economic modeling performed by Complaint Counsel's expert witnesses bolsters the conclusion that the advertising restraints in the Challenged Agreements have actual anticompetitive effects, as discussed below.

c. Economic modeling

Complaint Counsel's expert witnesses, Dr. Athey and Dr. Evans, each constructed a "but-for" world without the Challenged Agreements, to model the economic impact of the Challenged Agreements in the relevant market. The expert reports and related testimony supporting and criticizing the economic modeling evidence have been fully reviewed and considered. A summary of the economic modeling evidence and Respondent's criticisms thereof follows.

37 In response to competition from "aggressive price messaging" by other online retailers, 1-800 Contacts instituted a price matching policy, which in 2016 states: "We'll beat any price on every product we carry by 2%." F. 436-439.

i. Dr. Athey's model

Dr. Athey constructed a model of a "counterfactual" world to assess what would happen in the absence of the Challenged Agreements. Dr. Athey first constructed counterfactual ad layouts, based on her prediction of what ads consumers would likely see in response to conducting internet searches for 1-800 Contacts' trademark terms, absent the Challenged Agreements. F. 743. Second, Dr. Athey constructed a model of consumer click behavior, which she applied to predict how many clicks the ads in each of the counterfactual ad layouts would receive. F. 743.

Dr. Athey's counterfactual ad layouts consisted of ad layouts observed in the comScore data as having been displayed in response to internet searches for generic terms related to contact lenses, such as "contacts" or "contact lenses." F. 744. Dr. Athey explained that she used searches for generic terms to estimate the likely counterfactual ad layouts because bidding on generic keywords is not restricted by the Challenged Agreements and because, based on the comScore data, the volume of generic searches is comparable to the volume of 1-800 Contacts branded searches. F. 744. Dr. Athey then modified the generic search ad layouts by (1) discarding ad layouts that did not include an advertisement for 1-800 Contacts; and (2) moving the 1-800 Contacts advertisement to the top ad position in each of the remaining layouts. F. 745.

Dr. Athey's model of consumer click behavior used a methodology referred to as "multinomial logistic regression" ("MNL"). F. 746. Dr. Athey first assessed the click-through statistics observed in the comScore data for searches for 1-800 Contacts' and other online contact lens retailers' brand name terms. Dr. Athey then estimated consumer click behavior by taking into account (i) the consumer appeal of the advertised brand, (ii) the position of the ad on the search results page, (iii) whether the ad was served by the firm searched for by the consumer, (iv) whether the ad is for 1-800 Contacts, and (v) the propensity of the consumer to click on any ad. F. 747. Dr. Athey applied this estimate of consumer click behavior to the counterfactual ad layouts that she constructed. F. 748.

Dr. Athey's model predicted that, in the absence of the Challenged Agreements, the number of competitor ads appearing on searches for 1-800 Contacts' trademark terms would increase, from 0.54 to 1.85 per search. F. 749. Dr. Athey's model further predicted that consumer clicks on the 1-800 Contacts ads would decline, by 2 clicks per hundred searches, and that consumer clicks on ads for competitors of 1-800 Contacts would increase, by 3.5 clicks per hundred searches. F. 750.

Respondent's expert, Dr. Anindya Ghose, criticized the assumptions underlying Dr. Athey's model and opined that the model's results are therefore unreliable. Regarding Dr. Athey's basing her counterfactual ad layouts on results for generic search terms, Dr. Ghose asserts there is no justification for Dr. Athey's assumption that search engines would have displayed the same number of ads in response to queries containing 1-800 Contacts' trademark as they did in response to generic queries because, in the actual world, Google did not necessarily display multiple ads in response to a search for 1-800 Contacts. RX0733 (Ghose Expert Report at 0065-66). Dr. Ghose also criticizes Dr. Athey's inclusion of ads in her counterfactual ad layouts for retailers who were not bound by the Challenged Agreements, but whose ads had not previously been displayed in response to searches for 1-800 Contacts. As an example, Dr. Ghose notes that Dr. Athey concludes that ads for Eyemart Express and Sclera would have appeared in response to searches for 1-800 Contacts' trademark, even though they did not appear in response to such searches in the actual world. RX0733 (Ghose Expert Report at 0066-67).

Regarding Dr. Athey's estimate of consumers' click-through behavior in response to the constructed ad layouts, Dr. Ghose criticizes the model for failing to analyze whether the estimated clicks would result in sales. Moreover, according to Dr. Ghose, Dr. Athey's use of MNL improperly fails to account for different intentions of users performing an internet search, i.e., whether users intend to search for information generally or to navigate to companies' websites, but simply assumes that the display of additional advertisements will make consumers more likely to click on the competitors' ads. Dr. Ghose asserts that, while Dr. Athey opines that additional advertisements improve consumer welfare, Dr. Athey's model fails to account for increased search costs that may result from the display of additional advertisements

to consumers who searched for 1-800 Contacts with navigational intent. RX0733 (Ghose Expert Report at 0067-69).

ii. Dr. Evans' model

Dr. Evans modeled the extent of reduced advertising caused by the Challenged Agreements by extrapolating from matched ads generated for Memorial Eye during the time period 2010 through 2011. F. 752. Based on Google data analyzed by Dr. Evans, between January 2010 and December 2011, Google showed Memorial Eye text ads on approximately 6 million search results pages generated by queries related to 1-800 Contacts brand name keywords and Memorial Eye's ads appeared on almost half of the search results pages generated by queries that included 1-800 Contacts brand name. F. 618. The average position of Memorial Eye's ads was second, directly below the ad for 1-800 Contacts. F. 618.

Based on the data for Memorial Eye, and additional assumptions regarding ad position, click-through rates, and level of advertising activity for other competitors, Dr. Evans predicted the number of additional advertisements that would be displayed by the competing retailers that are currently restricted under the Challenged Agreements, if they were not bound by the Challenged Agreements; the number of clicks these ads would receive; and the increased clicks and sales these competing retailers would receive. F. 754.[38] Specifically, Dr. Evans' model estimates that, absent the Challenged Agreements, between January 2010 and June 2015, 114 million additional ads for competitors would have been displayed in response to queries containing 1-800 Contacts' trademark terms. F. 755. Dr. Evans' model further estimates that in the first half of 2015 alone, based on assumptions of increased advertising activity by competitors to obtain repeat business, increased clicks for competitors, and decreased clicks for 1-800 Contacts, clicks for competitor ads

38 Dr. Evans' model assumed that Google would display up to five ads in response to a query for a 1-800 Contacts brand name term; that 1-800 Contacts would obtain first ad position; that there would be a click-through rate for an ad in the second position of 1.8%, based on data showing Memorial Eye's click-through rate in the second position of 1.84%, and that click-through rates for the third through fifth position would be 1.5% for position 3, 1.1% for position 4, and 0.7% for position 5. F. 753.

would increase by 145,000, and sales for competitors would increase by 12.3%. F. 755.

Respondent argues that Dr. Evans offered no reason to believe that Memorial Eye was representative of other online sellers of contact lenses and offered no explanation as to why it was appropriate to extrapolate data observed for Memorial Eye to other online competitors. Dr. Ghose asserted that there are a number of flaws in Dr. Evans' model, including improper extrapolation of the estimates of ad impressions and clicks for all retailers entirely from data on one retailer, Memorial Eye. RX0733 (Ghose Expert Report at 0069-71 ¶¶ 161-64). Dr. Ghose further criticized Dr. Evans' model as improperly excluding the effects of ads for retailers that Dr. Evans states do not sell in the United States, which caused an overestimation of the number of incremental ad impressions by 24% and incremental clicks by 26.7%. RX0733 (Ghose Expert Report at 0071 ¶ 166). In addition, Dr. Ghose asserts that Dr. Evans does not explain why search engines would have displayed so many ads in the but-for world even though they did not fill all ad positions in the actual world despite the existence of other bidders. RX0733 (Ghose Expert Report at 0071-72 ¶ 167).

iii. Conclusion regarding economic modeling

As noted above, the expert reports and related testimony supporting and criticizing the modeling evidence have been fully reviewed and considered. Although Respondent has identified some valid concerns regarding the underlying assumptions of both the Athey model and the Evans model, Respondent's criticisms do not warrant the conclusion that the models are so faulty that they should be rejected entirely as unreliable. Given appropriate weight, the models tend to reinforce the findings above that the advertising restraints at issue significantly reduced informative advertising for lower-priced competitors of 1-800 Contacts and more likely than not resulted in consumers purchasing contact lenses from 1-800 Contacts at higher prices than they would have paid to lower-priced competitors.

4. Respondent's Arguments Opposing a Finding of Actual Anticompetitive Effects

Respondent contends that the evidence fails to prove actual anticompetitive effects. All of Respondent's arguments in this regard were reviewed and considered. Many of Respondent's evidentiary assertions have been rejected as immaterial or against the weight of the evidence, and need not be discussed here. A number of Respondent's arguments were addressed in Section III.E.3.a. Additional contentions of Respondent that merit discussion are addressed below.

a. Burden of proof

Respondent contends that the law imposes a particularly "high burden" of proof with respect to anticompetitive effects in this case because the Challenged Agreements (except for the Luxottica Sourcing Agreement) are settlements of trademark litigation. Respondent quotes the court in *Clorox Co. v. Sterling-Winthrop*, 117 F.3d 50, 57 (2d Cir. 1997) stating: "[B]ecause the antitrust laws protect competition, not competitors, and trademarks are non-exclusionary, it is difficult to show that an unfavorable trademark agreement raises antitrust concerns." Respondent misreads *Clorox*, as explained below.

Plaintiff Clorox Company, owner of the LYSOL trademark, sued the defendant Sterling-Winthrop, owner of the PINE-SOL mark, to invalidate a settlement of trademark litigation. 117 F.3d at 52. The two brands had a long history of disputes beginning when a patent examiner refused to register a trademark for PINE-SOL because it determined that the name PINE-SOL was confusingly similar to a previously registered brand name, LYSOL. 117 F.3d at 53. When PINE-SOL continued to market its cleaning products under the PINE-SOL name, the owner of the LYSOL trademark sued, and the parties eventually settled. 117 F.3d at 53-54. The settlement agreement restricted the type of disinfectant products that could be marketed under the PINE-SOL name and the geographic area where they could be sold; required that the original PINE-SOL product be marketed as primarily a cleaner, as opposed to a "disinfectant"; and prohibited PINE-SOL products from being sold as anything other than generic cleaners, as opposed to special purpose cleaners, such as bathroom

cleaners. 117 F.3d at 54. Clorox claimed that by restricting the way Clorox could use the PINE-SOL mark to compete, the settlement agreement violated Section 1 of the Sherman Act, and alleged that the settlement agreement "serves no legitimate trademark purpose because there is no longer the likelihood of consumers confusing the LYSOL and PINE-SOL marks." 117 F.3d at 54.

The court applied a "rule of reason analysis . . . [to] determine whether the restraints in the agreement [were] reasonable in light of their actual effects on the market and their pro-competitive justifications . . . . Ultimately, the goal is to determine whether restrictions in an agreement among competitors potentially harm consumers. The focus of the inquiry on consumers 'cannot be overemphasized and is especially essential when a successful competitor,' as here, 'alleges antitrust injury at the hands of a rival.'" 117 F.3d at 56. The court observed that the agreement only restricted Clorox's marketing of products that carried the PINE-SOL name, and did not restrict Clorox from producing and selling other, non-PINE-SOL branded products that compete with the LYSOL brand. 117 F.3d at 57. The court further observed:

> [B]ecause the antitrust laws protect competition, not competitors, and trademarks are non-exclusionary, it is difficult to show that an unfavorable trademark agreement raises antitrust concerns. Even if such an agreement only marginally advances trademark policies, the antitrust laws do not exist to protect competitors from agreements that in retrospect turn out to be unfavorable to the complaining party.

117 F.3d at 57 (citation omitted). Thus, "in order to fulfill the requirement of showing an actual adverse effect in the relevant market, 'the plaintiff must show more than just that he was harmed by the defendant's conduct,'" but rather must show adverse effects on competition as a whole. 117 F.3d at 56-57. The court concluded that Clorox failed to make this showing. 117 F.3d at 57.

Contrary to Respondent's argument, *Clorox* does not hold that trademark settlements are subject to a higher burden of proof than

other agreements between competitors. *Clorox* applied a standard rule of reason analysis and, relying on the well-established proposition that the antitrust laws protect competition, not competitors, concluded that Clorox had failed to show harm beyond the harm allegedly caused to its own business. Moreover, the Supreme Court in *Actavis*, in rejecting the application of a "quick look" analysis to an allegedly anticompetitive reverse-payment patent settlement agreement, stated the FTC "must prove its case as in other rule-of-reason cases." 133 S. Ct. at 2237. This further indicates that there is no special burden of proof to be applied to trademark settlement agreements, which unlike patents, are non-exclusionary. Accordingly, Respondent's contention is rejected.

b. *De minimis* harm

Respondent asserts that the Challenged Agreements had, at most, a *de minimis* effect on competition. RFF 1985 (citing RX0739 (Murphy Expert Report at 0047-52); CX9048 (Murphy, Dep. at 46-47, 50-51)). Respondent's argument is invalid as a matter of law. "A court applying the Rule of Reason asks whether a practice produces net benefits for consumers; it is no answer to say that a loss is 'reasonably small.'" *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992).[39] In *Realcomp*, the challenged policies prevented only some public websites from displaying discounted listings and such listings were permitted on one website, Realtor.com, which the record showed reached approximately 90% of home buyers. 635 F.3d at 829-30. The Commission rejected as irrelevant the argument that the challenged policies did not entirely exclude discount listings from the MLS service, and that there were measures brokers could take to obtain listings on other websites. 2009 FTC LEXIS 250, at *110 & n.42. The Sixth Circuit, which affirmed the Commission's decision, held that "reducing by 10% the number of home buyers that are exposed to discount listings . . . may very well constitute an unreasonable restraint." *Realcomp*, 635 F.3d at

39 Moreover, to the extent Respondent asserts that the anticompetitive effects of the Challenged Agreements are small, any resulting procompetitive effects asserted by Respondent would be "correspondingly small." *Chicago Prof'l Sports*, 961 F.2d at 674.

830. Respondent cites no authority for the proposition that an advertising restraint must bar *all* advertising in order to have anticompetitive effects.

Respondent's *de minimis* argument is also unsupported by the facts in this case. Respondent notes that the Challenged Agreements only restricted advertisements in response to searches for 1-800 Contacts' trademark terms, which according to Respondent's expert witness, Dr. Murphy, are responsible for not more than 2% of contact lens sales. RX0739 (Murphy Expert Report at 0049). However, Dr. Murphy's calculations were derived from total sales in the overall contact lens market, and not the market for online sales of contact lenses, which is the relevant market in this case. Section III.D.2. In addition, Respondent asserts that the Challenged Agreements only restricted advertisements from 1-800 Contacts and from some, but not all, of 1-800 Contacts' competitors. However, 1-800 Contacts and the 14 parties to the Challenged Agreements account for 79% of online sales of contact lenses in the United States. F. 496.

Respondent's related argument, that the advertising restraints imposed by the Challenged Agreements, are not competitively significant, is also unsupported by the facts. Respondent points to evidence that only 2.1% of all Google paid search advertisements related to contact lenses were displayed as a result of competitors' bidding on 1-800 Contacts' trademark as keywords. RX0733 (Ghose Expert Report at 0055). Respondent also points to evidence that 3% of paid search advertisements on Google for contact lens retailers not bound by the Challenged Agreements were displayed based on bids for 1-800 Contacts' trademarks, and that these retailers earned only 1% from these advertisements. RX0739 (Murphy Expert Report at 0099). However, these statistics do not account for advertisements displayed as a result of an advertiser's bidding on generic keywords, such as "contacts," in broad match. In addition, data regarding the amount of keyword bidding does not measure the frequency of consumer searches for 1-800 Contacts' trademark terms. As set forth above, comScore data analyzed by Dr. Athey shows that searches for 1-800 Contacts' trademark terms comprised approximately 17% of search queries, and that the volume of searches for the top three generic terms ("contact," "contact lenses," and "contacts") was collectively similar in size to the

volume of searches for 1-800 Contacts. F. 657, 659. This is not *de minimis* or insignificant.

Furthermore, as discussed previously, the display of ads in response to a search for 1-800 Contacts' trademark terms is competitively significant, both to Respondent and to the parties to the Challenged Agreements. *See* Section III.E.2.a.ii. *E.g.*, F. 571 (trademark paid search is among the largest contributors to orders for 1-800 Contacts generally, and accounts for between 20 and 31% of 1-800 Contacts' new orders); F. 586 (chief executive officer of LensDirect explaining: "[a] lot of people search for '1800contacts' and we want to be there when they do . . . We hope to get those interested people to become customers of LensDirect because we believe we're offering . . . a better price for the same product."). Moreover, the display of advertisements for lower-priced competitors in response to searches for 1-800 Contacts' trademark terms has competitive significance to consumers, who, as discussed in Section III.E.3.b, stand to benefit economically by purchasing from a lower-priced competitor or securing a price-match from 1-800 Contacts.

Respondent also asserts that, as to the 13 Challenged Agreements that are settlement agreements, the fact that the settling parties agreed to the restraints contained therein demonstrates their judgment that the "lifetime benefits" of advertising in response to searches for 1-800 Contacts' trademark terms was less than the cost of litigating, implying that this shows that the restraints were not competitively significant. RB at 97. However, the evidence fails to show that at the time of the settlement, the settling parties did, or could, calculate or weigh the future, lifetime profits attributable to such advertising, or that the settling parties each had the financial ability to fund litigation in anticipation of future profits. Finally, Respondent relies on evidence indicating that Web Eye Care, AC Lens, and Vision Direct/Walgreens were able to grow, in spite of the advertising restraints. This is not persuasive evidence that the restraints had little or no competitive effect.

c. Availability of other information to consumers

Respondent contends that the evidence fails to show that, in restricting advertisements in response to a search for 1-800

Contacts' trademark terms, the Challenged Agreements reduced the information available to consumers. According to Respondent, there remain many ways for consumers to obtain information about competitors to 1-800 Contacts, other than through a search for 1-800 Contacts' trademark terms. Respondent further asserts that allowing more ads to appear in response to a search for 1-800 Contacts' trademark terms will serve to push organic listings further down the search engine results page, which Respondent argues are more relevant to consumers.

As noted above, it is not necessary to show that the Challenged Agreements repressed all competitor advertising. *Realcomp*, 2009 FTC LEXIS 250, at *110 & n.42. Moreover, the facts show that, by prohibiting advertisements from appearing in response to a search for 1-800 Contacts' trademark terms, the Challenged Agreements suppressed significant amounts of competitor advertisements, which interferes with an important marketing channel for competitors and with an important source of information for consumers. The facts further show that consumers respond to competitor advertisements with clicks through to the websites of, and/or purchases from, competitors with lower prices than those offered by 1-800 Contacts. Respondent's argument appears to be that consumers have enough relevant information available through other search tools, and that Respondent, through horizontal agreements, is entitled to determine what is "relevant" and/or "enough" advertising for consumers. Such an argument is comparable to a social welfare justification, which courts have rejected as legally non-cognizable. *See Professional Engineers*, 435 U.S. at 695; *In re North Carolina Board of Dental Examiners*, 2011 FTC LEXIS 290, at *67 (Dec. 7, 2011).

5. Conclusion Regarding Proof of Anticompetitive Effects

As shown above, Complaint Counsel has proven that the Challenged Agreements have anticompetitive effects in the form of harm to consumers and competition. This proof of harm is sufficient to establish Complaint Counsel's *prima facie* case that the agreements are anticompetitive. Therefore, this Initial Decision need not, and does not, further determine whether or not

the Challenged Agreements have anticompetitive effects in the form of harm to search engines. Once Complaint Counsel has established its *prima facie* case of competitive harm, the burden shifts to Respondent to proffer "legitimate, procompetitive justifications," *Realcomp*, 2009 FTC LEXIS 250, at *127, to which the analysis turns next.

F. Asserted Procompetitive Justifications

1. Overview

Where, as here, a challenged agreement is demonstrated to have anticompetitive effects, the burden shifts to the respondent to prove legitimate, countervailing justifications. *Realcomp*, 635 F.3d at 825, 834; *Polygram*, 416 F.3d at 36. As the Supreme Court explained in *National Collegiate Athletic Association v. Board of Regents,* the proponent of the restraint bears a "heavy burden" of "establishing an affirmative defense which competitively justifies" the demonstrated competitive harm. 468 U.S. at 113.

A legitimate justification is one that creates or improves competition, and the evidence must show a specific link between the challenged restraint and the purported justification. *Polygram*, 136 F.T.C. at 346-47. "[A]n agreement limiting consumer choice by impeding the 'ordinary give and take of the market place,' cannot be sustained under the Rule of Reason" unless the defendant proves "countervailing procompetitive virtue – such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services." *Indiana Fed'n*, 476 U.S. at 459 (internal citation omitted). A proffered justification may be rejected as noncognizable where, as a matter of law, the justification is "incompatible with the goal of antitrust law to further competition." *Polygram*, 136 F.T.C. at 345. "Cognizable justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve product quality, service, or innovation." *Id*. at 346-46. *See also Broadcast Music Inc. v. Columbia Broadcasting Sys. Inc.*, 441 U.S. 1, 19-20 (1979) (stating that courts should examine whether the practice will "increase economic efficiency and render markets more, rather than less, competitive") (quotation and citation omitted); *Paladin Assocs. v. Montana Power Co.*, 328

F.3d 1145, 1157 (3d Cir. 2003) (holding that "[i]mproving customer choice" and reducing costs are procompetitive justifications).

In the instant case, Respondent contends that the Challenged Agreements[40] have the following procompetitive benefits: (1) the Settlement Agreements avoided litigation costs; (2) the Challenged Agreements protected Respondent's trademarks and the incentives the trademarks created to invest in its brand and produce consistent products and services; (3) the Challenged Agreements prevented consumer confusion; (4) the Challenged Agreements reduced consumers' search costs; and (5) the Challenged Agreements increased purchases of contact lenses by consumers who searched for 1-800 Contacts' trademarks. RB at 34. These asserted justifications are analyzed below.

2. Avoidance of Litigation Costs

Respondent argues that public policy supports the private settlement of legal disputes because private settlements reduce litigation costs, and that settlements that reduce the costs of litigation are "generally economically efficient." RB at 34-35. Respondent asserts that, in the instant case, the parties to the Settlement Agreements weighed the costs and uncertainties of litigation against the value of the potential benefits and made economically rational decisions that it was preferable to settle. Thus, Respondent concludes, the Settlement Agreements are procompetitive. RB at 16-18, 34-36.

"Few public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute." *American Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986); *see TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (noting "the paramount policy of encouraging settlements"). Indeed, settlements promote "judicial economy." *American Sec. Vanlines*, 782 F.2d at 1060 n.5 ("[S]ettlements produce a

40 Thirteen of the fourteen Challenged Agreements are Settlement Agreements. F. 343. Respondent's justification arguments focus on the Settlement Agreements.

substantial savings in judicial resources and thus aid in controlling backlog in the courts . . . .").

Many of the settling parties testified that they weighed the costs and uncertainties of litigation against the value of the likely benefits, and decided that the costs were not "worth it." F. 349-352. For example, Lens.com estimated the cost of litigating its trademark dispute with 1-800 Contacts without trial and before appeal to be "approximately $1.4 million."[41] Complaint Counsel's and Respondent's expert witnesses agreed that settlements that reduce the cost of litigation are generally economically efficient. F. 357-358.

Although "public policy wisely encourages settlements," *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994), "there is nothing magical about a settlement that immunizes an agreement that may otherwise violate the antitrust laws." *In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279, 1309 (S.D. Fla. 2005). "[W]hile reducing risk and uncertainty is a legitimate benefit of settlements, antitrust tribunals reviewing settlements in patent disputes cannot simply rubber-stamp the parties' accords because they are in line with the litigants' own self-interest." *Id*. Indeed, as analyzed in Section III.C, Supreme Court precedent makes clear that even patent-related settlement agreements can sometimes violate the antitrust laws. *Actavis,* 133 S. Ct. at 2232; *Singer Mfg.*, 374 U.S. at 197 (stating that the Sherman Act "imposes strict limitations on the concerted activities in which patent owners may lawfully engage").

As noted previously, a cognizable justification is ordinarily one that stems from measures that increase output or improve product quality, service, or innovation. *Indiana Fed'n*, 476 U.S. at 459; *Broadcast Music*, 441 U.S. at 19-20. Furthermore, "[c]ognizable justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve product quality, service, or innovation." *Polygram*, 136 F.T.C. at

41 *1-800 Contacts, Inc. v. Lens.com, Inc.*, No. 2:07-cv-591 (D. Utah Mar. 7, 2011), Defendant Lens.Com, Inc.'s Memorandum In Support Of Motion For Award Of Attorneys' Fees And Costs, Exhibit 2 (Declaration of Cary Samourkachian) at ¶ 4, Dkt. 271-2 (D. Utah Mar. 7, 2011).

345-46. Even if the Settlement Agreements had the effect of reducing litigation costs for the settling parties, Respondent has failed to provide an "explanation connecting the practice to consumers' benefits." *Chicago Prof'l Sports*, 961 F.2d at 674.

Based on the foregoing, Respondent has failed to demonstrate that the avoidance of litigation costs constitutes a countervailing procompetitive benefit that outweighs or otherwise justifies the anticompetitive harm of the Settlement Agreements.

3. Trademark Protection

Respondent contends that the Settlement Agreements are procompetitive because they provide "trademark protection, which promotes economic efficiency." RB at 36. Complaint Counsel contends that the restraints at issue are broader than necessary to protect Respondent's trademark rights, including because the agreements bar advertisements that may not be confusing within the meaning of trademark law. Complaint Counsel argues that prohibiting non-infringing advertisements cannot represent a cognizable and plausible consumer benefit. CCB at 129-37.

Respondent asserts that trademark law prevents others "from copying a source-identifying mark," which in turn "reduce[s] the customer's costs of shopping and making purchasing decisions, for it quickly and easily assures a potential customer that this item – the item with this mark – is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past." RB at 36 (quoting *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64 (1995)). Respondent further asserts that protecting trademarks from infringement and dilution incentivizes investment in brand-building, by helping to "assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product." RB at 37 (quoting *Qualitex Co.*, 514 U.S. at 164). Respondent stresses that it has invested heavily in building the 1-800 Contacts brand, including by investments in broad scale advertising and customer service. *See* F. 50-64. Respondent argues that the Settlement Agreements are therefore procompetitive because they protect Respondent's trademark, and thus protect its incentives to continue investing in brand-building, and ultimately benefit

consumers. RB at 36-40. Respondent further argues that the Settlement Agreements are reasonably limited because they "prohibit only one limited kind of infringing behavior," namely "causing a Party's brand name, or link to the Party's Restricted Websites to appear as a listing in the search results page of an internet search engine, when a user specifically searches for the other Party's brand name." RB at 41.

Even if protecting Respondent's trademarks and related incentives to invest is a procompetitive goal as a general matter, Respondent's justification fails because it *assumes* that displaying an ad in response to a search for 1-800 Contacts' brand name is, in fact, trademark infringement. Just as the counterparties to the Settlement Agreements assessed the cost and risk of litigation, and made an economically rational decision to settle, so did Respondent. *See* F. 356-358. As a consequence, none of the underlying lawsuits determined trademark infringement. Rather, the Settlement Agreements released all trademark infringement claims and required the dismissal of the underlying lawsuits. F. 360.

Moreover, Respondent's position that its trademark rights necessarily encompassed prohibiting the display of any ad in response to a user's search query for 1-800 Contacts' trademark terms, regardless of whether the advertiser bid on any 1-800 Contacts trademark as a keyword, and regardless of the text of the ad displayed, is unconvincing. Respondent does not cite to any case adopting Respondent's position that merely displaying an ad in response to a user's search query for a trademark term constitutes a "use" that is "likely to confuse" as to source or affiliation, regardless of the text of the ad. While bidding on a competitor's trademark term as a keyword is now generally considered to be a "use" under trademark law, Respondent's expert witness on trademark law, Mr. Hogan, admitted that he is unaware of any United States court holding that the appearance of an ad in response to a trademark search due to broad matching an advertiser's bids on generic keywords (i.e., the failure to implement trademark terms as negative keywords) is a trademark "use." F. 336.

Further, whether a use creates a likelihood of confusion, including initial interest confusion,[42] involves a fact-intensive inquiry into multiple factors. F. 334. While not exhaustive, the list of relevant factors may include "(1) similarity of the marks, (2) intent of the alleged infringer, (3) evidence of actual confusion, (4) similarity of the competing parties' services and manner of marketing, (5) degree of consumer care, and (6) strength of the marks." *Lens.com*, 722 F.3d at 1243. *See also Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 153 (4th Cir. 2012) (factors include (1) the strength or distinctiveness of the plaintiff's mark as actually used in the marketplace; (2) the similarity of the two marks to consumers; (3) the similarity of the goods or services that the marks identify; (4) the similarity of the facilities used by the markholders; (5) the similarity of advertising used by the markholders; (6) the defendant's intent; (7) actual confusion; (8) the quality of the defendant's product; and (9) the sophistication of the consuming public). In *Lens.com,* the only cited case in which Respondent litigated the issue of likelihood of confusion, Respondent lost on summary judgment. Applying the multi-factor test to the evidence in that case, the court in *Lens.com* concluded that "the factors other than evidence of actual confusion (even if we assume that 1-800's mark is a strong one) firmly support the unlikelihood of confusion." 722 F.3d at 1245.

It should also be noted that resolving the Parties' opposing arguments as to whether the restraints in the Settlement Agreements exceed the scope of Respondent's trademark rights would necessarily involve an inquiry into the merits of whether or not Respondent could have, or would have, proven infringement in the underlying lawsuits. However, delving into the merits of 13 trademark lawsuits, after the fact, to determine whether or not 1-800 Contacts could ultimately have proven infringement, if even possible, would require unacceptable speculation and would constitute an unnecessary waste of judicial resources. *Cf. In re*

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42 As noted in Section III.E.2.b, in search engine advertising cases, courts have generally focused on the "species of confusion known as initial interest confusion." F. 335. Initial interest confusion "occurs when the defendant uses the plaintiff's trademark in a manner calculated to capture initial consumer attention, even though no actual sale is finally completed as a result of the confusion." *Network Automation*, 638 F.3d at 1144 (quoting *Nissan Motor Co.*, 378 F.3d at 1018).

Schering-Plough Corp., 136 F.T.C. 956, 997 (2003) (stating that "[a]n after-the-fact inquiry by the Commission into the merits of the underlying litigation is not only unlikely to be particularly helpful, but also likely to be unreliable").

Furthermore, Respondent erroneously relies on *Clorox v. Sterling-Winthrop*, 117 F.3d 50 (2d Cir. 1997) for the proposition that the Settlement Agreements, by virtue of being settlements of trademark claims, are presumptively procompetitive. In *Clorox*, unlike the instant case, the plaintiff failed to prove anticompetitive effects in connection with the settlement agreement. Moreover, the court's comments regarding the procompetitive nature of the settlement agreement at issue constituted dicta because, as the court recognized, "[o]nly if a plaintiff succeeds in establishing the actual adverse effects of an alleged restraint does the burden shift to the defendant to establish its pro-competitive redeeming virtues." 117 F.3d at 59-60 (holding that because the plaintiff failed to prove anticompetitive effects, whether or not the settlement agreement was "entirely necessary" to protect the plaintiff's trademark was "immaterial"). In addition, in *Clorox,* unlike the instant case, there had been a determination – prior to the litigation and settlement at issue – that the defendant's brand name, PINE-SOL, was confusingly similar to the plaintiff's trademark, LYSOL. *Clorox*, 117 F.3d at 53.

Based on the foregoing, Respondent has failed to demonstrate that protecting its trademark rights constitutes a countervailing procompetitive benefit that outweighs or otherwise justifies the anticompetitive harm of the Challenged Agreements.

4. Consumer Confusion

Next, Respondent argues that the Challenged Agreements are procompetitive because they prevented paid search advertising that was likely to cause consumer confusion. RB at 45. Respondent contends that the factual conclusion that the paid search advertising prohibited by the Challenged Agreements is likely to cause consumer confusion is supported by four sources of evidence: (i) expert opinion from Dr. Ronald Goodstein; (ii) expert opinion from Dr. Kent Van Liere; (iii) customer service records from the litigation between 1-800 Contacts and Memorial Eye; and (iv) expert opinion from Dr. Anindya Ghose. RB at 45-

50. As shown below, the evidence upon which Respondent relies fails to prove Respondent's contention.

a. Opinion of Dr. Ronald Goodstein

Respondent's expert witness, Dr. Ronald Goodstein, an associate professor of marketing, opined that "consumer confusion as to the source, affiliation, or sponsorship is reasonably expected from sponsored ads by other contact lens retailers that appear in response to an Internet search for '1-800 Contacts.'" RX0736 (Goodstein Expert Report at 004); RB at 45-46.

Dr. Goodstein based the foregoing opinion on numerous subsidiary opinions and assertions, including that: (1) many consumers do not recognize that sponsored ads are actually paid advertisements, and therefore confuse the sponsored ads for unbiased, impartial "organic" links;[43] (2) various changes that search engines made to search engine results pages ("SERP") between 2002 and 2013, such as eliminating color distinctions and moving more ads to the top of the page, have made it more difficult for internet users to distinguish paid ads from organic search results; (3) when a search is "navigational" (which Dr. Goodstein defined as a search where the user's immediate intent is to reach a particular website), consumers are more likely to rely on the first link and spend less time viewing the SERP before clicking a link; (4) consumer surveys conducted in 2008 and 2009, in connection with American Airlines' trademark litigation with Google and Yahoo! ("American Airline surveys"), which, according to Dr. Goodstein, found that a significant number of users performing a navigational search could be confused as to the source, affiliation, or sponsorship of ads by other companies that appear in response to a trademark search; and (5) Dr. Van Liere's survey conducted for this case, discussed in Section III.F.4.b. F. 779.

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43 "Organic," or "natural" links on a search results page are links to websites that the search engine has determined are relevant to the user's search terms. In general, organic results are ranked in order of relevance, with the most relevant result at the top of the list. F. 143.

Dr. Goodstein did not base his opinion on any independent study and analysis conducted by him of consumer behavior relating to search queries using "1-800 Contacts," but relied instead on data collected by third parties in studies that Dr. Goodstein merely summarized and reiterated in his expert report and on the witness stand. F. 780 (referring to reliance on "studies that have been done both in the science community and by the search engines looking at eye-tracking studies as to where people look"; testifying that his opinion that many consumers do not recognize that sponsored ads are actually paid advertisements is based "on science done both within the science of my field as well as by the search engine companies themselves, their own research"; describing and relying on numerous third-party studies; testifying that he "did an analysis of the secondary research that exists," which "is relevant research that someone else conducted," and reviewed "primary research that was made available in this case," which is "data that's collected particularly for this issue" and includes the study conducted by Dr. Van Liere).

Moreover, the reliability and validity of the studies upon which Dr. Goodstein relied have not been established. For example, Dr. Goodstein relied in part on the American Airline surveys, which, as noted above, were consumer surveys conducted for trademark litigation with Google and Yahoo!. F. 779. Complaint Counsel points to numerous potential flaws in the American Airline surveys, including the test questions, control conditions, scoring of results, and failure of the test stimuli to reflect real world conditions. *See, e.g.*, CCRFF 1498, 1722. In addition, as Dr. Goodstein testified, the American Airlines cases were settled (F. 781), and it should not be assumed that the surveys would have been accepted in those cases as reliable or valid.

Dr. Goodstein's opinion is also based on Dr. Van Liere's survey prepared for the instant case. As set forth in Section III.F.4.b, Dr. Van Liere's survey is entitled to little or no weight, and, accordingly, provides no support for Dr. Goodstein's opinion.

Although he testified that when a search is navigational, consumers expect that the top results will be the most relevant, Dr. Goodstein acknowledged that when a search query is "1-800

Contacts cheaper," one cannot determine if that is a navigational search and the consumer intended to go only to 1-800 Contacts' website. F. 782. Dr. Goodstein also acknowledged that there are studies finding that survey respondents have diverse preferences and expectations when they use brand names as search terms and that not everybody who uses a brand name as a search term is looking only for information about that brand. F. 783.

Furthermore, Dr. Goodstein failed to draw a clear or well-supported connection between the asserted inability of some consumers to distinguish between paid search ads and organic search results and his opinion that consumers viewing sponsored ads in response to a search for 1-800 Contacts would be confused as to the source or affiliation of those ads. Nor is such a connection intuitively obvious. *See Lens.com*, 722 F.3d. at 1245 ("Perhaps in the abstract, one who searches for a particular business with a strong mark and sees an entry on the results page will naturally infer that the entry is for that business. But that inference is an unnatural one when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for."). Dr. Goodstein explained: "[I]f I don't know what's an ad and what's an organic link, there's a much higher probability that what comes – appears towards the top left northern area [of the SERP], I would be confused into thinking that that's related to my search, is affiliated, sponsored, whichever of those words you'd want to use." (Goodstein, Tr. 2410). However, this explanation relates to confusion about the elements of the search results (ads v. organic results) and layout of the search results (the order in which the results are presented). It says nothing about confusion as to the source, sponsorship, or affiliation of the sponsored ads from other retailers that appeared in search results for the search "1-800 Contacts." The basis for Dr. Goodstein's leap of logic – from the proposition that consumers are confused between paid search advertisements and organic results to the conclusion that consumers must be confused as to the source or affiliation of ads by 1-800 Contacts' online competitors – is unclear and unsupported, and it is therefore unconvincing.

Based on the foregoing, Dr. Goodstein's opinion that consumer confusion as to the source, affiliation, or sponsorship is reasonably expected from sponsored ads by other contact lens

retailers that appear in response to an internet search for "1-800 Contacts" is entitled to, and is given, little weight.

b. Opinion of Dr. Kent Van Liere

Respondent's expert witness, Dr. Kent Van Liere, conducted a survey for this case intended to measure the degree to which sponsored links that appear when consumers search for "1-800 Contacts" are likely to confuse consumers into believing that those links will take them to a 1-800 Contacts website or a website affiliated with 1-800 Contacts. RX0735 (Van Liere Expert Report at 0003); Van Liere, Tr. 2977.

Dr. Van Liere defined the relevant population for his survey "as adult consumers 18 years or older who reside in the [United States] who either a) have purchased contact lenses online within the past 12 months; or b) would consider searching on the internet to purchase contact lenses in the next 12 months." F. 758. Dr. Van Liere used a national online survey firm, Critical Mix, which Dr. Van Liere has used before and described as well known. F. 759. Critical Mix has demographic, occupational, and other information regarding the persons who agree to participate on its panels. F. 759. Critical Mix provided Dr. Van Liere with an online panel of 689 consumers who met the qualifying criteria for the survey ("survey respondents"). F. 759.

The 689 survey respondents were assigned to perform a simulated internet search for "1-800 Contacts" as a keyword using one of two search engines, either Google or Yahoo!. F. 760. Survey respondents in each of the Google or Yahoo! groups were then randomly assigned to view either a test or control stimulus, which consisted of Google and Yahoo! SERP mock-ups constructed by Dr. Van Liere. F. 766.

In the test condition, survey respondents were told to search for "1-800 Contacts" and then they were shown either a Google or Yahoo! SERP that included sponsored ads with links ("sponsored links") to contact lens retailers other than 1-800 Contacts, as well as some links to organic search results ("organic links") (the "test SERP"). F. 766. Dr. Van Liere testified that he constructed the test SERPs based on his assessment of what could appear if the Challenged Agreements were not in place, and of what he

believed were representative of advertisements that currently appear in response to a search related to contact lenses, such as a search for "contact lenses" or other generic terms, or for the brands or names of the individual companies that are parties to the Challenged Agreements. Van Liere, Tr. 3017-18; RX0735 (Van Liere Expert Report at 0006, 0013-15). Dr. Van Liere did not include a sponsored link for 1-800 Contacts on the test SERPs. F. 767.

Survey respondents in the test condition were shown the test SERPs and asked to "point and click on the link or links, if any, that you think will take you to the website of the company that you searched for. Please select all that you think apply." For any link selected, survey respondents were asked, "What makes you say that?" F. 769. If no links were selected, survey respondents were shown the test SERP a second time and asked to "click on the link or links, if any, that you think will take you to the website of the company that is affiliated with the company that you searched for." F. 769. As to any links selected, the survey respondent was asked, "What makes you say that?" F. 769. Survey respondents in the test condition were counted as confused as to source or affiliation if they selected any sponsored links, such as www.visiondirect.com, in response to the questions. F. 769. Using this method, Dr. Van Liere calculated that 28.7% of survey respondents were confused (39.2% with the Yahoo! SERP and 17.8% with the Google SERP). RX0735 (Van Liere Expert Report at 0021, Table 3).

Dr. Van Liere's survey included a control condition, in which survey respondents were asked to search for "1-800 Contacts" and then were shown a Google or Yahoo! SERP identical to the test SERP, with the same organic links, but without any sponsored links (the "control SERP"). F. 770. According to Dr. Van Liere, removing sponsored ads is appropriate to control for the potentially confusing (i.e., "allegedly infringing" effect) of those ads. RX0735 (Van Liere Expert Report at 0015).

Survey respondents in the control condition were asked the same questions as in the test condition, i.e., "point and click on the link or links, if any, that you think will take you to the website of the company that you searched for" and "click on the link or links, if any, that you think will take you to the website of the

company that is affiliated with the company that you searched for." F. 770. Survey respondents in the control condition were counted as confused as to source or affiliation if they identified specified control links in organic search results, such as New York Times articles or Wikipedia, in response to the questions. F. 770. Using this method, Dr. Van Liere calculated that 8.1% of survey respondents were confused (12.0% with the Yahoo! SERP and 4.5% with the Google SERP). RX0735 (Van Liere Expert Report at 0021 Table 3).

Based on his survey results, Dr. Van Liere opined that "there is potential for real world confusion among consumers in the relevant population regarding whether the sponsored advertisements of the type tested are the same as or are affiliated with 1-800 Contacts when searching for 1-800 Contacts." RX0735 (Van Liere Expert Report at 0006); Van Liere, Tr. 2976.

Complaint Counsel contends that there are numerous flaws in Dr. Van Liere's survey, as identified by Complaint Counsel's expert witness, Dr. Jacob Jacoby, and that these flaws render Dr. Van Liere's results, and his conclusions based thereon, unreliable. CCB at 154-57; CCRB at 31-35. Among other things, Complaint Counsel asserts that, according to Dr. Jacoby, Dr. Van Liere's survey failed to replicate real-world conditions because the test and control SERPs removed advertisements for 1-800 Contacts. *See* CCRFF 1486 (citing Jacoby, Tr. 2222-23, 2230-34; CX8011 (Jacoby Rebuttal Expert Report at 0011-12)).

Dr. Van Liere responds that he did not include 1-800 Contacts ads in the stimuli in order to "measure the impact of [competitor] ads without the trademark owner having to essentially purchase its own ad to be in the sponsored link area . . . ." Van Liere, Tr. 3037-38; *see also* Van Liere, Tr. 3238 (test was designed to determine whether "the sponsored links in this case of the settlement parties [would] be confusing in a situation . . . in which the trademark holder is not required to purchase their own advertisement as a sponsored link"); CX9049 (Van Liere, Dep. at 187-88) ("confusion has to be measured whether 1-800 Contacts is forced to purchase its own name as the first sponsored links or it is not."). As explained below, this argument is not convincing.

Both Parties' experts acknowledged that for a consumer confusion survey to be reliable, it is important for the stimuli to reasonably replicate what consumers would encounter in the marketplace. F. 771. However, Dr. Van Liere removed sponsored links for 1-800 Contacts on the test SERP and all sponsored links, for any companies, on the control SERP, which does not reflect real world conditions. F. 773. By removing sponsored links for 1-800 Contacts from the test SERP, the test stimuli did not reflect what a consumer would "typically" see in response to a search query for "1-800 Contacts." Google places a priority on showing relevant ads. F. 194. Among the factors Google considers are the relevance of the ad to a user's search query and the amount of each advertiser's bid on keywords. F. 183, 194, 202. Respondent's strategy in search advertising was to spend as much as necessary when bidding on its trademark keywords to meet its goal of ensuring that 1-800 Contacts' advertisement was the first advertisement displayed in response to searches for its trademark. F. 575. Laura Schmidt, 1-800 Contacts' marketing director, could not recall an instance in which a 1-800 Contacts' advertisement was not the first advertisement that appeared in response to a 1-800 Contacts trademark search query. F. 576. Based on the foregoing, it is implausible that a search engine results page returned on a search for "1-800 Contacts" would not have an advertisement for 1-800 Contacts. Similarly, by removing all sponsored links from the control SERP, the control stimuli also did not reflect what a consumer would "typically" see in response to a search query for "1-800 Contacts." Google typically displays up to four sponsored links when a user's search is of a commercial nature. F. 142, 212, 234.

In excluding an ad for 1-800 Contacts from his test SERP, Dr. Van Liere not only disregarded the "real world," he also failed to remove an obvious alternative explanation for any resulting consumer "confusion" in his test condition. Respondent's trademark expert witness, Mr. Hogan, testified regarding a Bing study that demonstrated that when a trademark owner's ad appeared at the top of a SERP in response to a trademark search query, clicks on ads sponsored by non-trademark owners decreased from 40% to 9%. Hogan, Tr. 3342-44; RX0734 (Hogan Expert Report at 0089-90 ¶ 132). This study suggests that any purported confusion arising from the appearance of other ads

on the SERP dissipates when the trademark owner's ad appears at the top of the SERP.

It is readily apparent how the absence of a sponsored link for 1-800 Contacts on the test SERP could inflate the reports of source or affiliation confusion, given that the survey respondents were instructed to search for "1-800 Contacts" but were presented, in the test condition, only with sponsored links for companies other than 1-800 Contacts. Under these circumstances, a survey respondent viewing the test SERP could well be confused into thinking the returned links were for, or affiliated with, 1-800 Contacts. In this regard, it is noteworthy that Dr. Van Liere acknowledged that he was instructed not to include ads for 1-800 Contacts in his stimuli, after discussion with counsel. F. 768 ("After discussion with counsel of my prior work and my understanding, ultimately the way we agreed to do it and therefore the way I was instructed to do it was to leave it off.").

Moreover, when survey respondents were asked to select the links they believed were the same as, or were affiliated with, 1-800 Contacts, Dr. Van Liere's instructions did not allow the option of "I don't know" and directed survey respondents to "*select all* that you think apply" (emphasis added). F. 769. This suggests to the survey respondents that there was at least one correct answer, and were perhaps several correct answers, to the question. Dr. Jacoby explained the problem with asking users to "select all that might apply," while at the same time not including a link for 1-800 Contacts as an option:

> [T]his is essentially equivalent to a multiple-choice question. What you're doing is you're saying which of the following is the answer to my question. If you take out the right answer and you only leave in wrong answers, and you ask people which of the following is the answer to my question, and all they have left is not the right answer but the wrong answer, many are going to give you the wrong answer.
>
> If I ask you in which year did Columbus discover America, 1418, 1412, 1467 or 1593, . . . or no opinion, . . . you're going to get people a lot

> saying no opinion, but you're going to get a lot of people saying, oh, one of these other wrong answers because they wouldn't ask me this question if there wasn't a right answer in here. And that's equivalent to what he did.

F. 775. Further compounding this problem, after being shown the test SERP, if the survey respondents did not select any link, they were shown the test SERP a second time and asked again to select the link they thought would take them to the website of the company affiliated with the company they searched for. F. 769. By removing the option to select "1-800 Contacts" as an option, Dr. Van Liere's survey "stacked the deck" to find consumer confusion. F. 775.

In addition, Dr. Van Liere's conclusions based on the survey results do not address whether or not reported confusion may have been attributable to other factors, such as the specific ads selected by Dr. Van Liere; the quantity of ads or other links presented; the test conditions; or to other factors, alone or in combination. F. 761-762, 776-778; CX8011 (Jacoby Rebuttal Expert Report at 010-27 ¶¶ 20-34) (describing problems with Dr. Van Liere's survey, controls, and data collection).

Further, the calculations that Dr. Van Liere made are suspect. Dr. Van Liere assigned approximately 50% of his survey respondents to the Yahoo! version of his survey, even though Dr. Van Liere's report states that Google accounts for 65% of all consumer searches and Yahoo! accounts for 14%. F. 763. In his test group, Dr. Van Liere recorded that 39.2% were confused with the Yahoo! SERP and 17.8% with the Google SERP. RX0735 (Van Liere Expert Report at 0021 Table 3). He then averaged these two numbers to conclude that 28.7% of survey respondents were confused, even though Dr. Van Liere acknowledged that weighting is a statistical technique that can be used to adjust for over-represented or under-represented samples. F. 764. Dr. Van Liere acknowledged that if he had weighted the results from his survey questions to account for the percentages of searches conducted on Google and on Yahoo!, "the net confusion measured . . . across all of the study would reduce down to some degree." F. 765.

Moreover, Dr. Van Liere's opinion based on his survey, that there is "potential for confusion" if the Challenged Agreements are not in place, is not particularly definitive on the question he was tasked with answering, which was the degree to which sponsored links that appear when consumers search on "1-800 Contacts" are likely to confuse consumers. In this regard, Dr. Van Liere's opinion carries little probative weight.

For all the foregoing reasons, Dr. Van Liere's opinion is given little or no weight on the question of whether the Challenged Agreements prevented paid search advertising that was likely to cause consumer confusion.[44]

c. Customer service records

Respondent next argues that customer service records of Memorial Eye constitute evidence of actual consumer confusion. RB at 49-50. The evidence upon which Respondent relies consists of notations made in customer service records, produced in 1-800 Contacts' trademark litigation with Memorial Eye and introduced in this case, which Respondent asserts show that consumers believed that Memorial Eye was the same as or was affiliated with 1-800 Contacts. RFF 1137-1142. For example, Respondent points to a note dated July 23, 2008, in which a Memorial Eye customer service representative recorded that they received a call from a customer who "asked if we were 1-800

44 Dr. Van Liere testified that he ran searches on "1-800 Contacts" and that a sponsored link for 1-800 Contacts sometimes appeared and sometimes did not appear, Van Liere, Tr. 3009-10, and that he relied on these searches in constructing SERPs for his survey that did not include sponsored ads for 1-800 Contacts. Van Liere, Tr. 3002-03, 3010-11, 3013-14. However, Dr. Van Liere did not retain copies of those searches and they were not produced to Complaint Counsel in discovery. Tr. 3133. *See* Complaint Counsel's Motion to Disregard and Strike Certain Portions of the Report and Testimony of Dr. Kent Van Liere, May 16, 2017. Thus, Complaint Counsel was unable to fully test Dr. Van Liere's basis for excluding all 1-800 Contacts sponsored ads from his test condition, and his related opinion that the conditions in his survey replicated how a SERP would appear in response to a search for 1-800 Contacts, in a world without the Challenged Agreements. For these reasons as well, Dr. Van Liere's survey is entitled to little or no weight. *See* Bench Ruling, Tr. 3135 (stating that "any opinion by any expert wherein the party on the other side was not given appropriate documents relied upon by the expert . . . those expert opinions will not be considered").

contacts," then asked "if we [are] affiliated with them." RX1774; Holbrook, Tr. 2007-08. In another note referenced by Respondent, dated July 25, 2009, a customer service representative recorded a customer saying she "thought she was ordering from 1-800Contacts" when she placed her order with Memorial Eye. RX1777; Holbrook, Tr. 2003-06. In addition, in a note dated January 22, 2009, a customer service representative recorded that a customer who had ordered from Memorial Eye "said that she meant to order with 1-800contacts . . . awesome." RX1775; Holbrook, Tr. 2010-11.

The records notations upon which Respondent relies are not persuasive evidence that consumers are confused by paid advertisements appearing in response to a search for 1-800 Contacts. The cited documents, at best, show inquiries about affiliation and/or that some customers were mistaken about from whom or where they had ordered their contact lenses. Moreover, this anecdotal evidence of six alleged instances of confusion does not indicate that any purported confusion was attributable to having seen or responded to paid advertising in response to a search for 1-800 Contacts' trademark terms. Thus, the evidence is not probative of whether such advertising is confusing.

In Respondent's trademark litigation against Lens.com, the court found that a customer service record recording that the customer was canceling her order because she had "just realized" that Lens.com was not 1-800 Contacts, was not probative of confusion arising from Lens.com's search advertisements appearing in response to a search for 1-800 Contacts' trademark terms. 772 F.3d at 1245. The court stated:

> We now turn to 1-800's arguments regarding actual confusion. First, it cites what it claims to be anecdotal evidence of actual confusion in the marketplace: a customer-service record disclosed by Lens.com reported that a customer called Lens.com in July 2006 to cancel her order, apparently because she had just realized that Lens.com was not 1-800. Lens.com counters that the customer-service record cannot be probative of the relevant confusion in this case because, among other reasons, it gives no indication how the

> customer found Lens.com to place her order initially. We agree. It would be speculation to assume that she had clicked on a Lens.com ad after specifically searching for 1-800.

Id. at 1245.

Furthermore, the discovery of 6 alleged instances of confusion, out of the roughly 100,000 documents produced in the litigation between 1-800 Contacts and Memorial Eye (F. 341), is arguably *de minimis* and therefore carries little probative weight. *See*, *e.g.*, *Hornady Mfg. Co. v. Doubletap, Inc.*, 746 F.3d 995, 1005 (10th Cir. 2014) ("Even assuming that the three instances cited by [the plaintiff] constitute some evidence of actual confusion, we agree with the district court's assessment that a handful of instances over the ten years in which [the defendant] was in the market constitute de minimis evidence of a likelihood of confusion."); *King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1092 (10th Cir. 1999) ("[I]solated instances of actual confusion may be de minimis.").

Because this evidence does not show that consumers were confused by search results returned on an internet search for 1-800 Contacts' trademark terms, it fails to support Respondent's argument that the Challenged Agreements prevented paid search advertising that was likely to cause consumer confusion.

d. Opinion of Dr. Anindya Ghose

Respondent introduced evidence from its expert witness, Dr. Anindya Ghose, that 25.6% of consumers buy from 1-800 Contacts after searching for 1-800 Contacts' trademark and clicking on its ad, whereas only 5.2% of consumers buy from other retailers after searching for 1-800 Contacts and clicking on the other retailers' ads. RX0733 (Ghose Expert Report at 0048-50 ¶¶ 107-13). Respondent asserts that this evidence supports the inference that consumers who searched for 1-800 Contacts' trademarks and clicked on an ad for another retailer found themselves "in the wrong place." RB at 50 (citing RX0733 (Ghose Expert Report at 0049 ¶ 109)).

As an initial matter, the assumption underlying Respondent's assertion, that all consumers who type "1-800 Contacts" into a search engine intend to go only to 1-800 Contacts' website, and nowhere else, is not supported by the evidence in this case. Section III.F.5. Even assuming that most consumers who search for a 1-800 Contacts trademark are interested in navigating to the 1-800 Contacts website, there is no basis for assuming that these consumers, or that other consumers who may enter a 1-800 Contacts trademark as a search term, are not interested in obtaining any other information, including information about other sellers of contact lenses. Academic literature confirms that not all consumers who type in one company's brand name, but find themselves on that company's rivals' website, find themselves in the wrong place. *See* David J. Franklin & David A. Hyman, *Trademarks as Search Engine Keywords: Much Ado About Something?* 26 HARV. J.L. & TECH. 481, 532 (2013) (when asked, in the abstract, what consumers wished to see in response to a brand search, almost *half* responded that they wanted to see information relating to other brands); Eric Goldman, *Brand Spillovers*, 22 HARV. J.L. & TECH. 381, 411-12 (2009) ("many consumers entering a trademarked search term may not be looking for the trademark owner's goods or services").

More importantly, Dr. Ghose did not opine that consumers who search for 1-800 Contacts trademark terms convert to sales at higher rates on 1-800 Contacts' website than on the websites of 1-800 Contacts' rivals because they were confused. Dr. Ghose opined that this difference in conversion rates "supports the inference that consumers who clicked on other retailers' ads might have done so by mistake . . . *or* might have preferred the experience of shopping on 1-800 Contacts' website." RX0733 (Ghose Expert Report at 0049 ¶ 109) (emphasis added) (noting also "[t]here are other possible explanations why 1-800 Contacts' conversion rate might be higher; for example, 1-800 Contacts' website could have been more appealing to consumers than other retailers' websites, thus increasing the probability that consumers would purchase from 1-800 Contacts."). In other words, Dr. Ghose does not know why the conversion rates for consumers clicking on 1-800 Contacts' website in response to searches for 1-800 Contacts are higher than for consumers who click on other retailers' websites. He speculates that maybe consumers are

confused, or maybe consumers are not confused at all; they simply like to comparison shop.

Based on the foregoing, Dr. Ghose's opinion does not support Respondent's argument that the Challenged Agreements prevented paid search advertising that was likely to cause consumer confusion.

e. Summary

Respondent has failed to prove its claim that the Challenged Agreements are justified to prevent consumer confusion. As explained above, Respondent's assertion that consumers entering a search query for 1-800 Contacts' trademark terms are likely to be confused by the appearance of advertisements for other contact lens retailers is based upon inadequately supported expert opinion and a few vague notations in customer service records. The weight of this evidence is not sufficient to prove Respondent's assertion as to the likelihood of consumer confusion.

5. Search Costs

Respondent asserts that consumers who type "1-800 Contacts" into the search bar generally intend to navigate to 1-800 Contacts' website and that, for this reason, the additional ads for retailers other than 1-800 Contacts in response to those searches are only "minimally relevant" to consumers. RB at 57-58. Building on these factual assertions, Respondent argues that providing consumers with additional ads that are only minimally relevant can harm consumers by increasing the costs of finding the 1-800 Contacts website. RB at 58. Respondent concludes that, therefore, the Challenged Agreements, by eliminating only minimally relevant ads, reduced those increased search costs, and, thus, benefitted consumers. RB at 55. In essence, Respondent contends the Challenged Agreements are good for consumers because they address a "choice overload" problem, such as one presented to a shopper in the salad dressing aisle at one's local supermarket who is confronted with too many choices. RB at 59 (citing RX1963).

When an internet user types words or phrases in the search box on a search engine, if the search engine determines that the

search query is of a commercial nature (e.g., a search for "wine glasses" rather than a search for "history of wine"), the search engine will typically serve four paid advertisements above the hundreds, if not thousands, of natural search results it displays. F. 142, 212, 234. The factual predicate of Respondent's argument – that the display of four ads, instead of just one ad for 1-800 Contacts, has caused harm to consumers – has not been proven. As an initial matter, the evidence in this case fails to show that users who type in 1-800 Contacts' trademark terms into a search bar want to go only to 1-800 Contacts' website. The academic literature relied upon by Respondent's expert witness for this point, Dr. Ghose, makes clear that a user's intent cannot be inferred with any certitude from the user's search query. F. 784. Moreover, Dr. Ghose conceded that "advertising has the capacity to change the consumer's commercial intent." F. 785. Dr. Ghose acknowledged that if a consumer is engaged in comparative shopping, the consumer can benefit from seeing rival companies' ads. F. 786 (noting that among the benefits of targeted advertising is that consumers can make better and more informed decisions). Thus, users who may have initially wanted to navigate to 1-800 Contacts' website may be persuaded by ads from other retailers offering lower prices and change their intent and select an alternative website.

Dr. Athey, Complaint Counsel's expert witness, explained that relevant academic literature has shown researchers' observations that people used "'queries comprised of unambiguous company names or URLs and typically thought of as navigational'" "'not only to navigate to the corresponding homepage, but also to navigate to related pages (e.g., 17% of all queries for weather.com end up at http://weather.yahoo.com).'" CX8010 (Athey Rebuttal Expert Report at 008 ¶ 19). As Dr. Athey explained, "[i]n the weather.com example, . . . the logical conclusion is that subset of users who landed at weather.yahoo.com were ultimately seeking to understand the weather. Their apparent expressed preference for obtaining that information from weather.com was not a reliable indicator of their underlying intent. They may understand that weather.com is one way to meet their needs, but are open to other, potentially superior ways to learn about the weather." *Id.*

Furthermore, Respondent's position that consumers who type 1-800 Contacts' trademark terms into a search query intend to

navigate only to 1-800 Contacts' website is undermined by the proof in this case that when other online contact lens retailers' ads are shown in response to searches for 1-800 Contacts, those retailers' ads receive clicks and those retailers make sales. *See* Section III.E.2.a.ii.

For 1-800 Contacts' customers who want to go only to 1-800 Contacts' website without the distraction of advertisements for other online retailers of contact lenses, there are other ways of doing so, such as by typing "www.1800contacts.com" into the navigation bar of their computer's browser, bookmarking the 1-800 Contacts website, or ordering through 1-800 Contacts' mobile application. F. 577; *see also* F. 71, 704. Even for those consumers whose intent is to navigate only to 1-800 Contacts' website, the mere exposure to three additional paid search results, among the thousands of organic search results that are served in response to an internet search, can scarcely be viewed as harm of any consequence. As noted by the court in *Toyota Motor Sales U.S.A., Inc. v. Tabari*:

> When a domain name making nominative use of a mark does not actively suggest sponsorship or endorsement, the worst that can happen is that some consumers may arrive at the site uncertain as to what they will find. But in the age of FIOS, cable modems, DSL and T1 lines, reasonable, prudent, and experienced internet consumers are accustomed to such exploration by trial and error. They skip from site to site, ready to hit the back button whenever they're not satisfied with a site's contents. They fully expect to find some sites that aren't what they imagine based on a glance at the domain name or search engine summary.

610 F.3d 1171, 1179 (9th Cir. 2010) (internal citation omitted).

Indeed, Dr. Ghose does not offer a conclusion that any consumers who entered a search query that included a 1-800 Contacts' trademark term suffered (or would suffer) harm from being exposed to ads from 1-800 Contacts' rivals. F. 787 ("I haven't . . . quantified the specific proportion of people who would be harmed. All I'm saying is, based on the analysis, that a

large fraction of people would not find these competing ads relevant given the trademark search."). Moreover, Dr. Ghose did not conclude that by eliminating competitors' ads, the Challenged Agreements create benefits for consumers, as asserted by Respondent. *See* F. 788 (Dr. Ghose admitting "all I've said is that when consumers get to see these additional ads that may not be very relevant, their search costs can go up, and that's about it."). Furthermore, Dr. Ghose acknowledged that if consumers are looking for a product and they don't know which retailer they want to purchase from, then those consumers are willing to trade higher search costs in return for receiving a deeper discount. F. 789 (testifying also that, "as a general proposition, is it possible that some consumers benefit from seeing a price-comparative rival ad? Yes. I don't think . . . I have argued . . . against that").

To the extent that consumers are harmed by "choice overload," Respondent has not demonstrated that 1-800 Contacts is in a better position to make this decision for consumers than the search engines are. Google and Bing both have decided to serve up to four ads in response to commercial queries (F. 142, 212, 234); both have complex algorithms to determine which ads should be served up in response to users' queries (e.g., F. 158-161, 181-185, 190, 195, 237-240); and both have implemented trademark policies to specifically allow bidding on competitors' trademarks as keywords in advertising auctions. F. 290, 298. The search engines generate most of their money through search advertising and have an economic incentive to show relevant and useful information to users. F. 140, 185, 236; F. 199 ("[W]hen users encounter low-quality landing pages, their propensity for wanting to look at and click on ads in the future goes down," which "can diminish future revenue opportunities for Google."). *See also* Ghose, Tr. 3999 ("[A] search engine is a profit-maximizing corporation . . . . [T]hey are always trying to balance" making money from advertisers with satisfied consumers.).

Based on the foregoing, Respondent has not proven its assertion that the Challenged Agreements provided a procompetitive benefit of reducing search costs.[45]

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45 In addition, Respondent's purported justification, that consumers benefit from fewer choices, is comparable to social welfare justifications that courts

6. Increased Sales

Respondent argues that data from Complaint Counsel's expert witness, Dr. Athey, predicts that the Challenged Agreements increased sales of contact lenses by consumers who searched for 1-800 Contacts' trademark terms. RB at 8, 59-61.

Dr. Athey's model of a "counterfactual" world, discussed in Section III.E.3.c.1, predicts that, in the absence of the Challenged Agreements, consumer clicks on the 1-800 Contacts ads would decline, by 2 clicks per hundred searches; and consumer clicks on ads for competitors of 1-800 Contacts would increase, by 3.5 clicks per hundred searches. F. 750. Dr. Athey's model predicts clicks per searches and makes no predictions as to sales per searches (conversions). F. 751. Respondent's expert witness, Dr. Murphy, testified that in a counterfactual world without the Challenged Agreements, he would not expect to see the conversion rate going up because the Challenged Agreements relate to the propensity for ad impressions to show up; they do not address what the consumer does once he or she clicks on an ad impression. Murphy, Tr. 4231-32.

Dr. Murphy input data from Google regarding the rate at which consumers who click on an ad for a company convert into a sale. F. 791. Dr. Murphy selected what he termed an "average conversion rate" achieved by 1-800 Contacts on searches for its trademark terms of 27% and an "average conversion rate" achieved by 1-800 Contacts' online competitors of 10%. RX0739 (Murphy Expert Report at 0082-83 ¶ 231). Using Dr. Athey's model and Dr. Murphy's conversion rates, Dr. Murphy predicted that in the counterfactual world without the Challenged Agreements, 1-800 Contacts would have a loss of sales of 0.54 customers per 100 searches and the online competitors would have a gain in sales of 0.35 customers per 100 searches. F. 791. Respondent argues that, because the incremental gain of 0.35

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have rejected as non-cognizable. *See In re North Carolina Board of Dental Examiners*, 2011 FTC LEXIS 290, at *67 (Dec. 7, 2011); *Professional Engineers*, 435 U.S. at 685, 695 (rejecting defense that trade association rule was intended to protect public health, safety, and welfare); *Indiana Fed'n*, 476 U.S. at 463 (stating "there is no particular reason to believe" that consumers cannot digest the information competition provides).

sales for 1-800 Contacts' online competitors is less than the incremental loss of 0.54 sales for 1-800 Contacts, Dr. Athey's model shows that consumers' online purchases of contact lenses are lower in the counterfactual world without the Challenged Agreements, and that, therefore, it should be inferred that the Challenged Agreements increased sales of contact lenses. RB at 60.

Dr. Murphy's report fails to support a conclusion that the Challenged Agreements increased sales of contact lenses by consumers who searched for 1-800 Contacts' trademark terms. Indeed, Dr. Murphy explained that he performed the above calculations to make the point that, although Dr. Athey's model showed that if the Challenged Agreements were not in place, there would be more clicks on ads for online competitors, this does not necessarily mean that there would be more online sales of contact lenses in the counterfactual world.

> [O]nce you tell me these things are going in opposite directions [(referring to Dr. Athey's model showing a decline by 2 clicks on 1-800 Contacts ads and an increase by 3.5 clicks on competitors of 1-800 Contacts ads)], then the net effect of that is ambiguous because it is going to tend to reduce the propensity to buy things on 1-800 [Contacts] and maybe increase the propensity to buy somewhere else, but the net effect could easily be to lower the overall propensity.

F. 792. Dr. Murphy clearly disclaimed that his analysis was intended to show that the Challenged Agreements increased the sales of contact lenses, testifying "I am not saying this proves sales would go down in a but-for world"; "the effect on sales could go either way . . . ." F. 793.

Moreover, when asked if he was suggesting that in a counterfactual world without the Challenged Agreements that fewer people are going to buy contact lenses, Dr. Murphy testified:

> I don't think that's the way you would interpret this [analysis]. I think you would interpret this as

> saying these searches were less effective in helping these people purchase contacts. . . . [People are] going to have to go get their contacts somewhere else, maybe go back to the ECP, maybe do something else.

F. 794. Consumers looking to purchase contact lenses are unlikely not to actually purchase contact lenses, given that they went to the trouble of obtaining a prescription for them. F. 10. Contact lenses are not typically a discretionary product and a consumer has significant incentive not to abandon his or her purchase. F. 795. Dr. Murphy's analysis of conversion rates fails to account for these facts. For this reason also, Dr. Murphy's analysis of conversions fails to show that the Challenged Agreements increased output of contact lenses.

Based on the foregoing, the evidence upon which Respondent relies fails to prove Respondent's assertion that the Challenged Agreements increased sales of contact lenses by consumers who searched for 1-800 Contacts' trademark terms.

7. Summary and Conclusion

For all the foregoing reasons, Respondent has failed to prove that the Challenged Agreements have countervailing procompetitive benefits that outweigh or justify the demonstrated anticompetitive effects of the Challenged Agreements.

In conclusion, the evidence in this case proves that the Challenged Agreements pose significant, unjustified anticompetitive consequences in the relevant market for the sale of contact lenses online. The facts show that the restraints in the Challenged Agreements do not enhance or promote competition in the relevant market, but rather tend to suppress competition. Accordingly, Complaint Counsel has met its burden of proving that the Challenged Agreements unreasonably restrain trade in violation of Section 5 of the FTC Act. The analysis now turns to remedy.

G. Remedy

1. Applicable Legal Standards

Pursuant to Section 5 of the FTC Act, upon determination that the challenged practice is an unfair method of competition, the Commission "shall issue . . . an order requiring such person . . . to cease and desist from using such method of competition or such act or practice." 15 U.S.C. § 45(b); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957).

Courts have long recognized that the Commission has considerable discretion in fashioning an appropriate remedial order, subject to the constraint that the order must bear a reasonable relationship to the unlawful acts or practices found to exist. *See, e.g.*, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965) (stating that the FTC is permitted "to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices" in the future and that "[h]aving been caught violating the Act, respondents 'must expect some fencing in'") (quoting *Nat'l Lead*, 352 U.S. at 431); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946). As stated in *Polygram*:

> [T]he Commission is empowered to enter an appropriate order to prevent a recurrence of the violation. The Commission has wide discretion in its choice of a remedy. *Federal Trade Commission v. National Lead Co.,* 352 U.S. 419, 428 (1957); *Jacob Siegel Co. v. Federal Trade Commission,* 327 U.S. 608, 611 (1946). "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," but "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission v. Ruberoid Co.,* 343 U.S. 470, 473 (1952). The remedy selected, however, must be reasonably related to the violation found to exist. *Id.*; *Jacob Siegel*, 327 U.S. at 613.

Polygram, 136 F.T.C. at 379.

Complaint Counsel submitted a proposed order with its Post-Trial Brief. However, notwithstanding the clear direction of the Administrative Law Judge,[46] Complaint Counsel devoted little of its Post-Trial Brief to explaining or justifying the provisions of the proposed order, and, in fact, only Paragraph II of the proposed order was discussed. Respondent submitted revisions to the proposed order with its Reply Brief, together with argument in support thereof.

Based on full consideration of the applicable legal authorities, the proposed order, and Respondent's proposed revisions thereto, the attached Order, to be entered herewith, adopts the provisions of Complaint Counsel's proposed order except as explained below. The Order accomplishes the remedial objectives of the FTC Act and is reasonably related to the proven violations. Moreover, the Order is sufficiently clear and precise. The Order also is necessary and appropriate to remedy the violations of law found to exist.

2. Specific Provisions

a. Paragraph I

Respondent does not seek to modify the set of definitions in the proposed order, except that Respondent would omit from the definition of "1-800 Contacts" the partners, directors, officers, employees, agents, and representatives of "joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by 1-800 Contacts." As written, the definition is standard and not unreasonably broad. Accordingly, the definitions in the proposed order will be included in the Order.

b. Paragraphs II.A and II.B

Respondent seeks revisions to certain provisions in Paragraphs II.A and II.B of the proposed order.

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46 Tr. 4552-53 (instructing both parties to "concentrate heavily on the remedy" in post-trial briefing); Order on Post-Trial Briefs ("The parties shall specifically include briefing in support of or in opposition to the proposed order.").

Paragraph II.A prohibits: "Entering Into[47] any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on the ability of a Seller to participate in a Search Advertising auction, or to provide instructions to a Search Engine regarding the nature and extent of a Seller's participation, including but not limited to, prohibiting or restricting the use of a Keyword or requiring the use of a Negative Keyword."

Paragraph II.B prohibits: "Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on any Search Advertising . . ." Paragraph II.B specifies that the prohibitions do not prevent Respondent from entering into an agreement regarding certain types of advertising, such as false advertising, advertising that misrepresents an affiliation with or sponsorship by Respondent, or advertising using a confusingly similar name to any 1-800 Contacts' trademark. II.B.1, 2.

In addition, Paragraph II.B contains a "carve-out" clause with respect to future litigation by Respondent, as follows:

> [N]othing in this Paragraph II.B shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent's intention to initiate or prosecute a lawsuit, or (c) implementing or enforcing the order entered by any court of law at the conclusion of a contested litigation.

(the "litigation carve-out").

Respondent proposes to delete from subparagraph (c) of the litigation carve-out the phrase, "at the conclusion of contested litigation," and replace it with language expressly including in the litigation carve-out "an order approving a litigation settlement." Thus, Respondent requests that subparagraph (c) of the litigation

47 The proposed order makes "Entering Into" a defined term, meaning "entering into, adhering to, participating in, maintaining, implementing, enforcing, inviting, offering or soliciting." Paragraph I.D.

carve-out be modified as follows: "(c) implementing or enforcing the order entered by any court of law, including an order approving a litigation settlement." Respondent also requests that the litigation carve-out, as modified by Respondent, be added to Paragraph II.A.

Respondent argues that limiting the exemption to court orders that are entered "at the conclusion of contested litigation" interferes with the ability of an Article III court to issue court orders approving settlements and dismissing litigation, prior to conclusion. Respondent further contends such a limitation contravenes public policy that encourages settlements of litigation. Complaint Counsel did not address the litigation carve-out in its brief, except to assert that the proposed order "permit[s] 1-800 Contacts and its rivals to pursue litigation . . . or to settle any trademark dispute" within the boundaries set by the order. CCB at 183.

In order to preserve the prerogatives of a court overseeing litigation, while still ensuring that the purposes of the Order are carried out, subparagraph (c) of the litigation carve-out will be included in the Order, but modified as requested by Respondent, and the same litigation carve-out will be added to Paragraph II.A.[48]

It should be noted that the modification effectively exempts settlement agreements that would otherwise be prohibited by Paragraphs II.A and B, so long as the settlement agreement is submitted to and adopted by a court as an order. This could be problematic if a court receiving such submission has not been made aware of the prohibitions of the Order in this case. The proposed order contains a number of notification requirements in connection with Respondent's future litigation and settlements

48 Respondent's proposed litigation carve-out clause would further add a subparagraph (d) to allow Respondent to enforce "any settlement agreements already entered into prior to the initiation of the Commission's complaint in this matter." Respondent included subparagraph (d) in its proposed order but failed to submit any argument to specifically justify this provision. To the extent Respondent argues that this provision is necessary to prevent improper retroactive application of the order to existing agreements, the provision is rejected for the reasons set forth in Section III.G.2.d.

that should mitigate the risk that a court reviewing a settlement agreement for potential entry as a court order will not be made aware of the prohibitions of the Order. Specifically, Paragraph IV.B of the proposed order requires Respondent, for a period of five years, to notify Commission staff of communications with any Person regarding suspected trademark infringement and to provide such persons with a statement (attached to the proposed order as Appendix A) summarizing the prohibitions of the order. IV.B.1, 2. Further, Paragraph IV.B.3 requires Respondent to provide to Commission staff a copy of any agreement that Respondent enters into with a Seller[49] relating to Search Advertising,[50] within 30 days of entering into such agreement.

In addition to the foregoing notice provisions, a new subparagraph 5 is added to Paragraph IV.B of the Order, to require Respondent to: "Provide a copy of this Order to any court evaluating a settlement agreement relating to Search Advertising for approval and/or incorporation into a court order."

c. Paragraphs II.C and II.D

Paragraph II.C of the proposed order prohibits:

> Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place any limitation on truthful, non-deceptive, and non-infringing advertising or promotion.

Paragraph II.D of the proposed order prohibits:

> Entering Into any combination, conspiracy, or agreement with a Seller to:

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49 Paragraph I.K of the proposed order defines "Seller" as "any Person that markets or sells any contact lens product and includes its employees, agents, and representatives."

50 Paragraph I.H of the proposed order defines "Search Advertising" as "online advertisements displayed on a Search Engine Results Page in response to a user query."

1. Fix, raise, or stabilize prices or price levels, or engage in any other pricing action; or

2. Allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories.

Respondent requests that Paragraphs II.C and II.D of the proposed order not be included in the Order. Respondent argues that these provisions are unduly vague "obey-the-law" provisions, which have been held impermissible and unenforceable. Respondent further argues that the provisions go "'further than is reasonably necessary to correct the evil and preserve the rights of competitors and public,'" RRB at 147 (quoting *FTC v. Royal Milling Co.*, 288 U.S. 212, 217 (1933)), and that they are not justified as fencing-in relief because the provisions do not bear a "reasonable relation to the unlawful practices found to exist." RRB at 147 (quoting *Jacob Siegel*, 327 U.S. at 613). Regarding Paragraph II.C in particular, Respondent further argues that the prohibition against any agreement that would "place any limitation on truthful, non-deceptive, and non-infringing advertising" would effectively prevent 1-800 Contacts from entering into any settlement agreement involving alleged trademark infringement or deceptive advertising, either as a plaintiff or a defendant. RRB at 148. Complaint Counsel states that Paragraph II.C is similar to a provision in the Commission's order in *Polygram*. Complaint Counsel does not explain the basis or reasoning for Paragraph II.D.

Respondent's objections to Paragraph II.C are without merit, and Paragraph II.C will be included in the Order. Prohibiting Respondent from entering into agreements in the future that limit "truthful, non-deceptive, and non-infringing advertising or promotion" is reasonably related to the unlawful advertising restraints found in this case, and is appropriate fencing-in relief. In *Polygram*, where the respondent's horizontal agreement not to advertise was held to be an unlawful advertising restraint, the Commission's order prohibited, *inter alia*, any agreement to restrict truthful or "nondeceptive" advertising. 2003 FTC LEXIS 120, at *105-06. The Sixth Circuit upheld the Commission's order. 416 F.3d at 38.

In addition, the language of Paragraph II.C is not impermissibly vague. An order's prohibitions need only be sufficiently clear that "that they may be understood by those against whom they are directed . . . ." *Colgate Palmolive*, 380 U.S. at 392. The prohibitions in Paragraph II.C meet this standard. Additionally, some level of uncertainty is contemplated by the FTC Act, as noted by the Supreme Court in *Colgate-Palmolive*: "If, however, a situation arises in which respondents are sincerely unable to determine whether a proposed course of action would violate the present order, they can, by complying with the Commission's rules, oblige the Commission to give them definitive advice as to whether their proposed action, if pursued, would constitute compliance with the order." 380 U.S. at 394; *see, e.g.*, 16 C.F.R. § 2.41(d) ("Any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order.").

Paragraph II.D of the proposed order will not be included in the Order. The provisions focus on conduct, such as price-fixing and market allocation, that is too far removed from the unlawful conduct found to exist in this case to conclude that the provisions of Paragraph II.D are justified as reasonably related, fencing-in provisions.

Paragraph II.E of the proposed order will be included in the Order, renumbered as Paragraph II.D.

d. Paragraph III

Paragraph III of the proposed order would prohibit Respondent from enforcing, or attempting to enforce, any "existing agreement or court order that imposes a condition on a Seller that is not consistent with Paragraph II," and further requires Respondent to take steps to vacate or nullify any such agreement or court order. Respondent objects to Paragraph III in its entirety. Respondent contends that, in finding the Challenged Agreements unreasonably restrain trade, this adjudication adopts a "new rule" which cannot properly be applied retroactively. Respondent contends it might have proceeded differently in its trademark litigation had it anticipated such a new rule, and reiterates its assertions that the Settlement Agreements were

reasonable, typical, and/or based on a sincere belief that such agreements were valid as a matter of trademark law and antitrust law. Complaint Counsel failed to address Paragraph III of the proposed order.

Respondent's assertion that this case adopts a "new rule" is without merit. Respondent's assertion ignores the fact that this Initial Decision found that the Challenged Agreements have anticompetitive effects, and that, based on the totality of the record, they constitute an unreasonable restraint of trade. The notion that horizontal agreements to restrict advertising can constitute an unreasonable restraint of trade is scarcely a new rule. *See Indiana Fed'n*, 476 U.S. at 461-62. Similarly, balancing asserted procompetitive effects against anticompetitive effects, as done in this case, does not reflect a "new rule." Rather, it is well-established that "harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable." *Law*, 134 F.3d at 1019; *see also Cal. Dental Ass'n*, 224 F.3d at 957-58 (holding that the central factual determination is whether challenged restraints are net procompetitive or net anticompetitive).

Preventing Respondent from enforcing restrictions that have been determined to be unlawful is necessary and appropriate to remedy the violations found to exist. In *Polypore*, where it was determined that a non-compete provision in an agreement unlawfully restrained trade, the appropriate remedy was to prohibit enforcement of the challenged provision and to require modification of the agreement. *In re Polypore Int'l, Inc.*, 2010 FTC LEXIS 17, at **654, 669-71 (Mar. 1, 2010) (Initial Decision), *aff'd in part* 2010 FTC LEXIS 97 (Dec. 13, 2010), *aff'd Polypore v. FTC*, 686 F.3d 1208 (11th Cir. 2012). *See also In re Ky. Household Goods Carriers Ass'n*, 2004 FTC LEXIS 107, at *95 (June 21, 2004) (holding that where it was demonstrated that the respondent engaged in horizontal price fixing through the association's collective ratemaking practices, the appropriate remedy was an order requiring respondent to cease and desist from such collective ratemaking in the future and to take action to cancel or withdraw existing tariffs) (Initial Decision), *aff'd*, 2005 FTC LEXIS 124 (June 21, 2005), *rev. denied*, 2006 U.S. App. LEXIS 21864 (6th Cir. 2006). Based on the foregoing, Paragraph III of the proposed order will be

included in the Order. However, in order to ensure that the Order prohibits only those provisions of an agreement that impose a condition on a Seller that is not consistent with Paragraph II of the Order, Paragraph III will be modified, for the purpose of specificity, to require that Respondent:

A. Cease and desist from enforcing or attempting to enforce any and all provisions, terms, or requirements in an existing agreement or court order that impose a condition on a Seller that is not consistent with Paragraph II of this Order.

and

B. Within sixty (60) days after the date this Order is issued, take whatever action is necessary to vacate or nullify any and all provisions, terms, or requirements in any court order or agreement that impose a condition on a Seller that is not consistent with Paragraph II of this Order.

e. Paragraph IV

Paragraph IV of the proposed order would impose certain notification requirements on Respondent, including requirements that Respondent notify the settling parties, as well as others that Respondent may contact concerning alleged trademark infringement, of the contents of the Order, and to notify Commission staff of any trademark infringement claims and settlements relating to Search Advertising. Respondent objects to, and seeks deletion of, most of the notification provisions of Paragraph IV. Complaint Counsel does not address Paragraph IV. Respondent does not specifically justify its proposed deletions.

The notification requirements in Paragraph IV of the proposed order are reasonable and will assist in enforcement of the Order in the future. Accordingly, Paragraph IV of the proposed order will be included in the Order.

f. Paragraphs V-VIII

The remaining Paragraphs V through VIII of the proposed order contain standard reporting and notification requirements that are appropriate for future enforcement of the Order, and are not objected to by Respondent, except that Respondent proposes to limit Paragraphs VI and VII to five years and proposes that the Order shall terminate five years from the date it issued.

Pursuant to the Policy Statement Regarding Duration of Competition and Consumer Protection Orders, 60 Fed. Reg. 42,569 (August 16, 1995), the Commission's stated policy is for administrative cease and desist orders to terminate after twenty years. Accordingly, Respondent's request to limit the Order to five years is rejected. Paragraphs V through VIII of the proposed order are included in the Order.

IV. SUMMARY OF CONCLUSIONS OF LAW

1. Complaint Counsel bears the burden of proving jurisdiction and liability by a preponderance of evidence.

2. Respondent is a corporation, as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

3. Respondent's challenged activities relating to the sale of contact lenses 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.

4. The FTC has jurisdiction over Respondent and the subject matter of this proceeding, pursuant to Section 5 of the FTC Act.

5. The FTC Act's prohibition of unfair methods of competition under Section 5 of the FTC Act encompasses violations of Section 1 of the Sherman Act.

6. Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. 15 U.S.C. § 1.

7. *FTC v. Actavis*, 133 S. Ct. 2223 (2013) is not authority for the proposition that Respondent's trademark settlement agreements are immune from antitrust scrutiny.

8. A Sherman Act Section 1 violation requires a determination of (1) whether there was a contract, combination, or conspiracy – or, more simply, an agreement; and, if so, (2) whether the contract, combination, or conspiracy unreasonably restrained trade in the relevant market.

9. Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition.

10. An antitrust market is comprised of a relevant geographic market and a relevant product market.

11. A relevant geographic market is the area of effective competition in which the seller operates, and to which the purchaser can practicably turn for supplies.

12. The outer boundaries of a relevant product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.

13. The boundaries of a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

14. The relevant market in which to analyze the effects of the Challenged Agreements is the online sale of contact lenses in the United States.

15. The evaluation of whether a particular horizontal agreement unreasonably restrains trade takes place along an analytical continuum in which a challenged practice is

examined in the detail necessary to understand its competitive effect.

16. Under a "quick look" rule of reason analysis, also referred to as "inherently suspect" analysis, certain types of restraints are presumed to have anticompetitive effects.

17. Abandonment of the rule of reason in favor of presumptive rules (or a "quick-look" approach) is appropriate only where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.

18. A full rule of reason approach requires courts to engage in a thorough analysis of the relevant market and the effects of the restraint in that market. This may extend to a plenary market examination, which may include an analysis of the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.

19. The context and circumstances surrounding a restraint are examined, not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

20. If a restraint is demonstrated to be "inherently suspect" and has not been justified, it may be condemned without proof of market power or actual effects. Otherwise, a plaintiff must show that the challenged restraints have resulted in, or are likely to result in, anticompetitive effects, in the form of higher prices, reduced output, degraded quality of products or services, retarded innovation, or other manifestations of harm to consumer welfare.

21. A plaintiff may demonstrate actual anticompetitive effects in the relevant market, or make an indirect showing based on a demonstration of defendant's market power, which when combined with the anticompetitive nature of the

restraints, provides the necessary confidence to predict the likelihood of anticompetitive effects.

22. If actual anticompetitive effects are shown, then proof of market power is unnecessary, because an inquiry into market power is a surrogate for detrimental effects.

23. Complaint Counsel met its burden of proving that the Challenged Agreements pose actual anticompetitive effects, in the form of harm to consumers and competition.

24. If the plaintiff meets its burden of demonstrating actual anticompetitive effects, or likely anticompetitive effects based on proof of market power, the burden shifts to the defendant to prove legitimate, countervailing procompetitive justifications for the challenged restraint.

25. A court applying a rule of reason analysis asks whether a practice produces net benefits for consumers; it is no answer to say that a loss is reasonably small.

26. A legitimate justification is one that creates or improves competition, and the evidence must show a specific link between the challenged restraint and the purported justification.

27. An agreement limiting consumer choice by impeding the ordinary give and take of the market place, cannot be sustained under the rule of reason unless the defendant proves countervailing procompetitive virtue, such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services.

28. Cognizable justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve product quality, service, or innovation.

29. The proponent of the restraint bears a heavy burden of establishing an affirmative that competitively justifies the demonstrated competitive harm.

30. If the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner.

31. Respondent failed to demonstrate that the Challenged Agreements have procompetitive benefits that outweigh or otherwise justify the anticompetitive harm.

32. Pursuant to Section 5 of the FTC Act, upon determination that the challenged practice is an unfair method of competition, the Commission shall issue an order requiring such person to cease and desist from using such method of competition or such act or practice.

33. The FTC has considerable discretion in fashioning an appropriate remedial order, subject to the constraint that the order must bear a reasonable relationship to the unlawful acts or practices found to exist.

34. The Order entered herewith is necessary and appropriate to remedy the violations of law found to exist, is reasonably related to the proven violations, and is sufficiently clear and precise.

ORDER

I.

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

A. "1-800 Contacts" means 1-800 Contacts, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and any joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by 1-800 Contacts, and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "Communicate," "Communicating," or "Communication" means the exchange, transfer, or dissemination of any information, without regard to the manner or means by which it is accomplished.

D. "Entering Into" means entering into, adhering to, participating in, maintaining, implementing, enforcing, inviting, offering or soliciting.

E. "Keyword" means a word or phrase used to instruct a Search Engine to display specified Search Advertising.

F. "Negative Keyword" means a word or phrase used to instruct a Search Engine not to display specified Search Advertising.

G. "Person" means both natural persons and artificial persons, including, but not limited to, corporations and unincorporated entities.

H. "Search Advertising" means online advertisements displayed on a Search Engine Results Page in response to a user query.

I. "Search Engine" means a computer program, available to the public, that enables Persons to search for and identify websites and sources of information on the World Wide Web.

J. "Search Engine Results Page" means a web page displayed by a Search Engine in response to a user query.

K. "Seller" means any Person that markets or sells any contact lens product and includes its employees, agents, and representatives.

L. "Trademark Infringement Claim" means a lawsuit threatened or filed in the United States of America purporting to enforce rights under a trademark.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the advertising, marketing, sale, or distribution of contact lenses in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall cease and desist from:

A. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on the ability of a Seller to participate in a Search Advertising auction, or to provide instructions to a Search Engine regarding the nature and extent of a Seller's participation, including but not limited to, prohibiting or restricting the use of a Keyword or requiring the use of a Negative Keyword.

Provided further that nothing in this Paragraph II.A shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent's intention to initiate or prosecute a lawsuit, or (c) implementing or enforcing the order entered by any court of law, including an order approving a litigation settlement.

B. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on any Search Advertising; *provided, however,* that nothing in this Paragraph II.B shall prohibit Respondent from entering into or complying with a written agreement providing that a:

1. Seller shall not include in the text of any Search Advertising (a) a false or deceptive claim, (b) a representation that Respondent is the source of the goods or services advertised therein, (c) a representation that the Seller is affiliated with or sponsored by Respondent, or (d) a name that is identical to or confusingly similar to any trademark owned by Respondent; or

2. Seller's Search Advertising shall clearly identify the Seller (for the avoidance of doubt, including the name of the Seller in the URL, website address, or domain name shall constitute clear identification of the Seller); and

Provided further that nothing in this Paragraph II.B shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent's intention to initiate or prosecute a lawsuit, or (c) implementing or enforcing the order entered by any court of law, including an order approving a litigation settlement.

C. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place any limitation on truthful, non-deceptive, and non-infringing advertising or promotion;

D. Attempting to engage in any conduct that is prohibited by Paragraph II of this Order.

III.

IT IS FURTHER ORDERED that Respondent shall:

A. Cease and desist from enforcing or attempting to enforce any and all provisions, terms, or requirements in an existing agreement or court order that impose a condition on a Seller that is not consistent with Paragraph II of this Order.

B. Within sixty (60) days after the date this Order is issued, take whatever action is necessary to vacate or nullify any and all provisions, terms, or requirements in any court order or agreement that impose a condition on a Seller that is not consistent with Paragraph II of this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall:

A. Within thirty (30) days from the date this Order is issued:

1. Distribute by first-class mail, return receipt requested or by electronic mail with return confirmation, a copy of this Order and the Complaint to each of its officers, directors, and managers;

2. Send by first-class mail, return receipt requested or by electronic mail with return confirmation, on Respondent's official letterhead, the statement attached to this Order as Appendix A to each Person:

   a. To whom Respondent communicated regarding that Person's involvement as a plaintiff or defendant in any actual or potential Trademark Infringement Claim; and

   b. With whom Respondent entered into any agreement prohibited by Paragraph II of this Order.

B. For a period of five (5) years from the date this Order is issued:

1. Provide to Commission staff a copy of any Communication by Respondent with any Person regarding that Person's suspected trademark infringement no later than ten (10) days after Communicating with such Person;

2. Send by first-class mail, return receipt requested or by electronic mail with return confirmation, on Respondent's official letterhead, the statement attached to this Order as Appendix A to each Person referenced in Paragraph IV.B.1. of this

Order no later than the time Respondent initially Communicates with such Person;

3. Provide to Commission staff a copy of any agreement (or description, if the agreement is not in writing) that Respondent enters into with a Seller relating to Search Advertising, no later than thirty (30) days after it enters into such agreement;

4. Distribute by first-class mail, return receipt requested or by electronic mail with return confirmation, a copy of this Order and the Complaint to each Person who becomes an officer, director, or manager and who did not previously receive a copy of this Order and Complaint, no later than ten (10) days after the date such Person assumes his or her position; and,

5. Provide a copy of this Order to any court evaluating a request that a litigation settlement agreement relating to Search Advertising be approved by the court and/or incorporated into a court order.

C. Retain documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph IV.

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 from the date this Order is issued, and

B. One (1) year from 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 may request.

VI.

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

A. Any proposed dissolution of Respondent;

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

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

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, that Respondent shall, without restraint or interference, 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 relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date it is issued.

Appendix A

[Letterhead of 1-800 Contacts]

[Name and Address of the Recipient]

Dear (Recipient):

As you may know, the Federal Trade Commission issued an administrative complaint in 2016 against 1-800 Contacts, Inc. ("1-800 Contacts") challenging several agreements between 1-800 Contacts and other contact lens sellers that restrict the ability of such sellers to purchase trademark keywords in search advertising auctions, or to place search advertising triggered by those keywords on internet search engine results pages.

The Federal Trade Commission has issued a Decision and Order ("Order") against 1-800 Contacts in connection with its complaint. This Order provides, in part, that 1-800 Contacts may not prohibit competing sellers of contact lenses from engaging in truthful, non-deceptive advertising or solicitation through the display of search advertising. Specifically, 1-800 Contacts may not:

1. Enter into, enforce, or attempt to enforce any agreement between or among 1-800 Contacts and a contact lens seller to restrict the ability of the seller to participate in any internet search advertising auction, including restricting the use of keywords or requiring the use of negative keywords;

2. Enter into, enforce, or attempt to enforce any agreement with a contact lens seller that otherwise places any limitation on any search advertising; or

3. Enter into, enforce, or attempt to enforce any agreement with a contact lens seller to allocate or divide markets or customers; or to raise, fix, maintain, or stabilize prices or price levels.

The Order further requires 1-800 Contacts to take whatever action is necessary to have vacated all court orders or other restraints related to trademark infringement claims initiated to accomplish any of the above-listed prohibited activities.

The Order does not prohibit 1-800 Contacts from entering into an agreement with a seller of contact lenses that requires certain disclosures in the *text* of an advertisement, including a clear identification of the seller placing the advertisement.

For more specific information, you should refer to the FTC order itself. The Federal Trade Commission's Complaint and Decision and Order are available on the Commission's website, http:\\www.ftc.gov.

Complaint

IN THE MATTER OF

ABBOTT LABORATORIES
AND
ALERE INC.

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

Docket No. C-4625; File No. 161 0084
Complaint, September 28, 2017 – Decision, November 2, 2017

This consent order addresses the $8.3 billion acquisition by Abbott Laboratories of certain assets of Alere Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the U.S. markets for point-of-care blood gas testing systems and point-of-care cardiac marker testing systems. The consent order requires the parties to divest all rights and assets related to Alere's point-of-care blood gas testing business to Siemens Aktiengelsellschaft, and all rights and assets related to Alere's point-of-care cardiac marker testing business to Quidel Corporation.

Participants

For the *Commission*: *Aylin M. Skroejer* and *David Von Nirschl.*

For the *Respondents*: *Christopher Abbott, Kristin Sanford,* and *John E. Scribner, Weil, Gotshal & Manges LLP; Margaret S. D'Amico, Christine A. Varney,* and *Jesse M. Weiss, Cravath, Swaine & Moore LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Abbott Laboratories ("Abbott"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Alere Inc. ("Alere"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45; that such acquisition, if consummated, would violate Section 7 of the

Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Abbott is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its headquarters located at 100 Abbott Park Road, Abbott Park, Illinois 60064.

2. Respondent Alere 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 51 Sawyer Road, Suite 200, Waltham, Massachusetts 02453.

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.

THE PROPOSED ACQUISITION

4. Under the terms of an Amendment to Agreement and Plan of Merger signed on April 13, 2017, which amends an Agreement and Plan of Merger signed on January 30, 2016, Abbott will acquire Alere in a transaction valued at approximately $8.3 billion, which includes Abbott's assumption of $3.0 billion in debt (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

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, manufacture, license, marketing, distribution, and sale of point-of-care blood gas testing systems and point-of-care cardiac marker testing systems.

a. Point-of-care blood gas testing systems are small, portable medical instruments typically used at a patient's bedside to measure blood pH, oxygen, carbon dioxide, and electrolyte levels to assess lung and kidney function, as well as whether an acute patient requires oxygen or other urgent treatment.

b. Point-of-care cardiac marker testing systems are small, portable medical instruments typically used at a patient's bedside to measure specific proteins released into the blood to assess whether a patient experiencing chest pains is having a myocardial infarction (heart attack) or congestive heart failure.

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.

THE STRUCTURE OF THE MARKETS

7. Respondents Abbott and Alere are the only significant suppliers of point-of-care blood gas testing systems in the United States. They are also each other's closest competitors as the only suppliers of handheld systems in the relevant market. Abbott and Alere control approximately 82% and 15% of the market, respectively. Other firms in the point-of-care blood gas testing market have considerably smaller shares.

8. Respondents Abbott and Alere are the only significant competitors in the U.S. market for point-of-care cardiac marker testing systems. Abbott and Alere control approximately 87% and 13% of the market, respectively.

EFFECTS OF THE ACQUISITION

9. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant 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 Abbott and Alere in the markets for point-of-care blood gas testing systems and point-of-care

cardiac marker testing systems, thereby increasing the likelihood in these markets that: (1) a combined Abbott-Alere would be able to unilaterally exercise market power; (2) customers would be forced to pay higher prices; and (3) consumers would experience lower levels of innovation for each relevant product.

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 Acquisition. De novo entry would not take place in a timely manner because the product development, U.S. Food and Drug Administration approval, and market adoption times are lengthy. No other entry is likely to occur to deter or counteract the competitive harm likely to result from the Acquisition.

VIOLATIONS CHARGED

11. The Agreement and Plan of Merger and the Amendment to Agreement and Plan of Merger described in Paragraph 4 constitute 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-eighth day of September, 2017, issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Abbott Laboratories ("Abbott) of one hundred percent (100%) of the voting securities of Respondent Alere Inc. ("Alere") (Abbott and Alere hereinafter collectively referred to as "Respondents"), and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of 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 Abbott is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its principal executive offices located at 100 Abbott Park Road, Abbott Park, Illinois 60064.

2. Respondent Alere is 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 51 Sawyer Road, Suite 200, Waltham, Massachusetts 02453.

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

ORDER
I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final and effective, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

A. "Abbott" means Abbott Laboratories; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Abbott Laboratories, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Abbott shall include Alere.

B. "Alere" means Alere Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Alere Inc. (including, without limitation, Epocal Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. For the purposes of the definitions in this Order to Maintain Assets, "Alere" does not include "Abbott".

C. "Commission" means the Federal Trade Commission.

D. "Respondent(s)" means Abbott and Alere, individually and collectively.

E. "Decision and Order" means the:

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

2. Final Decision and Order following its issuance and service by the Commission in this matter.

F. "Divestiture Product Business(es)" means the Business of a Respondent (as that Respondent is specified in the definition of each Divestiture Product) 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.

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

H. "Transition Period" means, for each Divestiture Product that is marketed or sold in the United States before the Closing Date, the period beginning on the date this Order to Maintain Assets is issued and ending on the earlier of the following dates: (i) the date on which the relevant Acquirer directs the Respondent(s) to cease the marketing, distribution, and sale of such Divestiture Product(s); (ii) the date on which the relevant Acquirer commences the marketing, distribution, and sale of such Divestiture Product(s); or (iii) the date four (4) months after the Closing Date for such Divestiture Product(s).

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 viability, marketability, and competitiveness of such Divestiture Product Businesses and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; 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 the Respondents, including, but not limited to, all research, Development, manufacturing, distribution, marketing, and sales expenditures;

3. providing such resources as may be necessary to respond to competition against each of the Divestiture 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 the date the Respondents entered the agreement to effect the Acquisition (as such agreement is identified in the definition of Acquisition), 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, Respondents shall:

1. for a period of six (6) months after the Closing Date, provide each 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 Divestiture Product 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 the relevant Respondent to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by that 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, (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, and (iii) restrict access to the information to such of the Acquirer's or Proposed Acquirer's employees who need such access in connection with the specified and permitted use;

3. during the 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 a 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 a Respondent that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, for a period of one (1) month following the receipt of a written offer of employment from an Acquirer or its Manufacturing Designee, a Respondent shall not make any counteroffer to any 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 a Respondent from continuing to employ any Divestiture Product Core

Employee under the terms of that employee's employment with a Respondent prior to the date of the written offer of employment from the Acquirer 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 a 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 a Respondent to terminate the employment of any employee or to prevent a Respondent from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year after the Closing Date, not hire any individual that is employed by an Acquirer immediately following the Closing Date to whom an offer of employment was made pursuant to a Remedial Agreement ("Divestiture Product Employee");

provided, however, a Respondent may hire any Divestiture Product Employee whose employment has been terminated by the relevant Acquirer or with the agreement of the relevant Acquirer with respect to that Divestiture Product Employee.

E. During the Transition Period, with respect to each Divestiture Product that is marketed or sold in the United States before the Closing Date for that Divestiture Product, Respondents, in consultation with the relevant Acquirer, for the purposes of ensuring an orderly marketing and distribution transition, shall:

1. develop and implement a detailed transition plan to ensure that the commencement of the marketing, distribution, and sale of such Divestiture 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 Divestiture Products who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer to the Acquirer of the Divestiture Products Businesses;

3. maintain and manage inventory levels of the Divestiture Products in consideration of the marketing and distribution transition to the Acquirer;

4. continue to market, distribute, and sell the Divestiture Products;

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

6. to the extent known or available to the specified Respondent, provide the Acquirer with a list of the inventory levels (weeks of supply) in the possession of each customer (*i.e.*, healthcare provider, hospital, group purchasing organization, wholesaler, or distributor) by UPC or DI on a regular basis and in a timely manner;

7. to the extent known by the specified Respondent, provide the Acquirer with anticipated reorder dates for each customer by UPC or DI 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 Divestiture Product Businesses 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, (iv) the Monitor (if any has been appointed) and *except* to the extent necessary to comply with applicable law; and

3. ensure that Confidential Business Information related exclusively to the Divestiture Products is not disseminated among the employees associated with Respondents' Retained Business(es) who are directly related to the Business of Respondents' Products identified in the Commission's Complaint as competing Products and 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 that Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information.

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 that Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with,

the acknowledgment program. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's 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 United States of America 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 United States of America; 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 ("Monitor") to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.

B. The Commission shall select the Monitor, subject to the consent of 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 notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

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

D. If a Monitor is appointed, 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 asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

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

3. The Monitor shall serve until the later of:

   a. the date the Respondents complete: (1) the transfer of all Divestiture Product Assets, and (ii) the transfer and delivery of the related Manufacturing Technology, Product Intellectual Property and Product Licensed Intellectual Property;

b. the date that each respective Acquirer has obtained all Product Approvals necessary to manufacture and market each Divestiture Product acquired by that Acquirer in the United States of America independently of the Respondents;

c. the date on which an agreement to provide transition services to the Acquirer terminates;

d. with respect to the Triage Product Facility, the date on which all relocation activities within the Triage Product Facility that are agreed upon between the Acquirer and the Respondent are completed; and

e. the date of written notification from Commission staff that the Monitor, in consultation with Commission staff, has determined that the Acquirer has abandoned its efforts to manufacture a Divestiture Product that is being monitored by the Monitor;

provided, however, that the Monitor's service shall not extend more than four (4) years after the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

E. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to 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 the 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 Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor the Respondents' compliance with the Orders.

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 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.

H. 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 a Respondent, and any reports submitted by each Acquirer with respect to the performance of a Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders; *provided, however*, beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph VII.C. of the Decision and Order, and ninety (90) days thereafter, the 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 Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

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

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

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

M. The Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as the Monitor pursuant to the Decision and Order.

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

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the

Commission, and every sixty (60) days thereafter until Respondents have fully complied with this Order to Maintain Assets, 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 its report concerning compliance with the Orders to the Monitor, if any Monitor has been appointed. Respondents 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 relevant Respondent to the relevant Acquirer, and (iii) relocation activities within the Triage Product Facility; and

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

provided, however, that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the reports of compliance required to be submitted by Respondents pursuant to 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 Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

VII.

IT IS FURTHER ORDERED that 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;

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 Manufacturing Technology related to each Divestiture Product has been provided to the Acquirer in a manner consistent with the Technology Transfer Standards and the Monitor (if one has been appointed), in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers, and other transitions related to the provision of the Manufacturing Technology are complete; or

D. the day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Abbott Laboratories ("Abbott") of one hundred percent (100%) of the voting securities of Respondent Alere Inc. ("Alere") (Abbott and Alere hereinafter collectively referred to as "Respondents"), and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement") containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of the Complaint, a statement that the signing of said

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

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

1. Respondent Abbott is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its principal executive offices located at 100 Abbott Park Road, Abbott Park, Illinois 60064.

2. Respondent Alere is 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 51 Sawyer Road, Suite 200, Waltham, Massachusetts 02453.

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

ORDER

I.

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

A. "Abbott" means Abbott Laboratories; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Abbott Laboratories, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Abbott shall include Alere.

B. "Alere" means Alere Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Alere Inc. (including, without limitation, Epocal Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. For the purposes of the definitions in this Order, "Alere" does not include "Abbott".

C. "Commission" means the Federal Trade Commission.

D. "Respondent(s)" means Abbott and Alere, individually and collectively.

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

1. a Person specified by name in this Order to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective; or

2. a Person approved by the Commission to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

F. "Acquisition" means Abbott's acquisition of Alere pursuant to the Acquisition Agreements.

G. "Acquisition Agreements" means the Agreement and Plan of Merger dated as of January 30, 2016, and the Amendment to Agreement and Plan of Merger dated as of April 13, 2017, by and between Abbott Laboratories and Alere Inc. that were submitted by Abbott to the Commission in this matter. The Acquisition Agreements are contained in Non-Public Appendix I.

H. "Acquisition Date" means the date on which Abbott acquires fifty percent (50%) or more of the voting securities of Alere.

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

J. "Application(s)" means all submissions and applications for a Product filed or to be filed by the holder, the applicant, and/or the sponsor of a Product with the FDA pursuant to 21 C.F.R. Parts 800 to 898 (entitled "Regulations Subchapter H—Medical Devices"), including, without limitation, the following:

1. Premarket Notification ("510(k) Submission");

2. Premarket Approval Application ("PMA");

3. Investigational Device Exemption Application ("IDE");

4. Device Master File ("MAF");

5. Device History File ("DHF");

6. Device History Record ("DHR");

7. Device Master Record ("DMR");

8. authorizations to the holder, applicant, and/or sponsor of a Product from any Third Party to incorporate the information contained in an application or submission held by that Third Party to the FDA into a 510(k) Submission, PMA or IDE submitted or to be submitted by the holder, applicant, and/or sponsor;

9. supplements, amendments, and revisions to the abovementioned submissions and applications;

10. preparatory work, registration dossier, drafts, and data necessary for the preparation of the abovementioned submissions and applications; and

11. all correspondence between the FDA and the holder, the applicant, and/or the sponsor related to the abovementioned submissions and applications.

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

L. "Categorized Assets" means the following assets and rights of Alere, as such assets and rights are in existence as of the date Alere signs the Consent Agreement in this matter:

1. all rights to all of the Applications related to the specified Divestiture Product;

2. all rights to all of the Device Studies related to the specified Divestiture Product;

3. all Product Intellectual Property related to the specified Divestiture Product that is not Product Licensed Intellectual Property;

4. all Product Approvals related to the specified Divestiture Product;

5. all Manufacturing Technology exclusively related to the specified Divestiture Product;

6. all Marketing Materials related to the specified Divestiture Product;

7. all Scientific and Regulatory Material related to the specified Divestiture Product;

8. all Website(s) related exclusively to the specified Divestiture Product;

9. 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;

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 to the extent related to the specified Divestiture Product;

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 the precision or accuracy of the specified Divestiture Product;

13. for each specified Divestiture Product that has been marketed or sold by a Respondent prior to the Closing Date:

    a. a list of all 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 during the one (1) year period immediately prior to the Closing Date, stated on either an annual, quarterly, or monthly basis, including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of the specified Divestiture Product on behalf of the High Volume Account and his or her business contact information;

    b. for each High Volume Account, a list by either UPC or DI containing the following: (i) the net price per UPC or DI as of the Closing Date, *i.e.*, the final price per UPC or DI, charged by the specified Respondent net of all customer-level discounts, rebates, or promotions; (ii) the net price per UPC or DI charged by the specified Respondent at the end of each quarter during the one (1) year immediately prior to the Closing Date; (iii) any supply outages by UPC or DI during the one (1) year period immediately prior to the Closing Date the result of which caused the specified Respondent to make a financial payment to the customer or to incur a penalty for a failure to supply;

    c. for each month for the one (1) year period immediately prior to the Closing Date, a list containing the following historical information for the specified Divestiture Product: wholesale acquisition cost; and

d. backorders by UPC or DI as of the Closing Date;

14. a list of each specified Divestiture Product that has had any finished Product batch or lot determined to be out-of-specification during the one (1) year period immediately preceding the Closing Date, and, for each such Divesture Product: (i) a detailed description of the nonconformity with respect to any out-of-specification batch or lot; (ii) the corrective actions or reworking taken to remediate the cGMP deficiencies in the Divestiture Product; and (iii) to the extent known by the specified Respondent, the employees (whether current or former) responsible for taking such corrective actions or reworking;

15. for each specified Divestiture Product:

    a. to the extent known or available to the specified Respondent, a list of the inventory levels (weeks of supply) in the possession of each customer (*i.e.*, healthcare provider, hospital, group purchasing organization, wholesaler, or distributor) as of the date prior to and closest to the Closing Date as is available;

    b. to the extent such records are in existence in Salesforce.com as of the Closing Date, records of all sales calls, visits, or contacts with current or prospective customers of the Divestiture Product(s) within the one (1) year period immediately preceding the Closing Date;

    c. to the extent known to the specified Respondent, a summary of any potential future sales of the Divestiture Product(s) with current or prospective customers; and

d. to the extent known by the specified Respondent, any pending reorder dates for a 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 and labeling materials (including FDA-approved Product labeling and currently used or planned product inserts), work-in-process, replacement and spare parts, operating supplies and inventory on consignment, and finished and semi-finished products used or intended for use in the specified Divestiture Product and, for a limited period of time sufficient for that Acquirer to market or sell any finished or semi-finished inventory as of the Closing Date and to the extent required for that specific purpose, a license to the corporate names or corporate trade dress of the specified Respondent, or the related corporate logos thereof; or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by that Respondent or the related corporate logos thereof; or general registered images or symbols by which that Respondent can be identified or defined that the Respondent has been using on the final Product or its packaging prior to the Closing Date;

17. the quantity and delivery terms in 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, the right to fill any or all unfilled customer purchase orders for the specified Divestiture Product as of the Closing Date; and

19. all of a Respondent's books, records, and files related to the foregoing;

provided, however, that "Categorized Assets" shall not include: (i) documents relating to a Respondent's general business strategies or practices relating to the conduct of its Business outside of the Divestiture Products, where such documents do not discuss with particularity the specified Divestiture Product; (ii) information that is exclusively related to the Retained Products; and (iii) all Product Licensed Intellectual Property;

provided further, *however*, that in cases in which documents or other materials included in the assets to be divested contain information: (i) that relates both to the specified Divestiture Product and to Retained Products or Businesses of the specified Respondent and cannot be segregated in a manner that preserves 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, that Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer of the specified Divestiture Product, the Respondents shall provide that Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the Respondents provide the Acquirer with the above-described information without requiring a Respondent completely to divest itself of information that, in content, also relates to Retained Product(s);

provided further, that, with the agreement of the relevant Acquirer, Respondents may retain co-ownership of an undivided interest in the following (but only to the extent it is not exclusively related to the Divestiture Products being acquired by that Acquirer): (i) Manufacturing Technology; (ii)

Marketing Materials; (iii) Scientific Regulatory Materials; (iv) Copyrights; (v) Software; and (vi) Trade Dress; (vii) trade secrets; and (viii) books, records and files.

M. "cGMP" means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act (21 C.F.R. 820), as amended, and includes all rules and regulations promulgated by the FDA thereunder.

N. "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.

O. "Confidential Business Information" means all information owned by, or in the possession or control of, a Respondent that is not in the public domain and to the extent that it is directly related to the conduct of the Business related to a Divestiture Product(s). The term "Confidential Business Information" *excludes* the following and the Respondents are not required to submit this information to an Acquirer:

1. information relating to a 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 a 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.

P. "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 United States of America, 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 all 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 Device Studies of that Product, all case report forms relating thereto, and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze 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.

Q. "Development" means all research and development activities, including, without limitation the following: design; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; mechanical properties testing; performance testing; safety testing; conducting Device Studies for the purpose of obtaining or achieving 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). "Develop" means to engage in Development.

R. "Device Study(ies)" means a controlled study of the quality, safety, efficacy, precision, or accuracy of a Product (including any or all such investigations conducted *in vitro*, *in vivo*, and/or *in silico*) and includes, without limitation, such studies as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval and any other such study used in research and Development of a Product.

S. "DI" means that mandatory portion of the unique device identifier (*i.e.*, an identifier number that identifies a device through its distribution and use by meeting the requirements of 21 C.F.R. 830.20) that identifies the specific version or model of a device and the labeler of that device.

T. "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.

U. "Divestiture Product(s)" means the following, individually and collectively:

1. Epoc Products; and

2. Triage Products.

V. "Divestiture Product Assets" means the following, individually and collectively:

1. Epoc Product Assets; and

2. Triage Product Assets.

W. "Divestiture Product Business(es)" means the Business of a Respondent (as that Respondent is specified in the definition of each Divestiture Product) 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.

X. "Divestiture Product Core Employees" means the Sales and Marketing Employees, Research and Development Employees, and the Manufacturing Employees.

Y. "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 Manufacturing Technology used in the manufacture of the specified Divestiture Product(s) that is also used in the manufacture of Retained Products (*i.e.*, Manufacturing Technology that is used in, but not exclusively used in, the manufacture of the Divestiture Product(s) being acquired by a particular Acquirer) that was owned, licensed, held, or controlled by a Respondent:

1. to research and Develop the specified Divestiture Product(s) for marketing, distribution, or sale;

2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the specified Divestiture Product(s);

3. to import or export the specified Divestiture Product(s) to or from the United States of America to the extent related to the marketing, distribution, or sale of the specified Divestiture Products; and

4. to have the specified Divestiture Product(s) made anywhere in the world for distribution or sale within, or import into the United States of America;

provided, however, that for any Product Licensed Intellectual Property or Manufacturing Technology that is the subject of a license from a Third Party entered into by a Respondent prior to the Acquisition, the scope of the rights granted hereunder shall only be required to be equal to the scope of the rights granted by the Third Party to that Respondent.

Z. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

AA. "Domain Name" means the domain name(s) (uniform resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration; *provided, however*, "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Trademarks required to be divested.

BB. "Epoc Product(s)" means all Products researched, Developed, in Development, marketed, sold, owned, or controlled by Alere that are a part of, used with, or intended to be used with, the Epoc® (Enterprise Point-of-care) blood analysis system product line, including, without limitation, the following:

1. Epoc Host Rx (510(k) Number: K113726);

2. epoc Host 2 Motorola (510(k) Number: K113726);

3. epoc Host 2 Motorola Refurbished (510(k) Number: K113726);

4. epoc Reader (510(k) Number: K113726);

5. epoc BGEM Crea/CI Test card (50T) (510(k) Number: K113726);

6. epoc BGEM Lac Test Card (510(k) Number: K093297);

7. Veterinary;

8. epoc BGEM Test Cards w/ Lactate (50T) (510(k) Number: K093297);

9. epoc Care-Fill Capillary Tubes (50T) (510(k) Number: K113726);

10. EDM Software (510(k) Number: K113726);

11. Total CO2 analyte;

12. Blood Urea Nitrogen (BUN) analyte;

13. the following Products in Development: BUN/TCO2 eMP test card; next generation Epoc System with co-oximetry and tHb; eMP card CLIA-waived; tBili; iMag; Coagulation (ACT); and

14. all improvements or modifications to the abovementioned devices that are in existence as of the date Alere signs the Consent Agreement in this matter.

CC. "Epoc Product Assets" means all rights, title, and interest in and to all assets related to the Business of Alere related to each of the Epoc Products, to the extent legally transferable, including, without limitation, the following:

1. the Categorized Assets related to the Epoc Products;

2. all outstanding capital stock, voting securities and equity ownership interests in Epocal Inc. (a corporation organized, existing, and doing business under and by virtue of the laws of Canada, with its registered office located at 2060 Walkley Road, Ottawa, ON K1G 3P5, Canada); and

3. the Epoc Product Facilities.

DD. "Epoc Product Divestiture Agreement(s)" means the following:

1. *Asset Purchase Agreement* by and among Alere Inc., Siemens Diagnostics Holding II B.V., and for the limited purposes therein set forth, Abbott Laboratories, dated as of July 21, 2017 as amended by that certain *Amendment to Purchase Agreement* by and among Alere Inc., Siemens Diagnostics Holding II B.V. and Abbott Laboratories, dated as of September 15, 2017;

2. *Transition Services Agreement* by and between Alere Inc. and Siemens Diagnostics Holding II B.V. to be executed on or before the Closing Date; and

3. all amendments, exhibits, attachments, agreements, and schedules attached to and submitted to the Commission with the foregoing listed agreement.

The Epoc Product Divestiture Agreements are contained in Non-Public Appendix II.B. The Epoc Product Divestiture Agreements that have been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective are Remedial Agreements.

EE. "Epoc Product Facilities" means all the Facility Assets located at:

1. 2060 Walkley Road, Ottawa, Ontario, Canada, K1H 1W1; and

2. 855 Brookfield Drive, Ottawa, Ontario, Canada K1V 2S5.

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

1. real property at the specified location, including all rights, title, and interests in and to owned or leased land and all improvements thereon, including buildings, fixtures, improvements, easements, rights of way, appurtenances, and the rights and privileges appertaining thereto ("Facility");

2. all Manufacturing Equipment related to the Divestiture Product Business located at the Facility;

3. all other equipment, machinery, tools, spare parts, vehicles, personal property, furniture, fixtures, and supplies located at the Facility;

4. all other tangible property, owned, leased or operated on or behalf of a Respondent located at the Facility; and

5. to the extent transferable by Law, all permits, registrations, and applications to or from a Government Entity related to the Respondent's use of the Facility.

GG. "Government Entity" means any Federal, state, local, or non-U.S. government; any court, legislature, government agency, or government commission; or any judicial or regulatory authority of any government.

HH. "High Volume Account(s)" means any healthcare provider, group purchasing organization, hospital, wholesaler, or distributor whose annual or projected annual purchase amounts, in units or in dollars, of a Divestiture Product in the United States of America from a Respondent, was or was forecasted (prior to the public announcement of the Acquisition and subsequent divestiture) to be among the top twenty (20) highest such purchase amounts of that Respondent's total sales of that Divestiture Product to U.S. customers on any of the following dates: (i) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (ii) the end of the last quarter that immediately preceded the Acquisition Date; (iii) the end of the last quarter that immediately preceded the Closing Date for the relevant assets; or (iv) for forecasts of purchases of the Divestiture Product, the quarter immediately following the Closing Date.

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

JJ. "Manufacturing Designee" means any Person other than a Respondent that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer.

KK. "Manufacturing Equipment" means all fixtures, equipment (including, without limitation, technical equipment, lab equipment, and computers), and machinery that is being used or has been used at any Facility that is subject to transfer to an Acquirer pursuant to this Order at any time since the Respondents entered into the Acquisition Agreements, in the research, Development or manufacture of a Divestiture Product and that is suitable for use in the research, Development, or manufacture of a Divestiture Product as of the Closing Date.

LL. "Manufacturing Employees" means all salaried employees of a Respondent who have directly participated in any of the following: (i) defining the commercial manufacturing process, (ii) confirming that the manufacturing process is capable of reproducible commercial manufacturing, (iii) formulating the manufacturing process performance qualification protocol, (iv) controlling the manufacturing process to assure performance Product quality, (iv) assuring that during routine manufacturing the process remains in a state of control, (v) collecting and evaluating data for the purposes of providing scientific evidence that the manufacturing process is capable of consistently delivering quality Products, (vi) managing the operation of the manufacturing process, or (vii) managing the technological transfer of the manufacturing process to a different facility, of the Manufacturing Technology of 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;

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, "Manufacturing Employees" means (i) the employee(s) as are identified in such Remedial Agreement for that Divestiture Product, and (ii) any other employee(s) meeting the criteria described above that are identified by the relevant Acquirer within thirty (30) days after the Closing Date.

MM. "Manufacturing Technology" means all technology, trade secrets, know-how, designs, ideas, concepts and proprietary information (whether patented, patentable, or otherwise) used by Alere to manufacture each specified Divestiture Product, including, but not limited to, the following:

1. all product specifications, product designs and design protocols, including without limitation, the exact combination, design, array and identity and specifications of all components that achieve a particular set of application and end-use characteristics in a final Product;

2. to the extent applicable to the specified Divestiture Product, antibody generation and reagent formulation;

3. manufacturing processes, analytical methods, flow diagrams and other related manuals and drawings;

4. standard operating procedures;

5. quality assurance and control procedures;

6. control history;

7. research and Development records;

8. annual product reviews;

9. supplier lists;

10. labeling and product manuals;

11. manuals and technical information provided to employees, customers, distributors, suppliers, agents, licensees, including, without limitation, manufacturing, equipment and engineering manuals and drawings;

12. repair and performance records related to the Manufacturing Equipment for the two (2) year period immediately preceding the Closing Date;

13. records related to the protective workplace safety standards related to the Manufacturing Equipment for the two (2) year period immediately preceding the Closing Date;

14. audits of manufacturing methods for the Products conducted by any Agency; and

15. all other information related to the manufacturing process.

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

components, television masters, and other similar materials related to the specified Divestiture Product.

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

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

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

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

SS. "Patent(s)" means all patents and patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

TT. "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.

UU. "Product(s)" means any medical device as defined by the FDA pursuant to the United States Federal Food, Drug, and Cosmetic Act (*i.e.,* any instrument, apparatus, appliance, software, material, or other article, whether used alone or in combination,

including the software intended by its holder, applicant, and/or sponsor to be used specifically for diagnostic and/or therapeutic purposes and necessary for its proper application) which is:

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

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

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

VV. "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.

WW. "Product Contracts" means all contracts or agreements:

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 a Respondent;

2. pursuant to which a Respondent has as of the Closing Date the ability to independently purchase the raw materials, inputs or component(s) from any Third Party, for use in connection with the specified Divestiture Product;

3. relating to any Device Studies 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 specific 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 in finished form in order to provide it to a Respondent;

7. pursuant to which a Third Party provides or plans to provide any part of the manufacturing process including, without limitation, the assembly or packaging of the specified Divestiture Product;

8. pursuant to which a Third Party provides the Manufacturing Technology related to the specified Divestiture Product to a Respondent;

9. pursuant to which a Third Party collaborates with a Respondent in the research and development of any Manufacturing Technology related to the specified Divestiture Product;

10. pursuant to which a Third Party is licensed by a Respondent to use the Manufacturing Technology related to the specified Divestiture Product;

11. constituting confidentiality agreements involving the specified Divestiture Product;

12. involving any royalty, licensing, covenant not to sue, or similar arrangement involving the specified Divestiture Product;

13. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture, or distribution of the specified Divestiture Product to a Respondent including, but not limited to, consultation arrangements;

14. pursuant to which any Third Party collaborates with a Respondent in the performance of research, Development, marketing, distribution, or selling of the specified Divestiture Product or the Business related to such Divestiture Product;

15. pursuant to which a Respondent leases buildings or equipment that is subject to transfer to the Acquirer pursuant to this Order; and/or

16. pursuant to which a Respondent licenses Software related to the specified Divestiture Product.

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

XX. "Product Development Reports" means:

1. 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;

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

3. FDA-approved Product labeling related to the specified Divestiture Product;

4. currently used or planned product package inserts related to the specified Divestiture Product;

5. FDA-approved circulars and information related to the specified Divestiture Product;

6. adverse event reports, adverse experience information, and descriptions of material events and matters concerning safety or lack of accuracy related to the specified Divestiture Product;

7. summary of Product complaints from physicians or clinicians related to the specified Divestiture Product;

8. Product recall reports filed with the FDA related to the specified Divestiture Product, and all reports, studies, and other documents related to such recalls;

9. investigation reports and other documents related to any out of specification results for any impurities or defects found in the specified Divestiture Product;

10. 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 or defects;

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

12. analytical methods development records related to the specified Divestiture Product;

13. manufacturing batch or lot records related to the specified Divestiture Product;

14. stability testing records related to the specified Divestiture Product;

15. change in control history related to the specified Divestiture Product; and

16. executed validation (including design validation and process validation) and qualification protocols and reports related to the specified Divestiture Product.

YY. "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; and

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. the base salary or current wages;

d. the most recent bonus paid, aggregate annual compensation for the relevant Respondent'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); and

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

ZZ. "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, held, or controlled by a Respondent as of the Closing Date:

1. Patents;

2. Copyrights;

3. Software;

4. Trademarks;

5. Trade Dress;

6. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information; and

7. rights to obtain and file for patents, trademarks, and copyrights and registrations thereof, and to bring suit against a Third Party for the past, present, or future infringement, misappropriation, dilution, misuse, or other violation of any of the foregoing;

provided, however, that "Product Intellectual Property" does not include the corporate names or corporate trade dress of "Abbott", "Alere", or the related corporate logos thereof; or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by a Respondent or the related corporate logos thereof; or general registered images or symbols by which Abbott or Alere can be identified or defined.

AAA. "Product Licensed Intellectual Property" means all of the following intellectual property related to a Divestiture Product that is owned, licensed, held, or controlled by a Respondent as of the Closing Date:

1. Patents that are related to a Divestiture Product that a Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product that is the subject of an active Application;

2. Patents that are related to a Divestiture Product that are the subject of a license with a Third Party entered into by a Respondent prior to the Acquisition Date; and

3. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information, and all rights in the United States of America to limit the use or disclosure thereof, that are related to a Divestiture Product and that a Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product.

BBB. "Proposed Acquirer" means a Person proposed by a Respondent (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission as the acquirer for particular assets or rights required to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed pursuant to this Order.

CCC. "Quidel" means Quidel Corporation, a corporation organized, existing, and doing business under and by virtue of the state of Delaware with its principal executive offices located at 12544 High Bluff Drive, Suite 200, San Diego, California 92130.

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

1. any agreement between a Respondent and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including, without limitation, any agreement to supply specified Products or components thereof, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

2. any agreement between a Respondent and a Third Party to effect the assignment of assets or rights of that Respondent related to a 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 and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred,

delivered, or otherwise conveyed, including, without limitation, any agreement by that Respondent to supply specified Products or components thereof, and that has been approved by the Commission to accomplish the requirements of this Order; and/or

4. any agreement between a Respondent and a Third Party to effect the assignment of assets or rights of that Respondent related to a 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.

EEE. "Research and Development Employees" means all salaried employees of a Respondent who have directly participated in the research, Development, regulatory approval process, or Device 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;

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, "Research and Development Employees" means (i) the employee(s) as are identified in such Remedial Agreement for that Divestiture Product, and (ii) any other employee(s) meeting the criteria described above that are identified by the relevant Acquirer within thirty (30) days after the Closing Date.

FFF. "Retained Product(s)" means any Product(s) other than a Divestiture Product.

GGG. "Sales and Marketing Employees" means all employees of a Respondent whose primary work

responsibilities were in the Business of the Divestiture Products within the eighteen (18) month period immediately prior to the Closing Date and who directly have participated in the sales, marketing, or technical support (including installation) of the specified Divestiture Product directly to distributors or end-use customers, including, without limitation, the regional sales managers;

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, "Sales and Marketing Employees" (i) the employee(s) as are identified in such Remedial Agreement for that Divestiture Product, and (ii) any other employee(s) meeting the criteria described above that are identified by the relevant Acquirer within thirty (30) days after the Closing Date.

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

III. "Siemens" means Siemens Aktiengesellschaft a corporation organized, existing, and doing business under and by virtue of laws of the Federal Republic of Germany with its corporate headquarters located at Werner-von-Siemens-Straße, 80333 Munich Germany and its affiliates.

JJJ. "Software" means computer programs related to the Business of the specified Divestiture Product, including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any of the foregoing, and the content and information contained on any Website; *provided, however*, that "Software" does not include

software that is readily purchasable or licensable from sources other than the Respondents and which has not been modified in a manner material to the use or function thereof (other than user preference settings).

KKK. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered to an Acquirer pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, *inter alia*:

1. designating employees of a Respondent knowledgeable about the Manufacturing Technology (and all related intellectual property) related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer or its Manufacturing Designee, and the Monitor (if one has been appointed), for the purpose of effecting such delivery *unless* such Persons are hired by the Acquirer;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified Divestiture Product that are acceptable to the Acquirer to the extent that any such technology is either (i) not maintained and fully available at a facility that is being transferred to the Acquirer pursuant to this Order or (ii) not maintained and fully available at a facility operated by the Acquirer's Manufacturing Designee;

3. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Manufacturing Technology (including all related intellectual property) to the Acquirer or its

Manufacturing Designee to the extent that any such technology is either (i) not maintained and fully available at a facility that is being transferred to the Acquirer pursuant to this Order or (ii) not maintained and fully available at a facility operated by the Acquirer's Manufacturing Designee;

4. permitting employees of the relevant Acquirer to visit the Respondent's facility from which the Divestiture Product will be transferred for the purposes of evaluating and learning the manufacturing process of such Divestiture Product and/or discussing the process with employees of a Respondent involved in the manufacturing process (including, without limitation, use of equipment and components, manufacturing steps, time constraints for completion of steps, and validation of the manufacturing of the Divestiture Product at the Respondent's facility; and

5. to the extent that Persons with the relevant knowledge remain employees of a Respondent (*i.e.*, are not hired by the Acquirer), 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 a 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 Manufacturing Technology and all such intellectual property related to the specified Divestiture Product.

LLL. "Third Party(ies)" means any non-governmental Person other than the following: a Respondent; or an Acquirer of particular assets or rights pursuant to this Order.

MMM. "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.

NNN. "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.

OOO. "Triage Product(s)" means all Products researched, Developed, in Development, marketed, sold, owned, or controlled by Alere that are a part of, used with, or intended to be used with, the Triage® diagnostic product line for the Triage Meter Pro system, including, without limitation, the following:

1. Alere Triage BNP Calibration Verification (510(k) Number: K000231);

2. Alere Triage BNP Control 1 (510(k) Number: K000230);

3. Alere Triage BNP Control 2 (510(k) Number: K000230);

4. Alere Triage BNP Test (US and OUS versions) (510(k) Numbers: K051787 and K021317);

5. Alere Triage Cardiac Panel (US and OUS versions) (510(k) Number: K030286);

6. Alere Triage Cardiac Panel, TnI (US only) (510(k) Number: K030286);

7. Alere Triage Cardiac Panel, TnI and CK-MB (510(k) Number: K030286);

8. Alere Triage Cardio3 Panel (OUS only);

9. Alere Triage Cardio2 Panel (OUS only);

10. Alere Triage Troponin I Test (OUS only);

11. Alere Triage D-Dimer Test (US and OUS versions) (510(k) Number: K042890);

12. Alere Triage MeterPro (US and OUS versions) and related QC Device (510(k) Number: K973547);

13. Alere Triage NT-proBNP Control 1;

14. Alere Triage NT-proBNP Control 2;

15. Alere Triage NT-proBNP Test (OUS only);

16. Alere Triage Profiler SOB Panel (OUS only);

17. Alere Triage Total 3 Control 1 (510(k) Number: K093032);

18. Alere Triage Total 3 Control 2 (510(k) Number: K093032);

19. Alere Triage Total 5 Calibration Verification (510(k) Number: K072892);

20. Alere Triage Total 5 Control 1 (510(k) Number: K072892);

21. Alere Triage Total 5 Control 2 (510(k) Number: K072892);

22. Alere Triage TOX Drug Screen (US and OUS versions) (510(k) Number: K060791);

23. Alere Triage TOX Drug Screen, 10 Test Panel (US only) (510(k) Number: K060791);

24. Alere Triage TOX Drug Screen, 9 Test Panel (US only) (510(k) Number: K060791);

25. Alere Triage TOX Drug Screen, 7 Test Panel (US only) (510(k) Number: K060791);

26. Alere Triage TOX Drug Screen Control 1 (510(k) Number: K060788);

27. Alere Triage TOX Drug Screen Control 2 (510(k) Number: K060788);

28. the following Products in Development: Kit, Triage Troponin T2; Kit, Control Level 1 Troponin T2; Kit, Calibration Verification Troponin T2; Kit, Triage Tox DS-X; Kit, Control Level 1 Tox DS-X; Kit, Control Level 2 Tox DS-X; Triage Tox DS-RX; Kit, Triage Procalcitonin (antibody generation); Triage Procalcitonin T2; Kit, Control Level 1 Procalcitonin; Kit, Control Level 2 Procalcitonin; and Kit, Calibration Verification Procalcitonin;

29. the following discontinued products: NGAL Test and PLGF Test; and

30. all improvements or modifications to the abovementioned devices that are in existence as of the date Alere signs the Consent Agreement in this matter.

PPP. "Triage Product Assets" means all rights, title, and interest in and to all assets related to the Business of Alere related to each of the Triage Products, to the extent legally transferable, including, without limitation, the following:

1. the Categorized Assets related to the Triage Products; and

2. the Triage Product Facility, *provided however*, this Order does not restrict the Respondents from leasing any portion of this facility from the Acquirer of the Triage Assets, any assignee of such Acquirer, or any successor to such Acquirer's ownership interest in the Triage Product Facility.

QQQ. "Triage Product Divestiture Agreements" means the following:

1. *Amended and Restated Triage Purchase Agreement* by and among Alere Inc., Quidel Cardiovascular Inc., for purposes of section 6.13 and 12.15 thereof, Quidel Corporation and for the limited purposes therein set forth, Abbott Laboratories, dated as of September 15, 2017;

2. *Triage Transition Services Agreement* by and between Alere Inc. and QTB Acquisition Corp. to be executed on or before the Closing Date; and

3. all amendments, exhibits, attachments, agreements, and schedules attached to and submitted to the Commission with the foregoing listed agreement.

The Triage Product Divestiture Agreements are contained in Non-Public Appendix II.A. The Triage Product Divestiture Agreements that have been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective are Remedial Agreements.

RRR. "Triage Product Facility" means all the Facility Assets located at 9965, 9975, 9985 and 9995 Summers Ridge Road, San Diego, California, 92121.

SSS. "United States of America" means the United States of America, and its territories, districts, commonwealths and possessions.

TTT. "UPC" means the Universal Product Code (*i.e.*, the product identifier used to identify an item sold at retail in the United States of America).

UUU. "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 thirty (30) days after the Acquisition Date, Respondents shall divest the Triage Product Assets and grant the Divestiture Product Licenses related to the Triage Products, absolutely and in good faith, to Quidel pursuant to, and in accordance with, the Triage Product Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Quidel or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Triage Product Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Triage Product Assets to Quidel 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 Quidel is not an acceptable purchaser of any of the Triage Product Assets, then

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

provided further, that if Respondents have divested the Triage Product Assets to Quidel 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 Triage Product Assets to Quidel (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Not later than thirty (30) days after the Acquisition Date, Respondents shall divest the Epoc Product Assets and grant the Divestiture Product Licenses related to the Epoc Products, absolutely and in good faith, to Siemens pursuant to, and in accordance with, the Epoc Product Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Siemens or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Epoc Product Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Epoc Product Assets to Siemens 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 Siemens is not an acceptable purchaser of any of the Epoc Product Assets, then Respondents shall immediately rescind the transaction with Siemens, in whole or in part, as directed by the Commission, and shall divest the relevant Epoc Product Assets within one hundred eighty (180) days after the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, that if Respondents have divested the Epoc Product Assets to Siemens 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 Epoc Product Assets to Siemens (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

C. Prior to the Closing Date for each respective Divestiture Product, Respondents shall provide each Acquirer with the opportunity to review all contracts or agreements that are Product Contracts related to the Divestiture Products being acquired by that Acquirer for the purposes of the Acquirer's determination whether to assume such contracts or agreements.

D. 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 Divestiture Product Assets 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 Assets has executed all such agreements or entered into equivalent arrangements directly with each of the relevant Third Parties.

E. 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 or provide direct electronic access that is fully accessible by the Acquirer to 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 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 Monitor (if any has been appointed) and *except* to the extent necessary to comply with applicable law;

6. ensure that Confidential Business Information related exclusively to the Divestiture Products is not disseminated among the employees of the Respondents; and

7. after the delivery of the Confidential Business Information to Acquirer of the particular Divestiture Products and upon request of that Acquirer, destroy any copies of Confidential Business Information exclusively related to the particular Divestiture Products acquired by that Acquirer (other than electric copies of Confidential Business Information created as a result of automatic back-up procedures) within thirty (30) days of such request except as otherwise agreed to between the Respondents and the Acquirer or to the extent necessary to comply with applicable law.

F. Respondents shall provide, or cause to be provided, to each Acquirer in a manner consistent with the Technology Transfer Standards the following:

1. all Manufacturing Technology (including all related intellectual property) related to the Divestiture Product(s) being acquired by that Acquirer; and

2. all rights to all Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed to a Respondent related to the Divestiture Product(s) being acquired by that Acquirer.

Respondents shall obtain any consents from Third Parties required to comply with this provision. Respondents shall not enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of that Acquirer to use or to acquire from the Third Party the Manufacturing Technology (including all related intellectual property) 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 Manufacturing Technology. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to such agreements that allows the Third Party to provide the relevant Manufacturing Technology to that Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to that Acquirer.

G. At the request of an Acquirer, Respondents shall designate employees of Respondents knowledgeable about the accounts receivable, accounts payable, payroll, employee benefits administration, information technology systems and support, human resources management, distribution, warehousing, and other logistical and administrative support of each of the

Divestiture Product Businesses to provide services and assistance to the Acquirer of the particular Divestiture Product Businesses, in the transfer and integration of that Divestiture Product Business into that Acquirer's business and for a time sufficient to enable that Acquirer to integrate and perform these functions independently of Respondents. Such services and assistance shall be provided by Respondents to that Acquirer at no greater than Direct Cost.

H. Respondents shall employ a staff of sufficient size, training, and expertise as is necessary to complete all of the transfers of the Manufacturing Technology to each of the Acquirers in a timely manner and to ensure that each Acquirer has sufficient assistance from Respondents to manufacture the Divestiture Products being acquired by that Acquirer in commercial quantities, and in a manner consistent with cGMP at a facility chosen by the Acquirer.

I. For each Acquirer, Respondents shall designate employees of Respondents knowledgeable about the marketing, distribution, warehousing, and sale (including administrative logistics of sales to the respective High Volume Accounts) related to each of the Divestiture Products to assist the Acquirer, in the transfer and integration of the Business related to the Divestiture Products into that Acquirer's business *unless* such employees of the Respondents are hired by that Acquirer in connection with the Acquirer's acquisition of the Divestiture Product(s).

J. Respondents shall require, as a condition of continued employment post-divestiture of the Divestiture Product Assets, that each employee that has had responsibilities related to the marketing or sales of the Divestiture Products in the United States of America 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 in the United States of America that perform the same or similar point-of-care diagnostic tests as 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 the Respondents (other than as necessary to comply with the requirements of this Order).

K. 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 that Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. 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 the Respondents' registered office within the United States of America and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications, and reminders sent to the Respondents' personnel.

L. Respondents shall:

1. for a period of six (6) months after the Closing Date, provide each 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 Divestiture Product 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 the relevant Respondent to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by that 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, (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, and (iii) restrict access to the information to such of the Acquirer's or Proposed Acquirer's employees who need such access in connection with the specified and permitted use;

3. during the 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 a 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 a Respondent that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, for a period of one (1) month following the receipt of a written offer of employment from an Acquirer or its Manufacturing Designee, a Respondent shall not make any counteroffer to any 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 a Respondent from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with a Respondent prior to the date of the written offer of employment from the Acquirer 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 Business related to 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 a Respondent until the Closing Date(s) for the divestiture of the Divestiture Product Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that this Paragraph does not require nor shall be construed to require a Respondent to terminate the employment of any employee or to prevent a Respondent from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year after the Closing Date, not hire any individual that is employed by an Acquirer immediately following the Closing Date to whom an offer of employment was made pursuant to a Remedial Agreement ("Divestiture Product Employee");

provided, however, a Respondent may hire any Divestiture Product Employee whose employment has been terminated by the relevant Acquirer or with the agreement of the relevant Acquirer with respect to that Divestiture Product Employee.

M. Until Respondents complete the divestitures required by this Order and fully provide, or cause to be provided, the 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 Manufacturing Technology; and

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

N. Respondents shall not, in the United States of America:

1. use any of the Trademarks related to Divestiture Products or any mark confusingly similar to the Trademarks as a trademark, tradename, or service mark *except* as may be necessary to sell inventory of Divestiture Products in existence as of the Acquisition Date or as otherwise specifically permitted by the Acquirer of the relevant Divestiture Product;

2. attempt to register the Trademarks;

3. attempt to register any mark confusingly similar to the Trademarks;

4. challenge or interfere with an Acquirer's use and registration of the Trademarks acquired by that Acquirer; or

5. challenge or interfere with an Acquirer's efforts to enforce its trademark registrations for and trademark rights in the relevant Trademarks against Third Parties.

O. 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 import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) acquired by that Acquirer, into, from, or within the United States of America.

P. For any patent infringement suit filed prior to the Closing Date in which a Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that a Respondent has prepared or is preparing to defend against as of the Closing Date, and where such a suit would have the potential directly to limit or interfere with the relevant Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the 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 import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) acquired by that Acquirer, into, from, or within the United States of America, that Respondent shall:

1. cooperate with that Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses from that Respondent in connection with obtaining resolution of any pending patent litigation related to that 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.

Q. The purpose of the divestiture of the Divestiture Product Assets and the provision of the related Manufacturing Technology and the related obligations imposed on the Respondents by this Order is:

1. to ensure the continued use of such assets for the purposes of the Business associated with each Divestiture Product within the United States of America;

2. to create a viable and effective competitor that is independent of Respondents in the Business of each Divestiture Product within the United States of America; and

3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

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

B. The Commission shall select the Monitor, subject to the consent of 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 notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

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

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

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

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

3. The Monitor shall serve until the later of:

   a. the date the Respondents complete: (i) the transfer of all Divestiture Product Assets, and (ii) the transfer and delivery of the related

Manufacturing Technology, Product Intellectual Property and Product Licensed Intellectual Property;

b. the date that each respective Acquirer has obtained all Product Approvals necessary to manufacture and market each Divestiture Product acquired by that Acquirer in the United States of America independently of the Respondents;

c. the date on which an agreement to provide transition services to the Acquirer terminates;

d. with respect to the Triage Product Facility, the date on which all relocation activities within the Triage Product Facility that are agreed upon between the Acquirer and the Respondent are completed; and

e. the date of written notification from Commission staff that the Monitor, in consultation with Commission staff, has determined that the Acquirer has abandoned its efforts to manufacture a Divestiture Product that is being monitored by the Monitor;

provided, however, that the Monitor's service shall not extend more than four (4) years after the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

E. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to 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 that Respondent's 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 Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor that Respondent's compliance with the Orders.

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

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.

H. Respondents shall report to the Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by each Acquirer with respect to the performance of a Respondent's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days after the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order; *provided, however*, beginning ninety (90) days after Respondents have filed its final report pursuant to Paragraph VII.C.,

and ninety (90) days thereafter, the 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 Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

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

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

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

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

IV.

IT IS FURTHER ORDERED that:

A. If the Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the 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(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondents

shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by 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(s) shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture

Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

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

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

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

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

V.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer 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 Respondents may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement, or arrangement;

provided further, *however,* that pursuant to this Paragraph, Respondents 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 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 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. 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 Respondents, all as soon as reasonably practicable.

E. Respondents 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. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

VII.

IT IS FURTHER ORDERED that:

A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition Date occurred.

B. Within five (5) days of each Closing Date, Respondents shall submit to the Commission a letter certifying the date on which that particular divestiture occurred.

C. Within thirty (30) days after the Order Date, and every ninety (90) days thereafter until Respondents have (i) transferred all of the Divestiture Assets to the relevant Acquirers; (ii) fully provided the Manufacturing Technology, Product Intellectual Property and Product Licensed Intellectual Property to the relevant Acquirers, (iii) completed all transitional services as provided for in any transitional services agreement between the Acquirer and the Respondents, and (iv) with respect to the Triage Product Facility, completed any relocation activities within the Triage Product Facility agreed upon between the Acquirer and the Respondents, 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 these requirements of the Orders. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Monitor, if any 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 Orders, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and

rights, and (ii) any transitional services being provided by Respondents to the relevant Acquirer; and

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

D. One (1) year after the Order Date, annually for the next four (4) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with the Order.

VIII.

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

A. any proposed dissolution of a Respondent;

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

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

IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to a Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on November 2, 2027.

By the Commission.

NON-PUBLIC APPENDIX I
ACQUISITION AGREEMENTS

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

NON-PUBLIC APPENDIX II.A
AGREEMENTS RELATED TO THE DIVESTITURES OF THE TRIAGE DIVESTITURE PRODUCTS

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

NON-PUBLIC APPENDIX II.B
AGREEMENTS RELATED TO THE DIVESTITURES OF THE EPOC DIVESTITURE PRODUCTS

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

NON-PUBLIC APPENDIX III
MONITOR AGREEMENT
(Non-Public Version)

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

PUBLIC APPENDIX IV
MONITOR AGREEMENT
(Public Version - REDACTED)

MONITOR AGREEMENT

This Monitor Agreement (this "Agreement") entered into this [15] day of September, 2017 by and between ING Financial Markets LLC ("ING" or the "Monitor"), Abbott Laboratories ("Abbott"), and Alere Inc. ("Alere," collectively with Abbott, "Respondents") provides as follows:

WHEREAS, the United States Federal Trade Commission (the "FTC") has accepted or will shortly accept for public comment an Agreement Containing Consent Order, including a proposed Decision and Order and a proposed Order to Maintain Assets ("Asset Maintenance Order," and collectively, the "Orders"), which, among other things, (i) would require the divestiture of Alere's Epoc Products and Triage Products businesses, as defined in the Orders, and (ii) contemplates the appointment of a Monitor to monitor Respondents' compliance with their obligations under the Orders;

WHEREAS, the FTC may appoint ING as Monitor pursuant to Section III of the proposed Decision and Order;

WHEREAS, the Orders further provide that Respondents shall execute an agreement, subject to the prior approval of the FTC, that confers all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of the Orders; and

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

NOW, THEREFORE, the parties agree as follows:

All capitalized terms used in this Agreement and not specifically defined herein shall have the respective definitions given to them in the Orders.

ARTICLE I

1.1 Monitor's Responsibilities. The Monitor shall be responsible for monitoring Respondents' compliance with their obligations as set forth in the Orders and the Remedial Agreements (including any Transition Services Agreement), as defined in the Remedial Agreements ("Monitor's Responsibilities"). In doing so, the Monitor recognizes that he shall act in a fiduciary capacity on behalf of the FTC. The Monitor will be serving hereunder as an independent contractor and no employment relationship shall exist between the Monitor and the Respondents. The Monitor shall have all rights, duties, powers and authorities required by the Orders, and nothing in this Agreement shall change, amend, modify or otherwise limit those rights, duties, powers, and authorities.

1.2 Access to Relevant Information and Facilities. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to the personnel, books and records of Respondents kept in the ordinary course of business, facilities, technical information related to Respondents' compliance with its obligations under the Orders and the Remedial Agreement, and such other relevant information as the Monitor may reasonably request.

Respondents shall cooperate with any reasonable request of the Monitor. The Monitor shall give Respondents a written request and at least five days' prior notice of any request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondents' operations. At the request of the Monitor, Respondents shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of Respondents who have knowledge relevant to the proper discharge of its responsibilities under the Orders.

1.3 Compliance Reports. Respondents shall provide the Monitor with copies of all compliance reports filed with the FTC in a timely manner, but in any event, no later than five (5) business days after the date on which Respondents file such a report with the FTC.

1.4 Additional Personnel. Respondents agree that, to the extent authorized by the Orders, the 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 Monitor's Responsibilities.

1.5 Monitor's Obligations. The Monitor shall:

a. Carry out the Monitor's Responsibilities, including submission of periodic reports to the FTC staff concerning performance by Respondents' of their obligations under the Orders, and any additional written reports as may be requested by the FTC staff;

b. Cooperate as appropriate with ING Bank N.V. London Branch ("ING London"), the Monitoring Trustee appointed pursuant to the Respondents' Commitments to the European Commission;

c. Maintain the confidentiality of all non-public information, including Confidential Business Information, provided to the Monitor by Respondents, the FTC-Approved Acquirer, any supplier or customer of Respondents, or the FTC in connection with the Monitor's Responsibilities ("Confidential Information"). Such Confidential Information shall be used only for the purpose of discharging the Monitor's obligations pursuant to this Agreement and not for any other purposes, including, without limitation, any other business, scientific, technological, or personal purpose. The Monitor may disclose Confidential Information only to:

   i. Persons employed by or working with the Monitor under this Agreement and who have executed a confidentiality agreement consistent with the provisions of this Agreement;

   ii. Persons employed by Respondents;

   iii. Persons employed by ING London, the Monitoring Trustee appointed pursuant to the Respondents' Commitments to the European Commission; and

iv. Persons employed at the FTC and working on this matter.

v. The Monitor shall maintain a record and inform the FTC of all persons to whom Confidential Information related to this Monitor Agreement has been disclosed.

d. Require any consultants, accountants, attorneys, and any other representatives and/or assistants retained by the Monitor to assist in carrying out the Monitor's Responsibilities to execute a confidentiality agreement that requires such third parties to treat Confidential Information with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Agreement;

e. Maintain the confidentiality, for a period of ten (10) years after the termination of this Agreement, of all other aspects of the performance of the Monitor's Responsibilities and not disclose any Confidential Information relating thereto except as required by law. In the event that Monitor is requested pursuant to subpoena or other legal process to produce any documents or to provide testimony relating to this matter in judicial or administrative proceedings to which the Monitor is not a party, Respondents shall reimburse the Monitor at standard billing rates for all professional time and expenses, including reasonable attorneys' fees, incurred in preparing for and responding to requests for documents and providing testimony;

f. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall consult with the FTC'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 FTC'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 FTC's staff of such request and, if the FTC's staff do not object, shall comply with the Respondents' request. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor.

For the purpose of this Agreement, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Monitor or by any employee, agent, affiliate or consultant of the Monitor), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than the Monitor, the Respondents, or any director, officer, employee, agent, consultant or affiliate of the Monitor or the Respondents, when such source was not known to recipient after due inquiry to be restricted from making such disclosure to such recipient.

1.6 Monitor Payment. Respondents will pay Monitor for services rendered by the Monitor pursuant to this Agreement in accordance with the confidential fee schedule listed on Schedule A to this Agreement. In addition, Respondents will pay: (a) out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's Responsibilities; and (b) fees and disbursements reasonably incurred by such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's Responsibilities. The Monitor shall invoice Respondents monthly, including details and an explanation of all matters for which the Monitor submits an invoice to Respondents. Respondents shall pay such invoices within sixty (60) days of receipt. Any consultants, accountants, attorneys, and other representatives and assistants retained by the Monitor shall invoice their services to the Monitor who will review and approve such invoices and submit to Respondents for payment. At their own expense, Respondents may retain an independent auditor to verify such invoices. A late payment charge of one percent (1%) per month (or the maximum rate permitted by law, whichever is less) may be added to any outstanding invoices that are past due. The Monitor and Respondents shall submit any disputes about invoices to the FTC for assistance in resolving such disputes.

1.7 Monitor's Indemnification and Limitation of Liability. Respondents shall (i) indemnify and hold harmless ING and all affiliates of ING and its directors and employees (the "Indemnified Parties") and (ii) hold the Indemnified Parties harmless (regardless of any action, whether in contract, statutory law, tort or otherwise) against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's Responsibilities, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from gross negligence, willful misconduct, or bad faith by the Monitor. In addition, the parties shall not be liable to each other for any consequential, incidental, special or punitive damages, nor shall the Monitor be liable for direct compensatory damages in excess of the fees actually received by the Monitor for the performance of services hereunder.

1.8 Disputes. In the event of a disagreement or dispute between Respondents and the Monitor concerning Respondents' obligations under one or both of the Orders, and, in the event that such disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the individual in charge of compliance at the FTC.

1.9 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 the Monitor's Responsibilities, the Monitor shall immediately inform Respondents and the FTC of any such conflict. ING may accept other retentions during the term of this Agreement and thereafter, provided that, during the pendency of this Agreement, ING agrees not to accept any other engagement which would result in ING working in a position directly adverse to the FTC, Respondents, or the FTC-Approved Acquirer in any substantially related matter.

1.10 Standard of Care. In the performance of the Monitor's Responsibilities, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his own business affairs.

ARTICLE II

2.1 Term. This Agreement shall terminate upon the earliest of: (a) such time as is necessary to monitor Respondents' compliance with the provisions of the Orders and the Remedial Agreement, including for as long as Respondents are providing Transition Services to the Acquirer pursuant to the a Transition Services Agreement; (b) the expiration or termination of the Orders; (c) the expiration or termination of the Divestiture Agreement; (d) Respondents' receipt of written notice from the FTC that the FTC 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, or that the employment of a Monitor is no longer required; or (e) with at least thirty (30) days advance notice to be provided by the Monitor to Respondents and to the FTC, upon resignation of the Monitor.

If this Agreement is terminated for any reason, the confidentiality provisions set forth in Section 1.5 above will remain in force.

2.2 Termination. In the event that ING wishes to terminate this Agreement, ING shall provide written notice to the Respondents and the FTC. Respondents and ING shall work in good faith with the FTC to identify and propose to the FTC a successor Monitor. ING shall continue to serve as Monitor under the terms of this Agreement until such time as the FTC approves a successor Monitor, and ING's termination of this Agreement shall be effective only upon the approval by the FTC of a successor Monitor.

2.3 Governing Law. This Agreement and the rights and obligations of the parties hereunder shall in all respects be governed by the substantive laws of the state of New York, including all matters of construction, validity and performance. The Orders shall govern this Agreement and any provisions herein which conflict or are inconsistent with them may be declared null and void by the FTC and any provision not in conflict shall survive and remain a part of this Agreement.

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

2.5 Assignment. This Agreement may not be assigned or otherwise transferred by Respondents or the Monitor without the consent of Respondents and the Monitor and the approval of the FTC. Any such assignment or transfer shall be consistent with the terms of the Orders.

2.6 Modification. No amendment, modification, termination, or waiver of any provision of this Agreement shall be effective unless made in writing, signed by all parties, and approved by the FTC. Any such amendment, modification, termination, or waiver shall be consistent with the terms of the Orders.

2.7 Approval by the FTC. This Agreement shall have no force or effect with respect to the Orders until approved by the FTC.

2.8 Entire Agreement. This Agreement, and those portions of the Orders incorporated herein by reference, constitute the entire agreement of the parties and supersede any and all prior agreements and understandings between the parties, written or oral, with respect to the subject matter hereof.

2.9 Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

2.10 Section Headings. Any heading of a section is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

Decision and Order

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

MONITOR

ING Financial Markets LLC

Name Philip Comerford Jr.
Title Managing Director

RESPONDENTS

Abbott Laboratories

_____
Name
Title

Alere Inc.

_____
Name
Title

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

MONITOR

ING Financial Markets LLC

_____
Name
Title

RESPONDENTS

Abbott Laboratories

_____
Name Hubert L. Allen
Title Executive Vice President
General Counsel and Secretary

Alere Inc.

_____
Name
Title

_____
Name
Title

Decision and Order

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

MONITOR

ING Financial Markets LLC

_____
Name
Title

_____
Name
Title

RESPONDENTS

Abbott Laboratories

_____
Name
Title

Alere Inc.

_____
Name Douglas Harry
Title Asst. Secretary

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

INTRODUCTION

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Abbott Laboratories ("Abbott") and Alere Inc. ("Alere") designed to remedy the anticompetitive effects resulting from Abbott's proposed acquisition of Alere. The proposed Decision and Order ("Order") contained in the Consent Agreement requires the parties to divest all rights and assets related to Alere's point-of-care blood gas testing business to Siemens Aktiengelsellschaft ("Siemens"), and all rights and assets related to Alere's point-of-care cardiac marker testing business to Quidel Corporation ("Quidel").

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

Under the terms of the Amendment to Agreement and Plan of Merger signed on April 13, 2017, which amends the Agreement and Plan of Merger signed on January 30, 2016, Abbott will acquire Alere in a transaction valued at approximately $8.3 billion, which includes Abbott's assumption of $3.0 billion in debt (the "Acquisition"). The Commission's Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the U.S. markets for point-of-care blood gas testing systems and point-of-care cardiac marker testing systems. 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 Acquisition.

THE PARTIES

Abbott, headquartered in Abbott Park, Illinois, is a global healthcare company with three business units in the United States: diagnostic, nutritional, and vascular. Its diagnostic testing division provides an expansive portfolio of instruments, tests, software, and training to hospitals, laboratories, blood banks, and physician offices.

Alere, headquartered in Waltham, Massachusetts, is a global leader in rapid diagnostic testing. Alere provides diagnostic equipment, consumables, and patient self-management tools for cardiometabolic disease, infectious disease, and toxicology.

THE RELEVANT PRODUCTS AND STRUCTURE OF THE MARKETS

Point-of-Care Blood Gas Testing Systems

Point-of-care blood gas testing systems are small, portable medical instruments that measure a patient's blood pH, oxygen, carbon dioxide, and electrolyte levels to assess lung and kidney function, as well as whether an acute patient requires oxygen or other urgent treatment. They provide results in less than five minutes at a patient's bedside or other acute care settings where fast turnaround time is critical, and rely on single-use, disposable test cartridges. Abbott and Alere offer the only handheld point-of-care blood gas testing devices, and other firms offer portable point-of-care models that range up to ten pounds in weight. Hospitals pay a substantial premium for the convenience of point-of-care blood gas testing equipment over the closest alternative, using larger benchtop analyzers that employ multi-use packs of reagents and are typically located in a hospital laboratory or other centralized location for analysis. The vast majority of customers would not switch to benchtop blood gas testing systems in response to a small but significant increase in the price of point-of-care blood gas testing systems.

Abbott and Alere are each other's closest competitors and the only significant suppliers in the U.S. market for point-of-care blood gas testing systems, accounting for 82% and 15% of 2016 sales, respectively. While IDEXX Laboratories, Inc. and

LifeHealth LLC offer single-use, portable (but not handheld) systems, they are more distant competitors to Abbott and Alere and maintain fringe positions in the market.

Point-of-Care Cardiac Marker Testing Systems

Point-of-care cardiac marker testing systems are small, portable medical instruments that measure specific proteins released into the blood to assess whether a patient experiencing chest pains is having a myocardial infarction or congestive heart failure. They allow for quick initial diagnoses at a patient's bedside, which is critical because the time between a cardiac event and treatment increases the likelihood the patient will suffer permanent loss of heart muscle. The convenience of point-of-care cardiac marker testing systems differentiates them from larger benchtop models that can only be located in a hospital laboratory or some other central area of larger emergency departments. A small but significant increase in the price of point-of-care cardiac marker testing systems would not cause customers to switch to benchtop cardiac marker testing systems.

Abbott and Alere are the only significant suppliers of point-of-care cardiac marker testing systems, accounting for approximately 87% and 13%, respectively, of the 2016 U.S. market. Abbott offers point-of-care cardiac marker testing on a handheld analyzer, and Alere on a two-pound portable analyzer. The next closest competitor to the parties is Response Biomedical, which offers a more complex technology and accounts for only a nominal share of the market.

THE RELEVANT GEOGRAPHIC MARKET

The relevant geographic market for point-of-care blood gas testing systems and point-of-care cardiac marker testing systems 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.

COMPETITIVE EFFECTS OF THE ACQUISITION

The proposed Acquisition would likely result in significant competitive harm to consumers in the markets for point-of-care blood gas testing systems and point-of-care cardiac marker testing systems. In each relevant market, customers are able to leverage Abbott and Alere against each other to obtain better prices and improved products. By eliminating this direct and substantial head-to-head competition, the proposed Acquisition likely would allow the combined firm to exercise market power unilaterally, resulting in higher prices, reduced innovation, and less choice for 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 Acquisition. New entry would require significant investment of time and money for product research and development, regulatory approval by the FDA, and establishment of a U.S. sales and service infrastructure. Such development efforts are difficult, time-consuming, and expensive, and often fail to result in a competitive product reaching the market.

THE CONSENT AGREEMENT

The Consent Agreement eliminates the competitive concerns raised by the proposed Acquisition by requiring Alere to divest: (1) its point-of-care blood gas testing business, including its Ottawa, Canada facilities, to Siemens; and (2) its point-of-care cardiac marker testing business, including its San Diego, California facility, to Quidel. Alere must divest all assets and rights to research, develop, manufacture, market, and sell its point-of-care blood gas testing and point-of-care cardiac marker testing product lines, including all related intellectual property and other confidential business information. Further, Siemens and Quidel intend to hire substantially all of Alere's employees whose responsibilities primarily relate to the research, development, manufacture, or sale of the relevant products. The provisions of the Consent Agreement ensure that Siemens and Quidel become

independent, viable, and effective competitors in the respective markets in order to maintain the competition that currently exists.

Siemens is a global conglomerate with a healthcare division that is one of the world's largest suppliers of technology to the healthcare industry and a leader in medical imaging and laboratory diagnostics. Siemens currently supplies a benchtop blood gas testing system, and Alere's handheld system will be highly complementary to Siemens' portfolio in the United States. Siemens has the expertise, U.S. sales infrastructure, and resources to restore the competition that otherwise would have been lost pursuant to the proposed Acquisition.

Based in San Diego, California, Quidel develops, manufactures, and markets point-of-care diagnostic testing solutions globally. The company has expertise with immunoassay testing and currently focuses on infectious diseases, women's and general health, and gastrointestinal diseases. The acquisition of Alere's point-of-care cardiac marker testing business will complement Quidel's portfolio of rapid diagnostic testing solutions. Moreover, Quidel's chairman was co-inventor of Alere's point-of-care cardiac marker testing system, providing Quidel with additional understanding and background of the divestiture business.

The parties must accomplish the divestitures no later than thirty days after the consummation of the Proposed Acquisition. If the Commission determines that either Siemens or Quidel 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 Siemens and/or Quidel and then divest the products to a Commission-approved acquirer(s) within six months of the date the Order becomes final.

The Commission has agreed to appoint a Monitor to ensure that Abbott and Alere comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the rights and assets to Siemens and Quidel. The proposed Order further allows the Commission to appoint a trustee in the event the parties fail to divest the products as required.

Analysis to Aid Public Comment

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

TRU COMMUNICATION, INC.
D/B/A
TCPRINTING.NET

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

Docket No. C-4628; File No. 172 3171
Complaint, November 20, 2017 – Decision, November 20, 2017

This consent order addresses Tru Communication, Inc.'s representations made to consumers while d/b/a TCPrinting.net ("TCP") concerning its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. and the European Union. The complaint alleges that TCP falsely represented that it was certified to participate in the EU-U.S. Privacy Shield framework when, in fact, TCP never completed the necessary steps to finalize its application and thus, was not certified to participate in the EU-U.S. Privacy Shield framework. The consent order prohibits TCP 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 EU-U.S. Privacy Shield framework.

Participants

For the *Commission*: *Monique F. Einhorn.*

For the *Respondent*: *Andrew Ha, Attorney at Law.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that Tru Communication, Inc., a corporation dba TCPrinting.net, 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 Tru Communication, Inc. dba TCPrinting.net is a California corporation with its principal office or place of business at 1215 G Street, Sacramento, CA 95814.

2. Respondent provides printing services such as copying, binding and scanning of documents.

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.tcprinting.net/info/lpi-privacy-policy.php, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

5. In fact, Respondent has not been certified to participate in the EU-U.S. Privacy Shield framework.

Privacy Shield

6. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide companies on both sides of the Atlantic with a mechanism to comply with European Union ("EU") data protection requirements when transferring personal data from the EU to the United States in support of transatlantic commerce.

7. Privacy Shield provides a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth 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 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.

8. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield

framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard.

9. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield 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.

10. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

Violations of Section 5 of the FTC Act

11. Respondent has disseminated or caused to be disseminated privacy policies and statements on the http://www.tcprinting.net/info/lpi-privacy-policy.php website, including, but not limited to, the following statements:

> TC Printing will remain compliant and current with Privacy Shield at all times.

12. Through the means described in Paragraph 11, Respondent represents, expressly or by implication, that it is a participant in the EU-U.S Privacy Shield framework.

13. In truth and in fact, although Respondent initiated an application to Commerce for Privacy Shield certification, it did not complete the steps necessary to participate in the EU-U.S Privacy Shield framework. Therefore, the representation set forth in Paragraph 12 is false and misleading.

14. The acts and practices of Respondent as alleged in this complaint constitute deceptive acts or practices, in or affecting

commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this twentieth day of November, 2017, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any 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 issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent Tru Communication, Inc. dba TCPrinting.net is a California corporation with its principal office or place of business at 1215 G Street, Sacramento, CA 95814.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Respondent" means Tru Communication, Inc. dba TCPrinting.net, a corporation and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in Privacy or Security Programs

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S.

Privacy Shield framework and the Swiss -U.S. Privacy Shield framework.

II. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For twenty (20) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives with responsibilities related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

III. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission,

may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal

Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: In re *Tru Communication, Inc. dba TCPrinting.net*, FTC File No. 1723171.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for 5 (five) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each unique advertisement, promotional material, or other marketing material making any representation subject to this Order, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on November 20, 2037, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Provision in this Order that terminates in less than twenty (20) years;

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

C. this Order if such complaint is filed after the order has terminated pursuant to this Provision. If such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order as to Respondent will

terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to Tru Communication, Inc. dba TCPrinting.net ("TCP").

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 TCP made to consumers concerning its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The EU-U.S. Privacy Shield framework allows U.S. companies to transfer data outside the EU consistent with EU law. To join the EU-U.S. Privacy Shield 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; accountability for onward transfer; security; data integrity and

purpose limitation; access; and recourse, enforcement, and liability. Commerce maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies indicates whether their self-certification is current. Companies are required to re-certify every year in order to retain their status as current members of the EU-U.S. Privacy Shield framework.

TCP provides printing services such as copying, binding and scanning of documents. According to the Commission's complaint, TCP has set forth on its website, www.tcprinting.net/info/lpi-privacy-policy.php, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework.

The Commission's complaint alleges that TCP falsely represented that it was certified to participate in the EU-U.S. Privacy Shield framework when, in fact, TCP never completed the necessary steps to finalize its application and thus, was not certified to participate in the EU-U.S. Privacy Shield framework.

Part I of the proposed order prohibits TCP 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 EU-U.S. Privacy Shield framework.

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

Part V mandates that TCP make available to the FTC information or subsequent compliance reports, as requested. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

MD7, LLC

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

Docket No. C-4629; File No. 172 3172
Complaint, November 20, 2017 – Decision, November 20, 2017

This consent order addresses Md7, LLC's representations made to consumers concerning its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. and the European Union. The complaint alleges that Md7 falsely represented that it was certified to participate in the EU-U.S. Privacy Shield framework when, in fact, Md7 never completed the necessary steps to finalize its application and thus, was not certified to participate in the EU-U.S. Privacy Shield framework. The consent order prohibits Md7 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 EU-U.S. Privacy Shield framework.

Participants

For the *Commission*: *Monique F. Einhorn.*

For the *Respondent*: *Lesli Esposito* and *Amanda Fitzsimmons, DLA Piper.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that Md7, 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 Md7, LLC is a Delaware limited liability company with its principal office or place of business at 10590 West Ocean Air Drive, Suite 300, San Diego 92130.

2. Respondent assists wireless operators in managing real estate-related issues.

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.md7.com/privacy-policy/, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

5. In fact, Respondent has not been certified to participate in the EU-U.S. Privacy Shield framework.

Privacy Shield

6. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide companies on both sides of the Atlantic with a mechanism to comply with European Union ("EU") data protection requirements when transferring personal data from the EU to the United States in support of transatlantic commerce.

7. Privacy Shield provides a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth 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 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.

8. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it

complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard.

9. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield 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.

10. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

Violations of Section 5 of the FTC Act

11. Respondent has disseminated or caused to be disseminated privacy policies and statements on the http://www.md7.com/privacy-policy/ website, including, but not limited to, the following statements:

> Md7, LLC is committed to protecting and respecting the privacy of our customers and employees. This Privacy Policy (the "Policy") sets forth the privacy principles that Md7, LLC follows with respect to transfers of Personal Data from the European Economic Area ("EEA") and Switzerland to the United States as well as our practices with respect to our services available under the domain and sub-domains of Md7, LLC. Visitors to our website are bound by the terms and conditions of this Policy in effect at the time of their visit; those who do not agree to this Policy should not use or access our website or our services.

Privacy Shield and Safe Harbor

> Md7, LLC complies with the US-EU Privacy Shield Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information from Individual Customers in the European Union member countries. Md7, LLC has certified that it adheres to the Privacy Shield principles of notice, choice, accountability for onward transfer, security, data integrity and purpose limitation, access, recourse, enforcement and liability. If there is any conflict between the policies in this privacy policy and the Privacy Shield Privacy Principles, regarding the collection, use and retention of personal information from Individual Customers in the European Union member countries, the Privacy Shield Privacy Principles shall govern. To learn more about the Privacy Shield program, and to view our certification page, please visit https://www.privacyshield.gov. . .

12. Through the means described in Paragraph 11, Respondent represents, expressly or by implication, that it is a participant in the EU-U.S Privacy Shield framework.

13. In truth and in fact, although Respondent initiated an application to Commerce for Privacy Shield certification, it did not complete the steps necessary to participate in the EU-U.S Privacy Shield framework. Therefore, the representation set forth in Paragraph 12 is false and misleading.

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

THEREFORE, the Federal Trade Commission this twentieth day of November, 2017, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any 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 issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent Md7, LLC is a Delaware limited liability company with its principal office or place of business at 10590 West Ocean Air Drive, Suite 300, San Diego 92130.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Respondent" means Md7, LLC, a limited liability company and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in Privacy or Security Programs

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss -U.S. Privacy Shield framework.

II. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For twenty (20) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives with responsibilities related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

III. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: In re *Md7, LLC*, FTC File No. 1723172.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for 5 (five) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each unique advertisement, promotional material, or other marketing material making any representation subject to this Order, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated

with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on November 20, 2037, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Provision in this Order that terminates in less than twenty (20) years;

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

C. this Order if such complaint is filed after the order has terminated pursuant to this Provision. If such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order as to Respondent will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to Md7, LLC ("Md7").

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 Md7 made to consumers concerning its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The EU-U.S. Privacy Shield framework allows U.S. companies to transfer data outside the EU consistent with EU law. To join the EU-U.S. Privacy Shield 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; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. Commerce maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies indicates whether their self-certification is current. Companies are required to re-certify every year in order to retain their status as current members of the EU-U.S. Privacy Shield framework.

Md7 assists wireless operators in managing real estate-related issues. According to the Commission's complaint, Md7 has set forth on its website, www.md7.com/privacy-policy/, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework.

Analysis to Aid Public Comment

The Commission's complaint alleges that Md7 falsely represented that it was certified to participate in the EU-U.S. Privacy Shield framework when, in fact, Md7 never completed the necessary steps to finalize its application and thus, was not certified to participate in the EU-U.S. Privacy Shield framework.

Part I of the proposed order prohibits Md7 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 EU-U.S. Privacy Shield framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that Md7 submit an initial compliance report to the FTC. Part IV requires Md7 to retain documents relating to its compliance with the order for a five-year period.

Part V mandates that Md7 make available to the FTC information or subsequent compliance reports, as requested. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

DECUSOFT, LLC

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

Docket No. C-4630; File No. 172 3173
Complaint, November 20, 2017 – Decision, November 20, 2017

This consent order addresses Decusoft, LLC's representations made to consumers concerning its participation in the Privacy Shield frameworks agreed upon by the U.S. and the European Union and the U.S. and Switzerland. The complaint alleges that Decusoft falsely represented that it was certified to participate in the Privacy Shield frameworks when, in fact, Decusoft never completed the necessary steps to finalize its applications, and thus, was not certified to participate in either the EU-U.S. Privacy Shield framework or the Swiss-U.S. Privacy Shield framework. The consent order prohibits Decusoft 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 EU-U.S. Privacy Shield framework and the Swiss-U.S. Safe Privacy Shield framework.

Participants

For the *Commission*: *Monique F. Einhorn.*

For the *Respondent*: *Mary Hildebrand, Lowenstein Sandler, LLP.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that Decusoft, 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 Decusoft, LLC is a New Jersey limited liability company with its principal office or place of business at 70 Hilltop Road, Suite 1003, Ramsey, New Jersey 07446.

2. Respondent develops software for use in human resources applications.

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.decusoft.com/privacy-policy, privacy policies and statements about its practices, including statements related to its participation in the Privacy Shield frameworks agreed upon by the U.S. government and the European Commission ("EU-U.S. Privacy Shield") and the U.S. and Switzerland ("Swiss-U.S. Privacy Shield").

5. In fact, Respondent has not been certified to participate in either the EU-U.S. Privacy Shield framework or the Swiss-U.S. Privacy Shield framework.

Privacy Shield

6. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide companies on both sides of the Atlantic with a mechanism to comply with European Union ("EU") data protection requirements when transferring personal data from the EU to the United States in support of transatlantic commerce.

7. Privacy Shield provides a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth 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 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.

8. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework

allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard.

9. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield 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.

10. The Swiss-U.S. Privacy Shield framework is identical to the EU-U.S. Privacy Shield framework and is consistent with the requirements of the Swiss Federal Act on Data Protection. The Swiss-U.S. Privacy Shield framework went into effect in April 2017.

11. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. and/or Swiss-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

Violations of Section 5 of the FTC Act

12. Respondent has disseminated or caused to be disseminated privacy policies and statements on the http://www.decusoft.com/privacy-policy/ website, including, but not limited to, the following statements:

> Decusoft participates in and has certified its compliance with the EU-U.S. Privacy Shield Framework and the Swiss-U.S. Privacy Shield Framework. We are committed to subjecting all personal data received from European Union (EU) member countries, in reliance on the Privacy Shield Framework, to the Framework's applicable

> Principles. To learn more about the Privacy Shield Framework, visit the U.S. Department of Commerce's Privacy Shield List, https://www.privacyshield.gov/list.

13. Through the means described in Paragraph 12, Respondent represents, expressly or by implication, that it is a participant in both the EU-U.S Privacy Shield framework and the Swiss-U.S Privacy Shield framework.

14. In truth and in fact, although Respondent initiated an application to Commerce for Privacy Shield certification, it did not complete the steps necessary to participate in either the EU-U.S or the Swiss-U.S Privacy Shield frameworks. 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 twentieth day of November, 2017, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any 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 issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent Decusoft, LLC is a New Jersey limited liability company with its principal office or place of business at 70 Hilltop Road, Suite 1003, Ramsey New Jersey 07446.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Respondent" means Decusoft, LLC, a limited liability company and its successors and assigns.

Provisions

I. Prohibition Against Misrepresentations About Participation in Privacy or Security Programs

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

II. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For twenty (20) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives with responsibilities related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

III. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar

proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: In re *Decusoft, LLC*, FTC File No. 1723173.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for 5 (five) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each unique advertisement, promotional material, or other marketing material making any representation subject to this Order, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on November 20, 2037, or twenty (20) years from the most recent date that the United States or the Commission files a complaint

(with or without an accompanying settlement) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Provision in this Order that terminates in less than twenty (20) years;

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

C. this Order if such complaint is filed after the order has terminated pursuant to this Provision. If such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order as to Respondent will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to Decusoft, LLC ("Decusoft").

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 Decusoft made to consumers concerning its participation in the Privacy Shield frameworks agreed upon by the U.S. and the European Union ("EU") and the U.S. and Switzerland (collectively, "Privacy Shield frameworks"). The Privacy Shield frameworks allow U.S. companies to transfer data outside the EU and Switzerland consistent with EU and Swiss law. To join the Privacy Shield 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; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. Commerce maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies that have self-certified to the Privacy Shield frameworks. The listing of companies indicates whether their self-certification is current. Companies are required to re-certify every year in order to retain their status as current members of the Privacy Shield frameworks.

Decusoft develops software for use in human resources applications. According to the Commission's complaint, Decusoft has set forth on its website, www.decusoft.com/privacy-policy, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. and the Swiss-U.S. Privacy Shield frameworks.

The Commission's complaint alleges that Decusoft falsely represented that it was certified to participate in the Privacy Shield frameworks when, in fact, Decusoft never completed the necessary steps to finalize its applications, and thus, was not certified to participate in either the EU-U.S. Privacy Shield framework or the Swiss-U.S. Privacy Shield framework.

Part I of the proposed order prohibits Decusoft 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 EU-U.S. Privacy Shield framework and the Swiss-U.S. Safe Privacy Shield framework.

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

Part V mandates that Decusoft make available to the FTC information or subsequent compliance reports, as requested. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

CSGOLOTTO, INC., TREVOR MARTIN A/K/A TMARTN, AND THOMAS CASSELL A/K/A THESYNDICATEPROJECT, TOM SYNDICATE, AND SYNDICATE

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

Docket No. C-4632; File No. 162 3184
Complaint, November 28, 2017 – Decision, November 28, 2017

This consent order addresses CSGOLotto, Inc.'s advertising for their website, www.csgolotto.com, which offered consumers the opportunity to gamble using what is in effect a virtual currency. The complaint alleges that respondents violated Section 5(a) of the FTC Act by misrepresenting that videos of Martin, Cassell, and other influencers gambling on CSGO Lotto and their social media posts about CSGO Lotto reflected the independent opinions or experiences of impartial users of the service. The complaint further alleges that respondents deceptively failed to disclose that Martin and Cassell were owners and officers of the company operating CSGO Lotto and that other influencers received compensation, including monetary payment, to promote CSGO Lotto. The consent order prohibits respondents, in connection with the sale of any product or service, from misrepresenting that any endorser of such product or service is an independent user or ordinary consumer of the product or service.

Participants

For the *Commission*: *Michael Ostheimer.*

For the *Respondents*: *Coleman Watson, Watson LLP; Alicia J. Batts, Squire Patton Boggs.*

COMPLAINT

The Federal Trade Commission, having reason to believe that CSGOLotto, Inc., a corporation, and Trevor Martin and Thomas Cassell, individually and as officers of CSGOLotto, Inc.

(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, CSGOLotto, Inc., is a Florida corporation with its principal office or place of business at 6511 Vineland Road, Orlando, FL 32819. It was incorporated in December 2015.

2. Respondent, Trevor Martin, also known as TmarTn, is the President and a 42.5% owner of CSGOLotto, Inc. Individually or in concert with others, he controlled or had the authority to control, or participated in the acts and practices of CSGOLotto, Inc., including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of CSGOLotto, Inc.

3. Respondent, Thomas Cassell, also known as TheSyndicateProject, Tom Syndicate, and Syndicate, is the Vice President and a 42.5% owner CSGOLotto, Inc. Individually or in concert with others, he controlled or had the authority to control, or participated in the acts and practices of CSGOLotto, Inc., including the acts and practices alleged in this complaint. When the acts and practices alleged in this complaint occurred, he resided in Los Angeles, California.

4. 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.

5. Respondents Martin and Cassell are both online influencers who operate YouTube channels focused primarily on online gaming. Respondent Martin's YouTube channels include "TmarTn2." Respondent Cassell's YouTube channels include "TheSyndicateProject." Each of these channels has millions of subscribers.

6. Counter-Strike: Global Offensive, also known as CS: GO, is an online, multiplayer, first-person shooter game, marketed by Valve Corp. Among other things, it uses collectible items called "skins," which cover weapons in distinctive patterns. Skins can be bought, sold, and traded for real-world money.

7. Beginning in October or November 2015, Respondents operated and advertised a website, www.csgolotto.com, that offered consumers the opportunity to gamble using skins as virtual currency ("CSGO Lotto"). Respondents earned revenue from their CSGO Lotto skin-betting service by charging an eight percent service fee on skin-betting pools.

8. Respondent CSGOLotto, Inc. provided Respondents Martin and Cassell with free skins with which to gamble on CSGO Lotto.

9. In a video posted in early-November 2015, Martin said,

> I've been starting to bet a little bit more. … [W]e found this new site called CSGO Lotto, so I'll link it down in the description if you guys want to check it out. But we were betting on it today and I won a pot of like $69 or something like that so it was a pretty small pot but it was like the coolest feeling ever. And I ended up like following them on Twitter and stuff and they hit me up. And they're like talking to me about potentially doing like a skins sponsorship like they'll give me skins to be able to bet on the site and stuff. And I've been like considering doing it.

10. Between mid-November 2015 and June 2016, Respondents Martin and Cassell posted videos to their respective YouTube channels showing themselves gambling on CSGO Lotto. These videos promoted CSGO Lotto and encouraged viewers to use the gambling service.

11. Between mid-November 2015 and June 2016, Respondent Martin posted at least 13 promotional videos to his "TmarTn2" YouTube channel showing himself gambling on CSGO Lotto, including ones with titles such as, "HOW TO WIN $13,000 IN 5 MINUTES (CS-GO Betting)," "$24,000 COIN FLIP (HUGE CSGO BETTING!) + Giveaway," "HUGE WINS (And Losses) - CounterStrike Betting Challenge #2 (CSGO Skins)," and "CS-GO Betting - Part 3 - HUGE $1000+ COIN FLIP BET! (Duel Arena Skin Gambling)." (*See*, *e.g.*, Exhibits A – D).

12. Nowhere in his videos promoting CSGO Lotto or in the videos' descriptions did Respondent Martin disclose that he was an officer and owner of the company operating CSGO Lotto or that he was gambling with free skins provided by that company. In the promotional videos showing him gambling on CSGO Lotto, Martin did not mention any connection between himself and CGSO Lotto and when he posted the videos he made no disclosures in the videos' descriptions.

13. Respondent Martin disseminated tweets that promoted CSGO Lotto and linked to his promotional videos. One such tweet read, "Made $13k in about 5 minutes on CSGO betting. Absolutely insane. Reactions here 😂: [*YouTube link*]." (March 6, 2016 tweet by @TmarTn). (Exhibit E). An Instagram post by Martin showed screen shots of TmarTn winning two betting pools on CSGO Lotto with the caption, "Unreal!! Won two back to back CSGOLotto games today on stream – $13,000 in total winnings 😂 😱 🙌 " (March 3, 2016 Instagram post by tmartn). (Exhibit F). Nowhere in his social media posts promoting CSGO Lotto did Martin disclose any connection between himself and CGSO Lotto.

14. Between January and June 2016, Cassell posted at least seven promotional videos showing himself gambling on CSGO Lotto, including ones with titles such as, "INSANE KNIFE BETS! (CS:GO Betting)," "CRAZY 6 KNIFE WIN!!! (CS:GO Betting)," and "ALL OR NOTHING! (CS:GO Betting)." (*See*, *e.g.*, Exhibits G – I). Cassell's videos promoting CSGO Lotto garnered more than 5.7 million views.

15. Nowhere in his videos promoting CSGO Lotto or in the videos' descriptions did Respondent Cassell disclose that he was an officer and owner of the company operating CSGO Lotto. In at least five of his videos promoting CSGO Lotto, Cassell did not mention any connection between himself and CSGO Lotto. Each of these videos' description boxes included the statement "This video is sponsored by CSGO Lotto!" The disclosure appeared in the description boxes "below the fold" where it would not be visible without consumers having to click on a link and perhaps scroll down.

16. Respondent Cassell disseminated tweets that promoted CSGO Lotto and did not disclose any connection between himself and CGSO Lotto. These tweets contained statements such as:

a. "CRAZY 6 KNIFE WIN!!! (CS:GO BETTING): [*YouTube link*] … OUR LUCK HAS CHANGED!!! 2016 IS THE YEAR OF THE KNIFZ! Site Used ► CSGO LOTTO: https://csgolotto.com Big thanks to Flux Pavilion for letting me use his music …" (January 2, 2016 tweet by @ProSyndicate) (Exhibit J);

b. "Bruh.. i've won like $8,000 worth of CS:GO Skins today on @CSGOLotto I cannot even believe it!" (March 30, 2016 tweet by @ProSyndicate) (Exhibit K);

c. "Not a bad way to start the day!" [*screen shot of Syndicate winning a betting pool worth over $2,100 on CSGO Lotto*] (March 31, 2016 tweet by @ProSyndicate) (Exhibit L)

d. "<3 @CSGOLotto" [*screen shot of Syndicate winning a betting pool worth over $1,100 on CSGO Lotto*] (April 20, 2016 tweet by @ProSyndicate) (Exhibit M); and

e. "I lied… I didn't turn $200 into $4,000 on @CSGOLotto…I turned it into $6,000!!!! csgolotto.com/duel-arena" [*screen shot of Syndicate winning a betting pool worth over $4,400 on CSGO Lotto*] (April 20, 2016 tweet by @ProSyndicate) (Exhibit N).

17. As described in Paragraphs 9 through 16, consumers who saw promotions of CSGO Lotto by Respondents Martin or Cassell were unlikely to learn of the connection between Martin or Cassell and CSGO Lotto. Even those who did learn of a sponsorship relationship with CSGO Lotto would not have learned that Martin and Cassell were officers and owners of the company operating CSGO Lotto and thus had a vested interest in the success of the service or that they were gambling with skins that were provided by that company.

18. Respondents used an "Influencer Program" to encourage certain online influencers "to post in their social media circles about their experiences in using" CSGO Lotto. Respondents contractually prohibited the influencers from making "statements, claims or representations … that would impair the name, reputation and goodwill of" CSGO Lotto.

19. Payments to influencers were in United States dollars, skins credits, or a combination of both and ranged from $2,500 to $55,000.

20. Participants in Respondents' influencer program included, among others: Albi Bytyqi, who operates the "SideArms4Reason" YouTube channel; Brennon O'Neil, who operates the "GoldGloveTV" YouTube channel; Joseph Rylott, who operates the "jahovaswitniss" YouTube channel; Lucas Watson, who operates the "KYRSP33DY" YouTube channel; Alan Widmann, who operates the "Hotted89" YouTube channel; Nathan "NBK" Schmitt, who operates a Twitch channel; and Edwin Castro, who operates a Twitch channel.

21. The influencers Respondents hired promoted CSGO Lotto on YouTube, Twitch, Twitter, and Facebook.

22. Numerous resulting YouTube videos of influencers gambling on CSGO Lotto did not include any sponsorship disclosure in the videos themselves and if they included sponsorship disclosures in the description boxes below the videos, they only did so "below the fold."

23. Numerous resulting social media posts by influencers promoting CSGO Lotto did not include any sponsorship disclosures. These include:

a. "LET'S GOOOO @CSGOLotto" [*screen shot of Hotted winning a betting pool worth over $4,100 on CSGO Lotto*] (April 13, 2016 tweet by @hotted89) (Exhibit O);

b. "25,000.00 @CSGOLotto COINFLIP!!! BIGGEST COINFLIP OF MY LIFE!! RT's appreciated ;) [*YouTube link*]" [*CSGO Lotto screen shot with*

"$24000 COINFLIP ON CSGOLOTTO" superimposed] (April 27, 2016 tweet by @hotted89) (Exhibit P);

c. "<3 @CSGOLotto" [*screen shot of jahova winning a betting pool worth over $500 on CSGO Lotto*] (April 22, 2016 tweet by @JahovasWitniss) (Exhibit Q);

d. "YES OMG @CSGOLotto" [*screen shot of SideArms winning a betting pool worth over $2,700 on CSGO Lotto*] (May 7, 2016 tweet by @Albi_SideArms) (Exhibit R);

e. "EZ $$$$$$$ bets $1,021…….WINS! @CSGOLotto http://twitch.tv.castro_1021 @twitch" [*screen shot of Castro1021 winning a betting pool worth over $2,000 on CSGO Lotto*] (May 9, 2016 tweet by @Castro1021) (Exhibit S);

f. "3 in a row :O @CSGOLotto <3" [*screen shot of jahova winning three consecutive CSGO Lotto betting pools*] (May 25, 2016 tweet by @JahovasWitniss) (Exhibit T);

g. "The 3% has happened! @CSGOLotto" [*screen shot of nickbunyun betting $158.91 and winning a betting pool worth over $4,800 on CSGO Lotto*] (May 29, 2016 tweet by @nickbunyun) (Exhibit U); and

h. "Stream is live at http://www.twitch.tv/nbk ! Ready to play FPL and fight you on @CSGOLotto 😎 " (May 31, 2016 tweet by @G2NBK) (Exhibit V).

24. In late-June 2016, it became publicly known that Respondents Martin and Cassell ran the company operating CSGO Lotto. Shortly after that public revelation and the resulting public reaction, in July 2016 CSGO Lotto ceased operations.

Count I
False Claim of Independent Reviews

25. Through the means described in Paragraphs 9 through 23, Respondents have represented, directly or indirectly, expressly or by implication, that videos of Trevor Martin, Thomas Cassell, and other influencers gambling on CSGO Lotto and their social media posts about CSGO Lotto reflected the independent opinions or experiences of impartial users of the service.

26. In truth and in fact, the videos of Trevor Martin, Thomas Cassell, and other influencers gambling on CSGO Lotto and the social media posts about CSGO Lotto did not reflect the independent opinions or experiences of impartial users of the service. Trevor Martin is the President and an owner of the company operating CSGO Lotto. Thomas Cassell is the Vice President and an owner of the company operating CSGO Lotto. The other influencers were paid to promote CSGO Lotto and were prohibited from impairing its reputation. Therefore, the representation set forth in Paragraph 25 was, and is, false and misleading.

Count II
Deceptive Failure to Disclose Endorsers Were Owners and Officers

27. Through the means described in Paragraphs 9 through 17, Respondents have represented, directly or indirectly, expressly or by implication, that videos of Trevor Martin and Thomas Cassell gambling on CSGO Lotto and their social media posts about CSGO Lotto reflected the opinions or experiences of individuals who had used the service. In numerous instances, Respondents failed to disclose or failed to disclose adequately that Trevor Martin and Thomas Cassell are owners and officers of the company operating CSGO Lotto. These facts would be material to consumers in their decisions regarding using CSGO Lotto. Respondents' failure to disclose or disclose adequately these facts, in light of the representation made, was, and is, a deceptive act or practice.

Count III
Deceptive Failure to Disclose Endorsers Were Paid

28. Through the means described in Paragraphs 18 through 23, Respondents have represented, directly or indirectly, expressly or by implication, that videos of influencers gambling on CSGO Lotto and the influencers' social media posts about CSGO Lotto reflect the opinions or experiences of individuals who had used the service. In numerous instances, Respondents have failed to disclose or failed to disclose adequately that the influencers received compensation, including monetary payment, to promote CSGO Lotto. These facts would be material to consumers in their decisions regarding using CSGO Lotto. Respondents' failure to disclose or disclose adequately these facts, in light of the representation made, was, and is, a deceptive act or practice.

Violations of Section 5

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

THEREFORE, the Federal Trade Commission this twenty-eighth day of November, 2017, has issued this Complaint against Respondents.

By the Commission.

Exhibit A

Trevor Martin video

HOW TO WIN $13,000 IN 5 MINUTES (CS-GO Betting)

Exhibit B

Trevor Martin video

$24,000 COIN FLIP (HUGE CSGO BETTING!) + Giveaway

Exhibit C

Trevor Martin video

HUGE WINS (And Losses) - CounterStrike Betting Challenge #2 (CSGO Skins)

Complaint Exhibit D

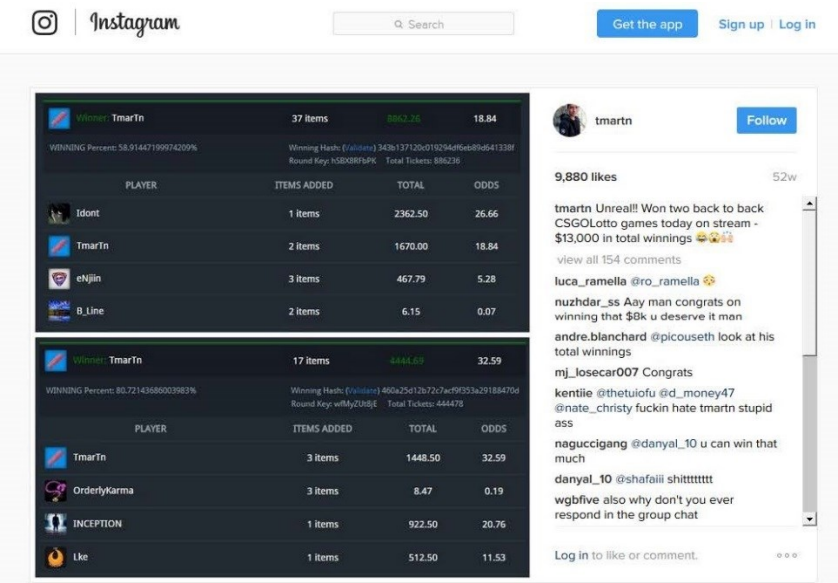
Trevor Martin video

**CS-GO Betting - Part 3
HUGE $1000+ COIN FLIP BET!
(Duel Arena Skin Gambling)**

Complaint

Exhibit E

Exhibit F



Complaint Exhibit G

Thomas Cassell video

INSANE KNIFE BETS! (CS:GO Betting)

Complaint Exhibit H

Thomas Cassell video

CRAZY 6 KNIFE WIN!!! (CS:GO Betting)

Complaint Exhibit I

Thomas Cassell video

ALL OR NOTHING! (CS:GO Betting)

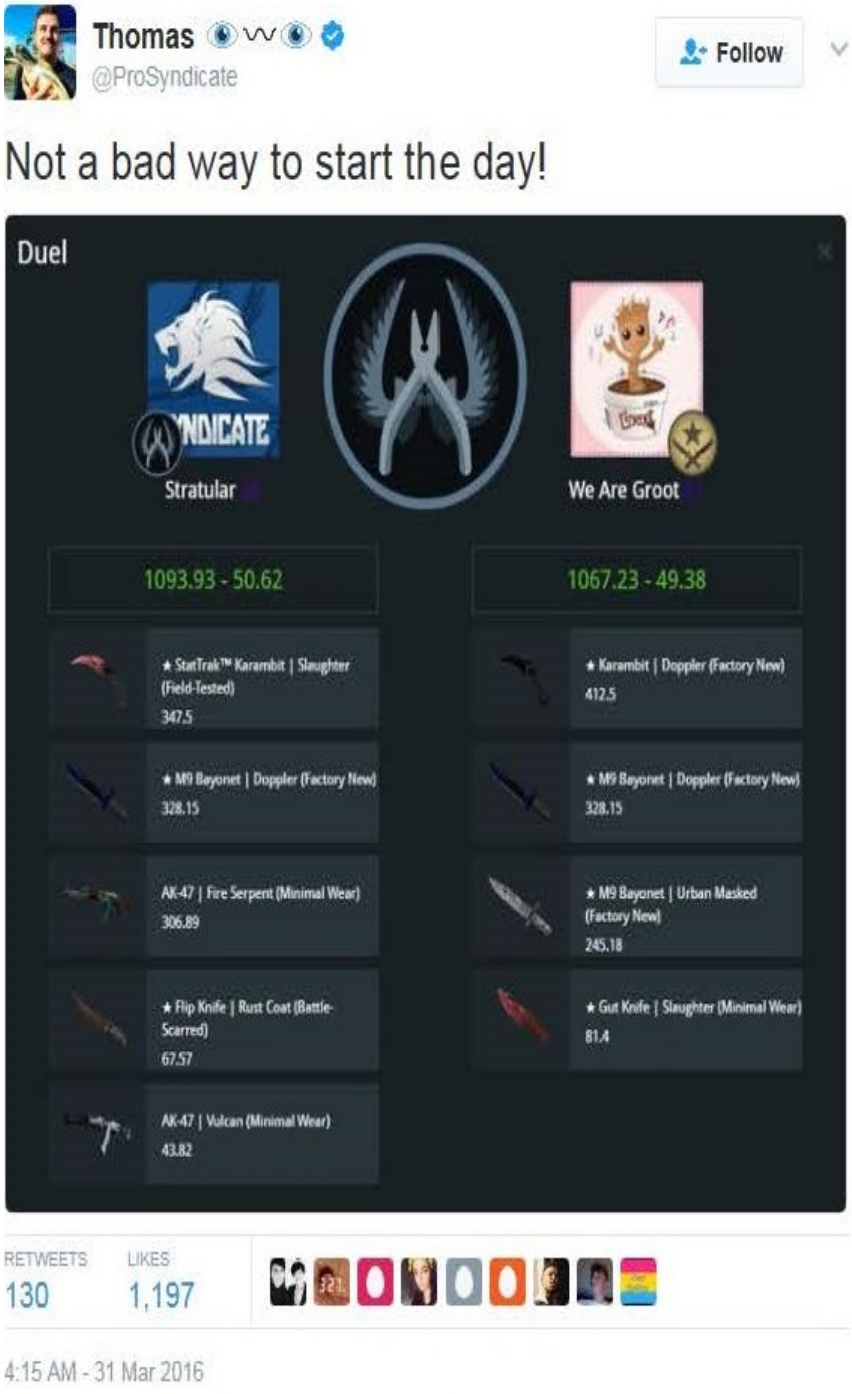
Complaint

Exhibit J

Exhibit K

Complaint

Exhibit L



Complaint

Exhibit M

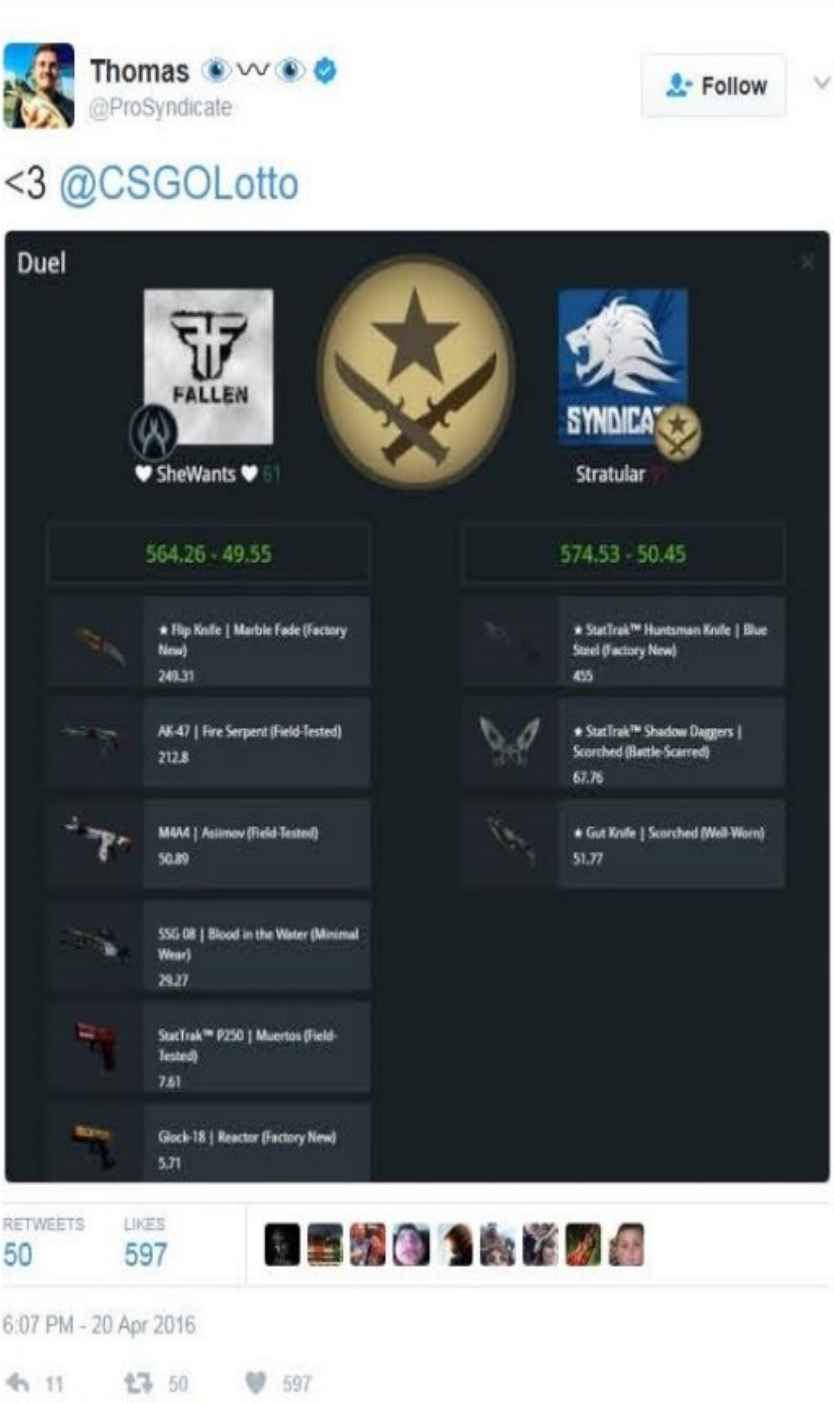


Exhibit N


Thomas
@ProSyndicate
Follow
I lied... I didn't turn $200 into $4,000 on @CSGOLotto... I turned it into $6,000!!!!
csgolotto.com/duel-arena
Duel
Twighsta
Stratular
2271.74 - 51.12
2172.62 - 48.88
★ StatTrak™ M9 Bayonet | Doppler (Minimal Wear)
868.75
★ StatTrak™ Bayonet | Doppler (Factory New)
562.5
★ Karambit | Doppler (Factory New)
442.5
★ Bowie Knife | Fade (Factory New)
397.99
★ StatTrak™ M9 Bayonet | Doppler (Minimal Wear)
868.75
★ Karambit | Doppler (Minimal Wear)
597.5
★ StatTrak™ Bayonet | Doppler (Factory New)
562.5
★ Butterfly Knife
143.87
RETWEETS
68
LIKES
574
6:26 PM - 20 Apr 2016

Complaint

Exhibit O

Complaint

Exhibit P

Exhibit Q

Exhibit R

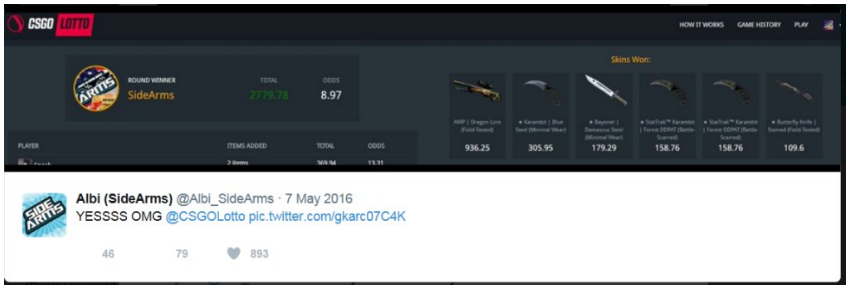


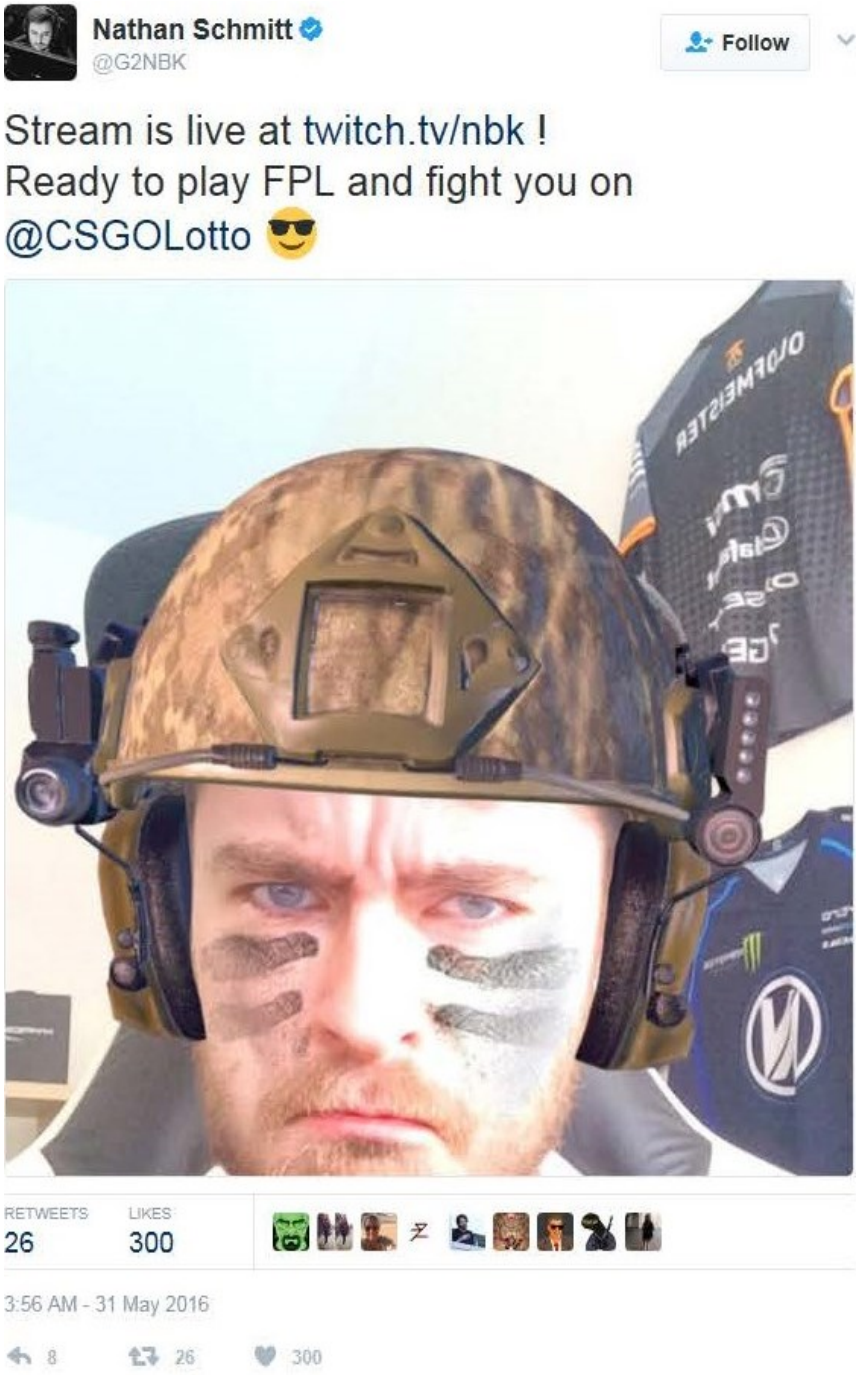
Exhibit S


Castro1021
@Castro1021
Follow
EZ $$$$$$$
bets $1,021.....WINS! @CSGOLotto
twitch.tv/castro_1021 @twitch
CONGRATULATIONS!
You are the winner of your duel with farting burrito!
You may collect your winnings here.
Trade request for winnings that are over 10 minutes old will be revoked.
Duel
BRUH.
Castro1021
farting burrito
1021.23 - 50.15
1015 - 49.85
★ M9 Bayonet | Fade (Factory New)
384.99
★ Falchion Knife | Fade (Factory New)
138.52
★ Bayonet | Stained (Field-Tested)
113.18
★ Bayonet | Rust Coat (Battle-Scarred)
109.24
★ Bayonet | Night (Field-Tested)
★ StatTrak™ M9 Bayonet | Doppler (Factory New)
507.5
★ StatTrak™ M9 Bayonet | Doppler (Factory New)
507.5

Exhibit T

Exhibit U

Exhibit V


Nathan Schmitt
@G2NBK
Follow
Stream is live at twitch.tv/nbk !
Ready to play FPL and fight you on
@CSGOLotto
RETWEETS
26
LIKES
300
3:56 AM - 31 May 2016
8
26
300

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondents named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondents a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondents with violation of the Federal Trade Commission Act.

Respondents and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondents that they neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, they admit the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondents are:

    a. Respondent CSGOLotto, Inc., a Florida corporation with its principal office or place of business at 6511 Vineland Road, Orlando, FL 32819.

b. Respondent Trevor Martin, also known as TmarTn, the President and a 42.5% owner of CSGOLotto, Inc. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of CSGOLotto, Inc. His principal office or place of business is the same as that of CSGOLotto, Inc.

c. Respondent Thomas Cassell, also known as TheSyndicateProject, Tom Syndicate, and Syndicate, is the Vice President and a 42.5% owner of CSGOLotto, Inc. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of CSGOLotto, Inc.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Clearly and conspicuously" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.

6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

7 The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

8. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

B. "Close proximity" means that the disclosure is very near the triggering representation. For example, a disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering representation.

C. "Respondents" means the Corporate Respondent and the Individual Respondents, individually, collectively, or in any combination.

1. "Corporate Respondent" means CSGOLotto, Inc., a corporation, and its successors and assigns.

2. "Individual Respondents" means Trevor Martin, also known as TmarTn, and Thomas Cassell, also known as TheSyndicateProject, Tom Syndicate, and Syndicate.

D. "Unexpected material connection" means any relationship that might materially affect the weight or credibility of a testimonial or endorsement and that would not reasonably be expected by consumers.

Provisions

I. Misrepresentation of Independence

IT IS ORDERED that Respondents, and Respondents' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, or sale of any product or service must not make any misrepresentation, expressly or by implication, that an endorser of such product or service is an independent user or ordinary consumer of the product or service.

II. Required Disclosure of Material Connections

IT IS FURTHER ORDERED that Respondents, and Respondents' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, or sale of any product or service must not make any representation, expressly or by implication, about any consumer or other endorser of such product or service without disclosing, clearly and conspicuously, and in close proximity to that

representation, any unexpected material connection between such endorser and (1) any Respondent; (2) any other individual or entity affiliated with the product or service; or (3) the product or service.

III. Monitoring of Endorsers

IT IS FURTHER ORDERED that Respondents, and Respondents' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, or sale of any product or service by means of an endorsement by an endorser with a material connection to (1) any Respondent, (2) any other individual or entity affiliated with the product or service, or (3) the product or service, must take steps sufficient to ensure compliance with Provisions I and II of this Order. Such steps shall include, at a minimum:

A. Providing each such endorser with a clear statement of his or her responsibilities to disclose clearly and conspicuously, and in close proximity to the endorsement, in any online video, social media posting, or other communication endorsing the product or service, the endorser's unexpected material connection to any Respondent, any other individual or entity affiliated with the product or service, or the product or service, and obtaining from each such endorser a signed and dated statement acknowledging receipt of that statement and expressly agreeing to comply with it;

B. Establishing, implementing, and thereafter maintaining a system to monitor and review the representations and disclosures of endorsers with material connections to any Respondent, any other individual or entity affiliated with the product or service, or the product or service, to ensure compliance with Provisions I and II of this Order. The system shall include, at a minimum, monitoring and reviewing the endorsers' online videos and social media postings;

C. Immediately terminating and ceasing payment to any endorser with a material connection to any Respondent, any other individual or entity affiliated with the product or service, or the product or service, who Respondents reasonably conclude:

1. Has misrepresented, in any manner, his or her independence or impartiality; or

2. Has failed to disclose, clearly and conspicuously, and in close proximity to the endorsement, an unexpected material connection between such endorser and any Respondent, any other individual or entity affiliated with the product or service, or the product or service.

Provided, however, that Respondents may provide an endorser with notice of failure to adequately disclose and an opportunity to cure the disclosure prior to terminating the endorser if Respondents reasonably conclude that the failure to adequately disclose was inadvertent. Respondents shall inform any endorser to whom they have provided a notice of a failure to adequately disclose an unexpected material connection that any subsequent failure to adequately disclose will result in immediate termination; and

D. Creating reports showing the results of the monitoring required by sub-provision B of this Provision of the Order.

IV. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondents obtain acknowledgments of receipt of this Order:

A. Each Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 5 years after the issuance date of this Order, each Individual Respondent for any business that such

Respondent, individually or collectively with any other Respondents, is the majority owner or controls directly or indirectly, and Corporate Respondent, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Respondent delivered a copy of this Order, that Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

V. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondents make timely submissions to the Commission:

A. One year after the issuance date of this Order, each Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Each Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of that Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Respondent (which Individual Respondents must describe if they know or should know due to their

own involvement); (d) describe in detail whether and how that Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, each Individual Respondent must: (a) identify all his telephone numbers and all his physical, postal, email and Internet addresses, including all residences; (b) identify all his business activities, including any business for which such Respondent performs services whether as an employee or otherwise and any entity in which such Respondent has any ownership interest; and (c) describe in detail such Respondent's involvement in each such business activity, including title, role, responsibilities, participation, authority, control, and any ownership.

B. For 10 years after the issuance date of this Order, each Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Respondent must submit notice of any change in: (a) any designated point of contact; or (b) the structure of Corporate Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, each Individual Respondent must submit notice of any change in: (a) name, including alias or fictitious name, or residence

address; or (b) title or role in any business activity, including (i) any business for which such Respondent performs services whether as an employee or otherwise and (ii) any entity in which such Respondent has any ownership interest and over which Respondents have direct or indirect control. For each such business activity, also identify its name, physical address, and any Internet address.

C. Each Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re CSGOLotto, Inc.

VI. Recordkeeping

IT IS FURTHER ORDERED that Respondents must create certain records for 10 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Corporate Respondent and each Individual Respondent for any business that such Respondent, individually

or collectively with any other Respondents, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold, the costs incurred in generating those revenues, and resulting net profit or loss;

B. personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. copies or records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. all records necessary to demonstrate full compliance with each Provision of this Order, including all submissions to the Commission and the reports required pursuant to the Provision titled Monitoring of Endorsers;

E. a copy of each unique advertisement or other marketing material making a representation subject to this Order; and

F. for 5 years from the date created or received, all records, whether prepared by or on behalf of Respondents, that tend to show any lack of compliance by Respondents with this Order.

VII. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondents' compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, each Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with each Respondent. Respondents must permit representatives of the Commission to interview anyone affiliated with any Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondents or any individual or entity affiliated with Respondents, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning Individual Respondents, pursuant to Section 604(2) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(2).

VIII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on November 28, 2037, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 20 years;

B. This Order's application to any Respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from CSGOLotto, Inc., Trevor Martin ("Martin"), and Thomas Cassell ("Cassell") (collectively "respondents").

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

Analysis to Aid Public Comment

This matter involves respondents' advertising for their website, www.csgolotto.com ("CSGO Lotto"), which offered consumers the opportunity to gamble using what is in effect a virtual currency. The complaint alleges that respondents violated Section 5(a) of the FTC Act by misrepresenting that videos of Martin, Cassell, and other influencers gambling on CSGO Lotto and their social media posts about CSGO Lotto reflected the independent opinions or experiences of impartial users of the service. According to the complaint, Martin is the President, Cassell is the Vice President, and both are owners of the company operating CSGO Lotto, and the other influencers were paid to promote CSGO Lotto and were prohibited from impairing its reputation. The complaint further alleges that respondents deceptively failed to disclose that Martin and Cassell were owners and officers of the company operating CSGO Lotto and that other influencers received compensation, including monetary payment, to promote CSGO Lotto.

The order includes injunctive relief to address these alleged violations and fences in similar and related violations.

Provision I prohibits respondents, in connection with the sale of any product or service, from misrepresenting that any endorser of such product or service is an independent user or ordinary consumer of the product or service.

Provision II prohibits respondents from making any representation about any consumer or other endorser of a product or service without disclosing, clearly and conspicuously, and in close proximity to that representation, any unexpected material connection between the consumer or endorser and (1) any respondent, (2) any other individual or entity affiliated with the product or service, or (3) the product or service ("relevant material connections"). The order defines "clearly and conspicuously" as the term applies to the required disclosures.

Provision III sets out certain monitoring and compliance obligations to ensure that when respondents advertise or promote any product or service through endorsers with relevant material connections, the endorsers comply with Provisions I and II of the order. These obligations include: obtaining signed acknowledgements from such endorsers that they will disclose

their relevant material connections; monitoring the endorsers' representations and disclosures; maintaining records of monitoring efforts; and, under certain circumstances, terminating and ceasing payment to endorsers who misrepresent their independence or fail to properly disclose a relevant material connection.

Provision IV mandates that respondents acknowledge receipt of the order, distribute the order to principals, officers, and certain employees and agents, and obtain signed acknowledgments from them. **Provision V** requires that respondents submit compliance reports to the FTC one year after the order's issuance and submit notifications when certain events occur. **Provision VI** requires that for ten years respondents must create and retain certain records. **Provision VII** provides for the FTC's continued compliance monitoring of respondent's activity during the order's effective dates. **Provision VIII** provides the effective dates of the order, including that, with exceptions, the order will terminate in 20 years.

The purpose of this analysis is to facilitate public comment on the order, and it is not intended to constitute an official interpretation of the complaint or order, or to modify the order's terms in any way.

Complaint

IN THE MATTER OF

MARS, INCORPORATED
AND
VCA INC.

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

Docket No. C-4633; File No. 171 0057
Complaint, November 30, 2017– Decision, November 30, 2017

This consent order addresses the $9.1 billion acquisition by Mars, Incorporated of certain assets of VCA Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the markets for certain specialty and emergency veterinary services in ten different localities in the United States. Under the order, Mars is required to divest twelve clinics.

Participants

For the *Commission*: *Michael R. Barnett* and *David J. Gonen.*

For the *Respondents*: *Clifford H. Aronson* and *Michael J. Sheerin, Skadden, Arps, Slate, Meagher & Flom LLP; William Diaz, McDermott, Will & Emery; Paul B. Hewitt* and *Corey W. Roush, Akin Gump Strauss Hauer & Feld LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Mars, Incorporated ("Mars"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent VCA Inc. ("VCA"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof

would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Mars is a private corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters at 6885 Elm St, McLean, VA 22101.

2. Respondent VCA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters at 12401 West Olympic Blvd., Los Angeles, CA 90064.

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 announced January 9, 2017, Mars proposes to acquire all of the assets of VCA in a transaction valued at approximately $9.1 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 lines of commerce in which to analyze the effects of the Acquisition are off-hours emergency and individual specialty veterinary services. Specialty veterinary services are required in cases that cannot be treated properly by a general practitioner veterinarian. General practitioner veterinarians commonly refer such cases to a specialist, typically a doctor of veterinary medicine board certified in the required specialty. Individual veterinary specialties include cardiology, critical care, internal medicine, neurology, oncology, ophthalmology, and surgery. Emergency veterinary services are used in acute

situations in which a general practice veterinarian is not available or in some cases not properly trained or equipped to treat an animal's medical problem. Mars and VCA both provide specialty and off-hours emergency veterinary services in facilities operated across the United States.

6. For the purposes of this Complaint, the relevant areas in which to assess the competitive effects of the Acquisition are local, delineated by the distance and time that pet owners travel to receive treatment. The specific relevant service or services differ by local geographic area. The localities and relevant services at issue in each locality, are:

a. Oncology in western suburbs of Chicago, IL;

b. Emergency in Corpus Christi, TX;

c. Critical Care, Emergency, Internal Medicine, and Surgery in Kansas City, MO;

d. Critical Care and Emergency in Mesa, AZ;

e. Critical Care and Oncology in northern New York City, NY and its northern suburbs;

f. Critical Care, Internal Medicine, Neurology, Oncology, and Ophthalmology in Portland, OR;

g. Emergency, Internal Medicine, and Oncology in Rockville, MD;

h. Emergency in San Antonio, TX;

i. Cardiology, Critical Care, Emergency, Internal Medicine, and Neurology in Seattle, WA; and

j. Emergency, Internal Medicine, Oncology, and Ophthalmology in Vienna, VA.

IV. THE STRUCTURE OF THE MARKETS

7. In each locality listed in Paragraph 6 above, the market for each relevant service indicated is highly concentrated. In a number of these markets, the combined firm would be the only provider following the transaction. In other markets, a limited number of alternatives to the combined firm would remain following the transaction. Thus, the Acquisition would substantially increase concentration within the described localities.

V. ENTRY CONDITIONS

8. 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. For de novo entrants, obtaining financing to build a new specialty or emergency veterinary facility and acquiring or leasing necessary equipment can be expensive and time consuming. The investment is risky for specialists that do not have established practices and bases of referrals in the area. Further, extensive education and training, beyond that required to become a general practitioner veterinarian, is required to become a licensed veterinary specialist. Consequently, specialists are in short supply, and recruiting them to move to a new area often takes more than two years, making timely expansion by existing specialty clinics difficult.

VI. EFFECTS OF THE ACQUISITION

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

a. eliminating head-to-head competition between Mars and VCA in the provision of specialty and emergency veterinary services;

b. increasing the likelihood that Mars would unilaterally exercise market power; and

c. increasing the likelihood that customers would be forced to pay higher prices or experience a degradation in quality for the relevant services.

VII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirtieth day of November, 2017 issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Respondent VCA Inc. ("VCA"), by Respondent Mars, Incorporated ("Mars"), 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 accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, and having revised the Decision and Order in certain respects, now in further conformity with Commission Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Mars 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 6885 Elm Street, McLean, Virginia, 22101.

2. Respondent VCA 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 12401 West Olympic Boulevard, Los Angeles, California, 90064.

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

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply and all other definitions used in the Hold Separate Order, shall apply:

A. "Mars" means Mars Incorporated, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Mars, including Banfield Pet Hospital, BluePearl and Pet Partners, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the date the Acquisition is completed, "Mars" includes VCA.

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

C. "Acquirer" means each Person approved by the Commission to acquire the Divestiture Assets pursuant to this Order.

D. "Acquisition" means the acquisition by Mars of VCA, as described in, and contemplated by, the Agreement and Plan of Merger dated January 7, 2017.

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

F. "Business Records" means all information, books and records, documents, files, correspondence, manuals, computer printouts, databases, and other documents, including all hard copies and electronic records wherever stored, including without limitation, client and customer lists, patient and payor information,

referral sources, research and development reports, production reports, service and warranty records, maintenance logs, equipment logs, operating guides and manuals, documents relating to policies and procedures, financial and accounting records and documents, creative materials, advertising materials, promotional materials, studies, reports, correspondence, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses, customer lists, customer contracts, employee lists and contracts, salaries and benefits information, physician lists and contracts, supplier lists and contracts, and, subject to legal requirements, copies of all personnel files.

G. "Clinic Assets" means all of Respondents' rights, title, and interest in all property and assets, tangible or intangible, of whatever nature and wherever located, relating to or used in connection with the Emergency Veterinary Clinic or Specialty Veterinary Clinic of the Divestiture Clinics, including, without limitation, all:

1. Real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee), wherever located, including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;

2. Tangible Personal Property, including, without limitation, any Tangible Personal Property removed from and not replaced at the Divestiture Clinics, if such property was used by or in connection with the provision of Specialty Veterinarian services at the Divestiture Clinics on or after June 1, 2017;

3. Rights under any and all contracts and agreements (e.g., leases, service agreements such as supply agreements, procurement contracts), including, but

not limited to, contracts and agreements with physicians and other veterinary health care providers and support staff, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consigners, and consignees;

4. Rights and title in and to use the name or part of the name of the Divestiture Clinic on a permanent and exclusive basis (even as to Respondents); *provided, however*, that Acquirer shall not have the right to use Mars and VCA trademarks, trade names, or logos; *provided further, however*, that the Acquirer of the BluePearl Hope Advanced Veterinary Center, located at 140 Park Street, SE, Vienna, VA 22180, shall have the exclusive right as to the Respondents to use, after a transition period, "Hope" in any veterinary clinic name – specialty or otherwise – in the Relevant Notice Area that includes the BluePearl Hope Advanced Veterinary Center in Vienna, VA.

5. Intellectual Property;

6. Intangible rights and property other than Intellectual Property, including, going concern value, goodwill, internet, telecopy and telephone numbers, domain names, listings, and web sites, *provided, however*, intangible rights do not include domain names, and web sites;

7. Approvals, consents, licenses, certificates, registrations, permits, waivers, or other authorizations issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefore or renewals thereof, to the extent assignable;

8. All consumable or disposable inventory kept in the normal course of business, including, but not

limited to, janitorial, office, and medical supplies, and pharmaceuticals;

9. Accounts receivable;

10. Rights under warranties and guarantees, express or implied; and

11. Business Records.

Provided, however, that Respondents may retain a copy of Business Records to the extent necessary to comply with applicable law, regulations, and other legal requirements.

H. "Closing Date" means the date on which each divestiture required by this Order is completed.

I. "Commission" means the Federal Trade Commission.

J. "Confidential Business Information" means information not in the public domain that is related to or used in connection with the Divestiture Clinics, 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, pricing information, marketing methods, market intelligence, competitor information, commercial information, management system information, business processes and practices, bidding practices and information, procurement practices and information, supplier qualification and approval practices and information, and training practices.

K. "Direct Cost" means cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide Transitional Services. "Direct Cost" to an Acquirer for its use of any of Respondents' employees' labor shall not exceed the then-current average wage rate for such employee, including benefits.

L. "Divestiture Clinics" means the following Emergency Veterinary Clinics or Specialty Veterinary Clinics owned and operated by Respondents:

1. VCA Mission Animal Referral and Emergency Center, located at 5914 Johnson Drive, Mission, KS 66202;

2. BluePearl Emergency Animal Clinic, located at 86 West Juniper Avenue, Gilbert, AZ 85233;

3. VCA Animal Specialty Center, located at 9 Odell Plaza, Yonkers, NY 10101;

4. VCA Veterinary Referral Associates, located at 500 Perry Parkway, Gaithersburg, MD 20877;

5. BluePearl Hope Advanced Veterinary Center, located at 140 Park Street, SE, Vienna, VA 22180;

6. BluePearl Columbia River Veterinary Specialist, located at 6607 NE 84th Street, Suite 109, Vancouver, WA 98665;

7. BluePearl Cascade Veterinary Referral Center, located at 11140 SW 68th Parkway, Tigard, OR 97223;

8. BluePearl Emergency Pet Clinic, located at 1502 Airline Road, #220, Corpus Christi, TX 78412;

9. Blue-Pearl Emergency Pet Center, located at 8503 Broadway Street, #105, San Antonio, TX 78217;

10. BluePearl Emergency Pet Hospital, located at 1050 Bonaventura Drive, Elk Grove Village, IL 60007;

11. VCA Veterinary Specialty Center of Seattle, located at 20115 44th Avenue W, Lynwood, WA 98036; and

12. VCA Alpine Animal Hospital, located at 888 NW Sammamish Road, Issaquah, WA 98027.

M. "Divestiture Package A" means the following Divestiture Clinics owned and operated by Respondents:

1. VCA Mission Animal Referral and Emergency Center, located at 5914 Johnson Drive, Mission, KS 66202;

2. BluePearl Emergency Animal Clinic, located at 86 West Juniper Avenue, Gilbert, AZ 85233; and

3. VCA Animal Specialty Center, New York, located at 9 Odell Plaza, Yonkers, NY 10101.

N. "Divestiture Package B" means the following Divestiture Clinics owned and operated by Respondents:

1. VCA Veterinary Referral Associates, located at 500 Perry Parkway, Gaithersburg, MD 20877;

2. BluePearl Hope Advanced Veterinary Center, located at 140 Park Street, SE, Vienna, VA 22180;

3. BluePearl Columbia River Veterinary Specialist, located at 6607 NE 84th Street, Suite 109, Vancouver, WA 98665; and

4. BluePearl Cascade Veterinary Referral Center, located at 11140 SW 68th Parkway, Tigard, OR 97223.

O. "Divestiture Package C" means the following Divestiture Clinics owned and operated by Respondents:

1. BluePearl Emergency Pet Clinic, located at 1502 Airline Road, #220, Corpus Christi, TX 78412;

2. Blue-Pearl Emergency Pet Center, located at 8503 Broadway Street, #105, San Antonio, TX 78217;

3. BluePearl Emergency Pet Hospital, located at 1050 Bonaventura Drive, Elk Grove Village, IL 60007;

4. VCA Veterinary Specialty Center of Seattle, located at 20115 44th Avenue W, Lynwood, WA 98036; and

5. VCA Alpine Animal Hospital, located at 888 NW Sammamish Road, Issaquah, WA 98027.

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

Q. "Emergency Veterinary Clinic" means a veterinary clinic that offers 24-hour or overnight service with the primary function of receiving, treating, and monitoring of emergency patients during its specified hours of operation. A veterinarian is in attendance at all hours of operation and sufficient staff is available to provide timely and appropriate care. Veterinarians, support staff, instrumentation, medications, and supplies must be sufficient to provide an appropriate level of emergency care.

R. "Government Approvals" means any permissions or sanctions issued by any government or governmental organization, including, but not limited to, licenses, permits, accreditations, authorizations, registrations, certifications, certificates of occupancy, and certificates of need.

S. "Intellectual Property" means, without limitation, all:

1. Patents, patent applications, and inventions and discoveries that may be patentable;

2. Know-how, trade secrets, software, technical information, data, registrations, applications for Governmental Approvals, inventions, processes,

best practices (including clinical pathways), formulae, protocols, standards, methods, techniques, designs, quality control practices and information, research and test procedures and information, and safety, environmental and health practices and information;

3. Confidential or proprietary information, commercial information, management systems, business processes and practices, customer lists, customer information, customer records and files, customer communications, procurement practices and information, supplier qualification and approval practices and information, training materials, sales and marketing materials, customer support materials, advertising and promotional materials; and

4. Rights in any jurisdiction to limit the use or disclosure of any of the foregoing, and rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.

Provided, however, that Intellectual Property shall not include Mars and VCA trademarks, trade names, or logos.

T. "Monitor" means the person appointed as Monitor in this Order.

U. "NVA" means National Veterinary Associates, Inc., a Delaware corporation, with its office and principal place of business located at 29229 Canwood Street #100, Agoura Hills, CA 91301.

V. "NVA Divestiture Agreements" means the Divestiture Agreements by and among VCA, BluePearl, Animal Care Specialists, and NVA, dated July 21, 2017, and July 24, 2017, and all attachments and exhibits, thereto, attached as Non-Public Appendix D to this Order.

W. "Pathway" means Pathway Partners Vet Management Company, LLC, a Delaware limited liability company, with its office and principal place of business located at 4225 Guadalupe St, Austin, TX 78751.

X. "Pathway Divestiture Agreement" means the Divestiture Agreement by and among VCA, BluePearl, and Pathway, dated July 24, 2017, and all attachments and exhibits, thereto, attached as Non-Public Appendix E to this Order.

Y. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity or governmental body.

Z. "PetVet" means PetVet Care Centers, a Delaware limited liability company, with its main office and principal place of business located at One Gorham Island, Westport, CT, 06880.

AA. "PetVet Divestiture Agreement" means the Divestiture Agreement by and among VCA, BluePearl, and PetVet, dated July 22, 2017, and all attachments and exhibits, thereto, attached as Non-Public Appendix F to this Order.

BB. "Relevant Notice Area" means the areas identified in Non-Public Appendix A to this Order.

CC. "Relevant Employees" means any and all full-time employees, part-time employees, or contract employees, who work or worked at the Divestiture Clinics at any time during the ninety (90) days preceding the date the Acquisition is completed or at any time after the date the Acquisition is completed, and whose duties relate or related to the Divestiture Clinic.

DD. "Remedial Agreement" means the following:

1. The NVA Divestiture Agreements;

2. The PetVet Divestiture Agreement;

3. The Pathway Divestiture Agreement; and

4. Any agreement between a Respondent and an Acquirer, including all amendments, exhibits, attachments, and schedules thereto, relating to a Divestiture Clinic or Clinic Assets, that has been approved by the Commission to accomplish the requirements of this Order.

EE. "Respondents" means Mars and VCA, collectively or individually.

FF. "Specialty Veterinarian" means a veterinarian who (i) legally holds himself or herself out as a specialist in veterinary medicine, and (ii) has board certification, in one, or more, of the following specialties: cardiology, emergency and critical care, internal medicine, neurology, oncology, ophthalmology, or surgery.

GG. "Specialty Veterinary Clinic" means a clinic where Specialty Veterinarians practice, including the Clinic Assets.

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

II. "Third Parties" means Persons other than Respondents or the Acquirer(s).

JJ. "Transitional Administrative Services" means administrative assistance with respect to the Divestiture Clinics, including, but not limited to,

assistance relating to billing, accounting, governmental regulation, human resources management, information systems, and purchasing, as well as providing assistance in acquiring and obtaining access to all software used in the provision of such services.

KK. "Transitional Clinical Services" means clinical assistance and support services with respect to the Divestiture Clinics.

LL. "Transitional Services" means Transitional Administrative Services and Transitional Clinical Services.

II.

IT IS FURTHER ORDERED that:

A. Respondents shall, within ten (10) business days after the Acquisition Date, absolutely, and in good faith, divest (i) Divestiture Package A to NVA, including all Clinic Assets related to those clinics pursuant to and in accordance with the NVA Divestiture Agreements; (ii) Divestiture Package B to PetVet, including all Clinic Assets related to those clinics pursuant to and in accordance with the PetVet Divestiture Agreement; and (iii) Divestiture Package C to Pathway, including all Clinic Assets related to those clinics pursuant to and in accordance with the Pathway Divestiture Agreement, absolutely, and in good faith, as on-going businesses. Any failure by Respondents to comply with a Remedial Agreement shall constitute a failure to comply with this Order. The Remedial Agreements shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of an Acquirer, or any obligations of Respondents, under the Remedial Agreements.

Provided, however, if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that NVA, PetVet, or Pathway is

not an acceptable Acquirer then, after receipt of such written notification: (1) Respondents shall immediately notify the unacceptable Acquirer of the notice received from the Commission and shall as soon as practicable, but no later than within five (5) business days, effect the rescission of the relevant Divestiture Agreement; and (2) Respondents shall, within six (6) months of the date Respondents receive notice of such determination from the Commission, divest the unacceptable Divestiture Clinics and Clinic Assets, as applicable, absolutely and in good faith, at no minimum price, as on-going businesses to an Acquirer or Acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

Provided further, however, that if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which any of the divestitures accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture including, but not limited to, entering into additional agreements or arrangements, as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Respondent Mars shall not acquire Respondent VCA until it has obtained for all the Divestiture Clinics:

1. All approvals for the assignment to each Acquirer of the rights, title, and interest to each lease for real property of each Divestiture Clinic; and

2. Any and all Governmental Approvals necessary for each Acquirer to operate each Divestiture Clinic as of the Closing Date of such Divestiture Clinic in substantially the same manner as the applicable Respondent operated such Divestiture Clinic immediately prior to such closing.

C. Respondents:

1. Shall not disclose Confidential Business Information relating exclusively to any of the Divestiture Clinics to any Person other than the Acquirer of such Divestiture Clinic; and

2. After the Closing Date of such Divestiture Clinic:

a. Shall not use Confidential Business Information relating exclusively to any of the Divestiture Clinics for any purpose other than for complying with the terms of this Order, for complying with any law, or for the purposes of billing and collections, quality incentive program performance management, patient outcomes, peer review and physician credentialing activities, or responding to any inquiry or action from a third party required by law; and

b. Shall destroy all records of Confidential Business Information relating exclusively to any of the Divestiture Clinics, except to the extent that: (i) Respondents are required by law to retain such information, and (ii) Respondents' inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of Mars or VCA, respectively.

D. From the date Respondents sign the Consent Agreement until the Closing Date, Respondents shall:

1. Maintain each of the Divestiture Clinics and all Clinic Assets in substantially the same condition (except for normal wear and tear) as they existed at the time Respondents sign the Consent Agreement;

2. Take such actions that are consistent with the past practices of Respondents in connection with each Divestiture Clinic and all the Clinic Assets, and

that are taken in the ordinary course of business and in the normal day-to-day operations of the Divestiture Clinics;

3. Keep available the services of the current officers, employees, and agents of Respondents; and maintain the relations and goodwill with suppliers, veterinarians, landlords, patients, employees, agents, and others having business relations with the Divestiture Clinics and the Clinic Assets; and

4. Preserve the Divestiture Clinics and Clinic Assets as ongoing businesses and not take any affirmative action, or fail to take any action within Respondents' control, as a result of which the viability, competitiveness, and marketability of the Divestiture Clinics and Clinic Assets would be diminished.

5. The purposes of this Paragraph II.D. are to: (1) preserve the Divestiture Clinics as viable, competitive, and ongoing businesses until the Closing Date, (2) prevent interim harm to competition pending the relevant divestitures and other relief, and (3) help remedy any anticompetitive effects of the Acquisition as alleged in the Commission's Complaint.

E. The purpose of the divestiture is to ensure the continuation of the Divestiture Clinics as ongoing viable businesses engaged in the same business in which the assets were engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in this matter.

III.

IT IS FURTHER ORDERED that Respondents:

A. Shall, no later than ten (10) days after a request from an Acquirer, provide the Acquirer with the following information for each Relevant Employee, and, to the extent known and applicable, each independent contractor who has worked at a Divestiture Clinic since January 1, 2017, as and to the extent permitted by law (unless such information has already been provided):

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 Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Relevant Employee.

B. Shall, within a reasonable time after a request from an Acquirer, provide to the Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Relevant Employees, and to make

offers of employment to any one or more of the Relevant Employees.

C. Shall not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Relevant Employees, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Relevant Employee by 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 Relevant Employees; or

2. Hire Relevant Employees 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 Relevant Employee 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.

D. Shall remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with an 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 an Acquirer, and shall not make any counteroffer to a Relevant Employee who receives a written offer of employment from an 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.

E. Shall provide reasonable financial incentives for Relevant Employees, as identified by Respondents and any Acquirer, to continue in their positions. Such incentives may include, but are not limited to, guaranteeing a retention bonus for the Specialty Veterinarians at the Divestiture Clinics to assure their continued employment at such clinic, a continuation of all employee benefits, including the funding of regularly scheduled raises and bonuses, and the vesting of pension benefits (as permitted by law and for those Relevant Employees covered by a pension plan), offered by Respondents.

F. Shall not, for a period of one (1) year following the Closing Date of the particular Divestiture Clinic, hire a Specialty Veterinarian to work at any of Respondent Mars' veterinary clinics in the Relevant Notice Areas of that Divestiture Clinic. This paragraph applies to any Specialty Veterinarian who was, has been, or is working at the particular Divestiture Clinic since the date the Order was issued.

Provided, however, Respondent Mars may offer part-time contract hours to a Specialty Veterinarian at a Divestiture Clinic who has been working as a part-time contract Specialty Veterinarian for Respondent Mars or VCA in the Relevant Notice Areas of that Divestiture Clinic, if the part-time contract hours offered by Respondent Mars would not, in any way, interfere with the Specialty Veterinarian's ability to fulfill his or her employment responsibilities to the Acquirer.

G. Shall not, for a period of two (2) years following the Closing Date of any Divestiture Clinic, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees who have accepted offers of employment with an 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 Relevant Employees; or

2. Hire Relevant Employees 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 Relevant Employee if an 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, at the request of an Acquirer, for a period not to exceed twelve (12) months, or as otherwise approved by the Commission, and in a manner (including pursuant to an agreement) that receives the prior approval of the Commission:

A. Respondents shall provide Transitional Services to the Acquirer or Acquirers sufficient to enable the Acquirer or Acquirers to operate the Divestiture Clinics, and to provide Specialty Veterinary services at the Divestiture Clinic in substantially the same manner that Respondents have operated such facility and provided such services at such Clinic; and

B. Respondents shall provide the Transitional Services required by this Paragraph at substantially the same

level and quality as such services are provided by Respondents at the Divestiture Clinics.

Provided, however, that Respondents shall not (i) require any Acquirer to pay compensation for Transitional Services that exceeds the Direct Cost of providing such goods and services, or (ii) terminate its obligation to provide Transitional Services because of a material breach by the Acquirer of any agreement to provide such assistance unless Respondents are unable to provide such services due to such material breach.

V.

IT IS FURTHER ORDERED that:

A. Thomas Carpenter shall be appointed Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Order.

B. No later than one (1) day after the Acquisition Date, Respondents shall, pursuant to the Monitor Agreement, attached as Appendix B and Non-Public Appendix C (Compensation) to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of this Order.

C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Mars, which consent shall not be unreasonably withheld. If Mars has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Mars of the identity of any proposed Monitor, Mars shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Mars shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor

all the rights and powers necessary to permit the Monitor to monitor Respondent's compliance with the terms of this Order and the Remedial Agreements in a manner consistent with the purposes of this Order.

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

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

   a. Assuring that Respondents expeditiously comply with all obligations and perform all responsibilities as required by this Order, and the Remedial Agreements;

   b. Monitoring any transition services agreements; and

   c. Assuring that Confidential Business Information is not received or used by Respondents or the Acquirers, except as allowed in this Order.

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

3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of this Order and the Remedial Agreements.

4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books,

documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under this Order and the Remedial Agreements. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order and the Remedial Agreements.

5. The Monitor shall serve, without bond or other security, at the expense of Mars on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Mars, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

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

7. Mars shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the

reports submitted to the Monitor by Mars, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under this Order and the Remedial Agreements.

8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order, and the Remedial Agreements.

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

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

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

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

H. A Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to this Order.

VI.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations imposed by Paragraphs II of this Order, the Commission may appoint a Divestiture Trustee to divest any remaining Divestiture Clinics, and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, and stated in writing their reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestitures required by, and satisfy the additional obligations imposed 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 effectuate the divestitures required by, and satisfy the additional obligations imposed by, this Order.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to effectuate the required divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan to divest, or believes the divestitures can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop

such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time for divestiture under this Paragraph for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

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. Each 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, malfeasance, willful or wanton acts, or bad faith by the Divestiture Trustee.

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

8. The Divestiture Trustee shall report in writing to 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, 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.

E. 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.

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

VII.

IT IS FURTHER ORDERED that:

A. 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 breach by Respondents

of any term of any Remedial Agreement shall constitute a failure to comply with this Order. If any term of any Remedial 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.

VIII.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years from the date this Order is issued, Respondent Mars shall not, without providing advance written notification to the Commission in the manner described in this Paragraph:

1. Acquire any assets of, or financial interest in, any of the particular Specialty Veterinary Clinics, any of the particular Emergency Veterinary Clinics, or other clinics identified in the Relevant Notice Areas; or

2. Enter into any contract to participate in the management, operation, or control of any of the particular Specialty Veterinary Clinics, any of the particular Emergency Veterinary Clinics, or other clinics identified in the Relevant Notice Areas.

B. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as "the Notification"), 16 C.F.R. § 803 App., 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 the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

IX.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after this Order is issued, and every thirty (30) days thereafter until Respondents have complied with their obligations in Paragraph II of this Order (or Paragraph VI of this Order, if applicable), 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 Paragraph II of this Order (or Paragraph VI of this Order, if applicable). Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II of this Order (or Paragraph VI of this Order, if applicable), including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communication to and from such parties, all internal

memoranda, and all reports and recommendations concerning the divestiture.

B. One (1) year after this Order is issued, annually for the next nine (9) years on the anniversary of that date, and at other times as the Commission may require, Respondent Mars 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 Respondent Mars shall notify the Commission at least thirty (30) days prior to:

A. Any proposed dissolution of Respondent Mars;

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

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

XI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to the applicable Respondent made to its principal United States offices, registered office of their United States subsidiaries, or headquarters addresses, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or

under the control of such Respondent related to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of such Respondent; and

B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Order.

XII.

IT IS FURTHER ORDERED that this Order shall terminate on November 30, 2027.

By the Commission.

NON-PUBLIC APPENDIX A
Relevant Notice Areas

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

APPENDIX B

MONITOR AGREEMENT

This Monitor Agreement ("Agreement") entered into this 15th day of August, 2017, by and between Dr. Thomas Carpenter ("Monitor") and Mars, Incorporated ("Mars") (collectively, the "Parties"), provides as follows:

WHEREAS the Federal Trade Commission (the **"Commission"**) is considering for public comment an Agreement Containing Consent Order with Respondent which provides, among other things, that Respondent divest certain specialty or emergency veterinary clinics and assets associated with those clinics, enter into agreements — if necessary — providing the acquirers of the veterinary clinics with transition services, and engage a monitor to monitor Respondent's compliance with its obligations under the Decision and Order (the Order);

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

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

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

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

All capitalized terms used in this Agreement and not specifically defined herein shall have the respective definitions given to them in the Order.

ARTICLE I

1.1 Powers of the Monitor. Monitor shall have the rights, duties, powers and authority conferred upon Monitor by the Order that are necessary for Monitor to monitor Respondent's compliance with the Order. No later than one (1) day after the Acquisition Date, Respondent hereby transfers to Monitor all rights, powers, and authorities necessary to permit Monitor to perform his duties and responsibilities pursuant to the Order. Any descriptions thereof contained in this Agreement in no way modify Monitor's powers and authority or Respondent's obligations under the Order.

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

ARTICLE II

2.1 Retention and Payment of Counsel, Consultants, and other Assistants. Monitor shall have the authority to employ, at the cost and expense of the Respondent, such attorneys, consultants, accountants, and other representatives and assistants as are necessary to carry out Monitor's duties and responsibilities as allowed pursuant to the Order.

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

2.3 To the extent available, Respondent will provide Monitor with temporary workspace and access to office equipment owned or used by Respondent at sites that Monitor elects to visit in order to fulfill his obligations under this Agreement. Monitor agrees to comply with all of Respondent's safety and security regulations, instructions and procedures while at Respondent's sites and make reasonable efforts to minimize disruption to Respondent's ongoing business operations.

ARTICLE III

3.1 Monitor's Liabilities and Indemnification. Respondent shall indemnify Monitor and hold Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by Monitor. Monitor's maximum liability to Respondent relating to services rendered in accordance with this Agreement (regardless of form of action, whether in contract, statutory law, or tort) shall be limited to an amount equal to the total sum of the fees paid to Monitor by the Respondent. Any claim arising from this Agreement that Respondent may have against Monitor must be brought no later than one (1) year following the termination or expiration of this Agreement. In the performance of his duties under this Agreement, Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his own business affairs. Monitor shall not be liable for any delays or other failures to perform resulting from circumstances or causes beyond his reasonable control, including, without limitation, fire or other casualty, act of God, strike or labor dispute, war or other violence, or any law, order or

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

b. Monitoring Remedial Agreements; and

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

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

1.4 Confidential and Propriety Information. Monitor must retain and maintain all confidential information, including Confidential Business Information, he receives from either Respondent or Acquirers on a confidential basis, except as is permitted by the Order. Monitor may disclose confidential information only to persons employed by or working with Monitor under this Agreement, to persons employed at the Commission, and as permitted by Respondent or Acquirers with respect to information they provided Monitor. Monitor shall require any person retained by Monitor to assist in carrying out the duties and responsibilities of Monitor to adhere to the same standard of care and obligations of confidentiality to which Monitor must adhere under this Agreement. Monitor shall maintain the confidentiality, for a period of five (5) years after the termination of this Agreement, of all other aspects of the performance of his duties under this Agreement and shall not disclose any confidential information relating thereto.

1.5 Restrictions. Except as set forth in this Agreement and the Order, Monitor shall not be otherwise involved in any way in the management, production, supply and trading, sales marketing, and financial operations of Respondent.

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

1.7 Access to Records, Documents and Facilities. Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to Respondent's personnel, including Relevant Employees, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as Monitor may reasonably request, related to Respondent's compliance with the obligations of Respondent under the Order in this matter. Documents, records and other relevant information are to be provided in an electronic format if they exist in that form. Respondent shall cooperate with any reasonable request of Monitor and shall take no action to interfere with or impede Monitor's ability to monitor Respondent's compliance with the Order.

requirement of any governmental agency or authority. Monitor warrants that he will perform his obligations hereunder in good faith. Monitor disclaims other warranties, expressed or implied, other than those expressly agreed to in writing between the Parties.

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

3.3 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission.

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

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

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

MONITOR

Dr. Thomas Carpenter

Dr. Thomas Carpenter

RESPONDENT

Mars, Incorporated

By: Peter Seka
Title: General Counsel, Corporate Development

By: Alistair Mackworth Gee
Title: Corporate Development Director

NON-PUBLIC APPENDIX C
Monitor Compensation

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

NON-PUBLIC APPENDIX D
NVA Divestiture Agreements

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

NON-PUBLIC APPENDIX E
Pathway Divestiture Agreements

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

NON-PUBLIC APPENDIX F
PetVet Divestiture Agreements

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") with Mars, Incorporated ("Mars"), which is designed to remedy the anticompetitive effects that would result from Mars' proposed acquisition of VCA Inc. ("VCA").

Pursuant to an Agreement and Plan of Merger announced January 9, 2017, Mars proposes to acquire all of the assets of VCA in a transaction valued at approximately $9.1 billion (the "Acquisition"). Both parties provide specialty and emergency veterinary services in clinics they operate in cities across the United States. The Commission alleges in its Complaint 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 lessening competition in the markets for certain specialty and emergency veterinary services in ten different localities in the United States. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the Acquisition. Specifically, under the terms of the Consent Agreement, Mars is required to divest twelve clinics. Mars and VCA have proposed National Veterinary Associates ("NVA"), PetVet Care Centers ("PetVet"), and Pathway Partners Vet Management Company ("Pathway") as buyers of these clinics.

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

Analysis to Aid Public Comment

II. The Relevant Markets and Market Structures

The relevant lines of commerce in which to analyze the Acquisition are individual specialty and off-hours emergency veterinary services. Specialty veterinary services are required in cases that a general practitioner veterinarian cannot treat properly. General practitioner veterinarians commonly refer such cases to a specialist, typically a doctor of veterinary medicine board certified in the required specialty. Individual veterinary specialties include cardiology, critical care, internal medicine, neurology, oncology, ophthalmology, and surgery. Emergency veterinary services are used in acute situations where a general practice veterinarian is not available or in some cases not trained or equipped to treat the animal's medical problem.

The relevant areas for the provision of specialty and off-hours emergency veterinary services are local, delineated by the distance and time that pet owners travel to receive treatment. The distance and time customers travel for specialty services are highly dependent on local factors such as the proximity of a clinic offering the required specialty service, population density, population demographics, traffic congestion, or specific local geographic barriers. The markets affected by the transaction differ by area. The localities and services at issue are:

a. Oncology in western suburbs of Chicago, IL;
b. Emergency in Corpus Christi, TX;
c. Critical Care, Emergency, Internal Medicine, and Surgery in Kansas City, MO;
d. Critical Care and Emergency in Mesa, AZ;
e. Critical Care and Oncology in northern New York City, NY and its northern suburbs;
f. Critical Care, Internal Medicine, Neurology, Oncology, and Ophthalmology in Portland, OR;
g. Emergency, Internal Medicine, and Oncology in Rockville, MD;
h. Emergency in San Antonio, TX;
i. Cardiology, Critical Care, Emergency, Internal Medicine, and Neurology in Seattle, WA; and
j. Emergency, Internal Medicine, Oncology, and Ophthalmology in Vienna, VA.

In each locality listed above, the relevant market is highly concentrated. In a number of these markets, the combined firm would be the only provider following the transaction. In other markets, consumers would only have one remaining alternative to the combined firm following the transaction. In all of these markets, the Acquisition would substantially increase concentration within the described localities.

III. Entry

Entry into the relevant markets described above would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. For de novo entrants, obtaining financing to build a new specialty or emergency veterinary facility and acquiring or leasing necessary equipment can be expensive and time consuming. The investment is risky for specialists that do not have established practices and bases of referrals in the area. Further, to become a licensed veterinary specialist requires extensive education and training, significantly beyond that for a general practitioner veterinarian. Consequently, specialists are in short supply, and recruiting them to move to a new area often takes more than two years, making timely expansion by existing specialty clinics unlikely.

IV. Effects of the Acquisition

The Acquisition, if consummated, may substantially lessen competition and tend to create a monopoly in the relevant markets by eliminating head-to-head competition between Mars and VCA in the provision of specialty and emergency veterinary services; increasing the likelihood that Mars would unilaterally exercise market power; and increasing the likelihood that customers would be forced to pay higher prices for and degraded quality of the relevant services.

V. The Consent Agreement

The proposed Consent Agreement effectively remedies the Acquisition's anticompetitive effects in ten markets where both Mars and VCA operate specialty or emergency veterinary clinics by requiring the parties to divest 12 facilities. Clinics in Kansas

City, New York, and Phoenix are to be divested to NVA. Clinics in Portland, Rockville, and Vienna are to be divested to PetVet. Clinics in Chicago, Corpus Christi, San Antonio, and Seattle are to be divested to Pathway. The divestitures will preserve competition between the divested clinics and Mars' BluePearl or VCA's clinics that offer the same specialty or emergency services within each locality. NVA, PetVet, and Pathway are qualified acquirers of the divested assets. Each firm has significant experience acquiring, integrating, and operating specialty and emergency veterinary clinics.

The divestiture includes all regulatory permits and approvals, confidential business information, including customer information, related to the divested clinics, and other assets associated with providing specialty and emergency veterinary care at the divested clinics. To ensure the divestiture is successful, the Order requires Mars and VCA to secure all third-party consents, assignments, releases, and waivers required to permit the buyers to conduct business at the divested clinics.

As part of these divestitures, Mars and VCA are required to provide reasonable financial incentives to certain employees to continue in their positions. Such incentives may include, but are not limited to, guaranteeing a retention bonus for the specialty veterinarians at the divestiture clinics to assure their continued employment at such clinic, a continuation of all employee benefits, including the funding of regularly scheduled raises and bonuses, and the vesting of pension benefits (as permitted by law and for those Relevant Employees covered by a pension plan), offered by the parties. These provisions ensure that the buyers will have the assets necessary to operate the divested clinics in a competitive manner.

The Consent Agreement contains several additional provisions designed to ensure that the divestitures are successful. First, the Consent Agreement prevents Mars for a period of one year from contracting with any specialty or emergency veterinarian affiliated with a divested clinic. This provides the buyers with sufficient time to build goodwill and working relationships with the veterinarians before Mars could capitalize on its prior relationships in soliciting their services. Second, to ensure continuity of patient care and records as the buyers implement

their own quality care, billing, and supply systems, Mars will provide transitional services for a period of one year. Finally, the Consent Agreement requires Mars for a period of ten years from the date the Commission issues the Order to provide prior notice to the Commission of its planned acquisitions of specialty or emergency veterinary clinics in certain geographic areas.

The Order requires Mars and VCA to divest the clinics no later than ten business days after the consummation of the Acquisition.

The Commission has appointed Thomas A. Carpenter, D.V.M. as Interim Monitor to ensure that Mars and VCA comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the rights and assets to NVA, Pathway, and PetVet. Dr. Carpenter assists client companies undergoing regulator-mandated ownership transitions and has experience with the purchase and sale of veterinary clinics.

If the Commission determines that NVA, Pathway, and PetVet are not acceptable acquirers of the divested assets, or that the manner of the divestitures is not acceptable, the parties must unwind the sale of rights and assets to NVA, Pathway, and PetVet and divest them to a Commission-approved acquirer within six months of the date the Order becomes final. In that circumstance, the Commission may appoint a trustee to divest the rights and assets if the parties fail to divest them as required.

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

Complaint

IN THE MATTER OF

MOONLIGHT SLUMBER, LLC

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

Docket No. C-4634; File No. 162 3128
Complaint, December 11, 2017 – Decision, December 11, 2017

This consent order addresses Moonlight Slumber, LLC's environmental and health claims made regarding its baby mattresses. The complaint alleges that respondent made unsubstantiated representations that its mattresses are organic, natural, or plant-based and that its mattresses will not emit any substance, including volatile organic compounds, or off gas; claimed that testing proved that its mattresses do not emit volatile organic compounds; and represented that its mattresses have been certified by Green Safety Shield, yet failed to disclose that it has a material connection to the Green Safety Shield seal. The consent order prohibits misleading representations regarding whether any mattress, blanket, pillow, pad, foam-containing product, or sleep-related product is organic, natural, or plant-based; regarding the emissions from such product; and regarding the general environmental and health benefits of such product and requires respondent to possess competent and reliable evidence, including scientific evidence when appropriate, to substantiate these representations.

Participants

For the *Commission*: *Jock Chung* and *Amanda B. Kostner.*

For the *Respondent*: *Kenneth W. Vorrasi, Drinker Biddle & Reath, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Moonlight Slumber, LLC, a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing that this proceeding is in the public interest, alleges:

1. Respondent Moonlight Slumber, LLC ("Moonlight Slumber") is an Illinois corporation with its principal office or place of business at 300 Brook Street, Elgin, Illinois 60120.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed baby mattresses.

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.

Moonlight Slumber's Business Practices

4. Respondent has disseminated advertisements for Moonlight Slumber baby mattresses, including the attached Exhibits 1 through 12. These materials contain the following statements and depictions:

a. Respondent's Starlight Simplicity mattress is an "Organic, hypoallergenic mattress that eliminates chemicals in your crib," "with no chemical additives, no chemical fire retardants, no foam, no plastics, no polyesters, and no harsh chemicals." Exhibit 1.

b. Respondent's Little Star mattress is a "Dual Firmness Organic Cotton Crib Mattress," "a safe, organic alternative to traditional crib mattresses," a "hypoallergenic crib mattress," and an "organic crib mattress." Exhibits 2 and 3.

c. Respondent's Little Star mattress contains a "Natural Latex Core." Exhibit 2.

d. Respondent's mattresses are made from "BabySafe Natural Materials." Exhibits 2, 4, 5, 6, 7, 8, and 9.

e. Respondent's Starlight Supreme, Starlight Sleepwell, Starlight Dream, Little Star, Little Dreamer, Little Dreamer Deluxe, and Little Angel mattresses are made with "eco-friendly plant-based foam," "eco-friendly, plant based foam," "eco-friendly plant-based, extra firm foam," or "eco-friendlier, extra firm, plant based foam." Exhibits 2, 3, 4, 5, 6, 7, 8, and 9.

f.  Respondent depicted a seal with a shield bearing a green leaf, partially encircled with the words "green safety shield." Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10.

g. Testing proves "that there are no VOCs (Volatile Organic Compounds, commonly known as 'Off Gassing') from Moonlight Slumber products. They are Green Safety Shield certified to assure no off gassing … ." Exhibits 10 and 11.

h. Respondent's mattresses are "[f]ree of … off gassing, or indoor air pollutants." Exhibit 12.

5. Respondent's mattresses are comprised almost entirely of a core, fire barrier, cotton cover, and cotton ribbon.

6. The substantial majority of content in Respondent's Starlight Simplicity and Little Star mattresses is non-organic. Neither the cores, which are the principal mattress components, nor the fire barriers for these two mattresses contain any organic content. About 70% of the cotton cover is not organic. Only the mattress ribbon, a minor component of the mattresses, is purely organic.

7. Most of Respondent's mattresses contain cores made wholly or substantially of polyurethane, a non-natural material made almost entirely from isocyanates and polyols derived from petrochemicals. In addition, the latex used in the core for the Little Star mattress is not a natural material, but is synthetic.

8. The foams used in Respondent's Starlight Supreme, Starlight Sleepwell, Starlight Dream, Little Star, Little Dreamer, Little Dreamer Deluxe, and Little Angel mattresses contain little or no plant-based material.

9. Respondent displayed the Green Safety Shield on its website and packaging near certifications from independent third parties.

10. Respondent did not disclose on its website and packaging that it awarded the Green Safety Shield to its own mattresses. The Green Safety Shield is not a certification by an independent third party.

11. Respondent did not possess testing that proves there are no VOCs (Volatile Organic Compounds) from its mattresses.

Count I
False or Unsubstantiated Representations

12. In connection with the advertising, promotion, offering for sale, or sale of baby mattresses, Respondent has represented, directly or indirectly, expressly or by implication, that:

a. Respondent's Starlight Simplicity and Little Star mattresses are organic;

b. The materials in Respondent's mattresses are natural;

c. Respondent's Little Star mattress contains a natural latex core; and

d. Respondent's Starlight Supreme, Starlight Sleepwell, Starlight Dream, Little Dreamer, Little Dreamer Deluxe, and Little Angel mattresses, and the infant side of the Little Star mattress, are made with foam that is derived wholly or almost wholly from plants.

13. In fact:

a. Respondent's Starlight Simplicity and Little Star mattresses are not organic. Indeed, a substantial majority of the content in these mattresses is not organic.

b. A substantial majority of materials in several of Respondent's mattresses is not natural.

c. Respondent's Little Star mattress does not contain a natural latex core.

d. Respondent's Starlight Supreme, Starlight Sleepwell, Starlight Dream, Little Dreamer, Little Dreamer Deluxe, and Little Angel mattresses, and the infant side of the Little Star mattress, are not made with foam derived wholly or almost wholly from plants. Indeed,

little or no plant-based material is used to make the foam in these mattresses.

Therefore, the representations set forth in Paragraph 12 were false or misleading, or were unsubstantiated at the time the representations were made.

Count II
Unsubstantiated Representations

14. In connection with the advertising, promotion, offering for sale, or sale of baby mattresses, Respondent has represented, directly or indirectly, expressly or by implication, that Respondent's mattresses will not emit any substance, including volatile organic compounds.

15. In fact, Respondent did not possess and rely upon a reasonable basis to substantiate that its mattresses will not emit any substance, including volatile organic compounds.

Therefore, the representations set forth in Paragraph 14 were unsubstantiated at the time the representations were made.

Count III
False Establishment Claim

16. In connection with the advertising, promotion, offering for sale, or sale of baby mattresses, Respondent has represented, directly or indirectly, expressly or by implication, that testing proves that Respondent's mattresses do not emit volatile organic compounds.

17. In fact, testing did not prove that Respondent's mattresses do not emit volatile organic compounds. Therefore, the representation set forth in Paragraph 16 is false or misleading.

Count IV
Deceptive Failure to Disclose—Material Connection with Green Safety Shield

18. In connection with the advertising, promotion, offering for sale, or sale of baby mattresses, Respondent has represented,

directly or indirectly, expressly or by implication, that its mattresses have been certified by Green Safety Shield.

19. In these instances, Respondent has failed to disclose or disclose adequately that the Green Safety Shield is its own designation.

20. Respondent's failure to disclose or disclose adequately the material information described in Paragraph 19, in light of the representation set forth in Paragraph 18, is a deceptive act or practice.

Violations of Section 5

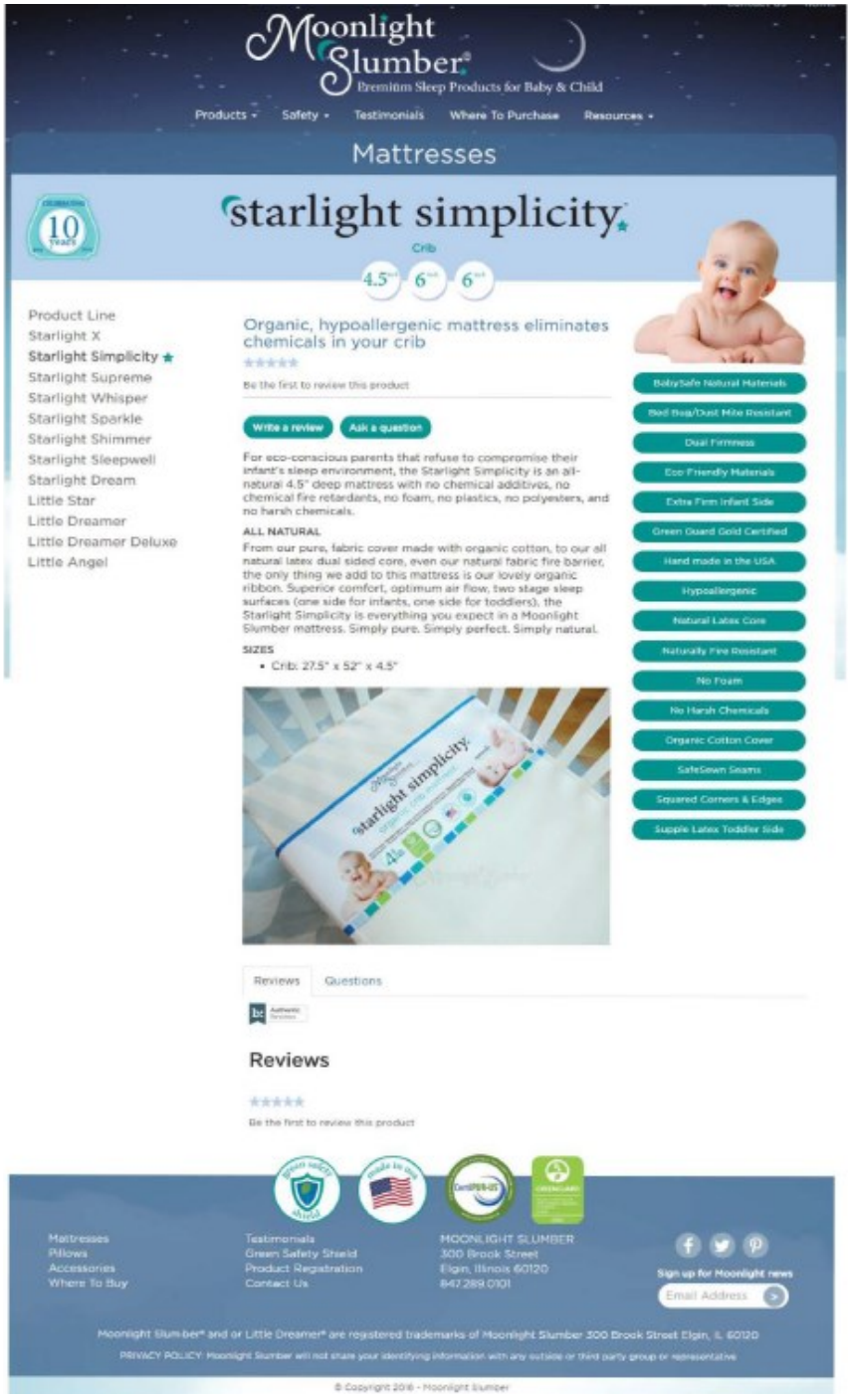
21. The acts and practices of Respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission, this eleventh day of December 2017, has issued this Complaint against Respondent.

By the Commission.

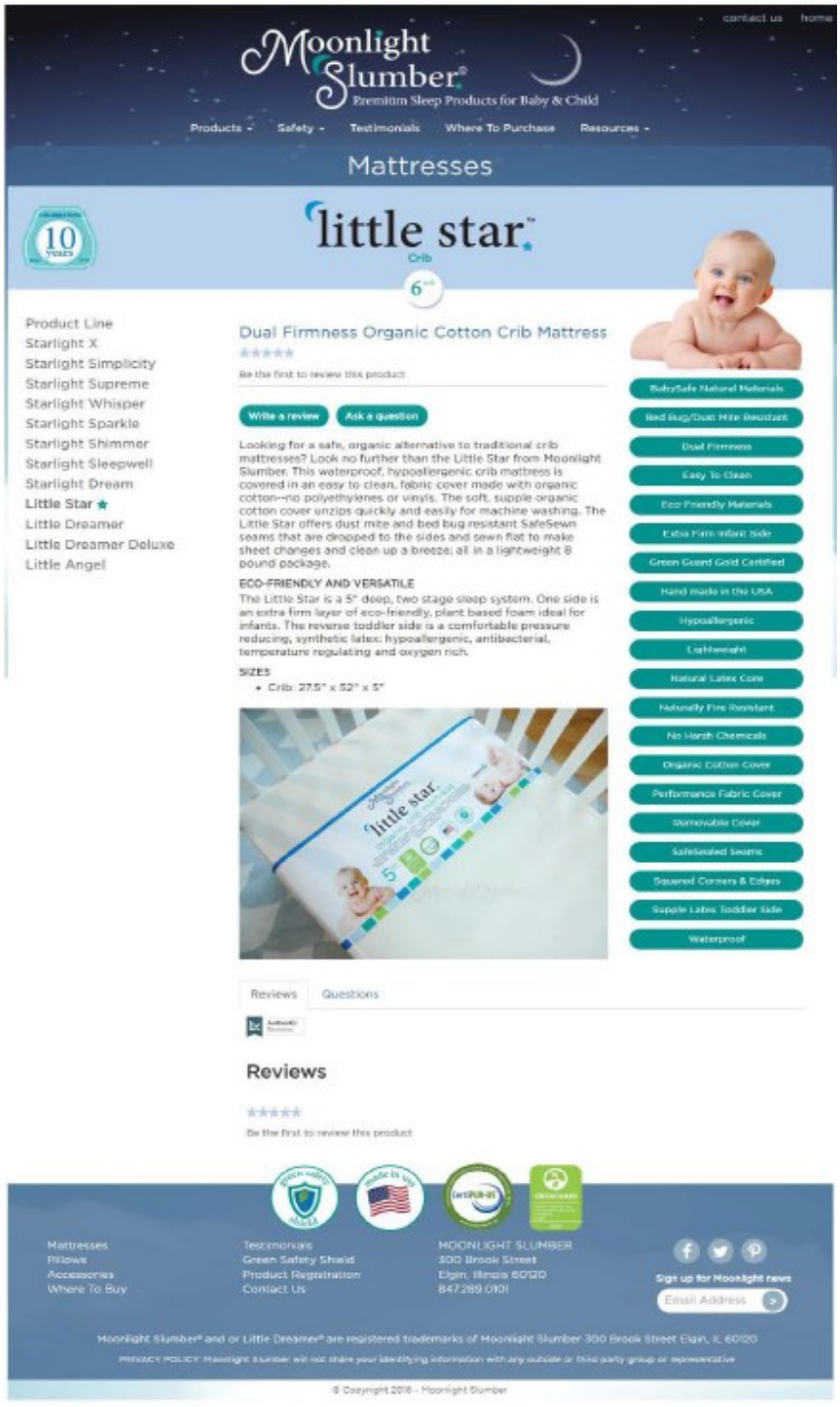
Complaint

Exhibit 1



Complaint

Exhibit 2



Complaint

Exhibit 3

little star™
organic crib mattress

Looking for a safe, organic alternative to traditional crib mattresses? Look no further than the Little Star from Moonlight Slumber. This waterproof, hypoallergenic crib mattress is covered in an easy to clean organic cotton fabric cover—no polyethelenes or vinyls. The soft, supple organic cotton cover unzips quickly and easily for machine washing. The Little Star offers dust mite and bed bug resistant SafeSewn seams that are dropped to the sides and sewn flat to make sheet changes and clean up a breeze; all in a lightweight 8 pound package. The Little Star is a 5" deep two stage sleep system. One side is an extra firm layer of eco-friendly, plant based foam ideal for infants. The reverse toddler side is a comfortable pressure reducing, synthetic latex: hypoallergenic, antibacterial, temperature regulating, and oxygen rich.

Moonlight Slumber
Premium Sleep Products for Baby & Child

green safety shield · made in usa · CertiPUR-US

Lifetime Warranty
www.moonlightslumber.com

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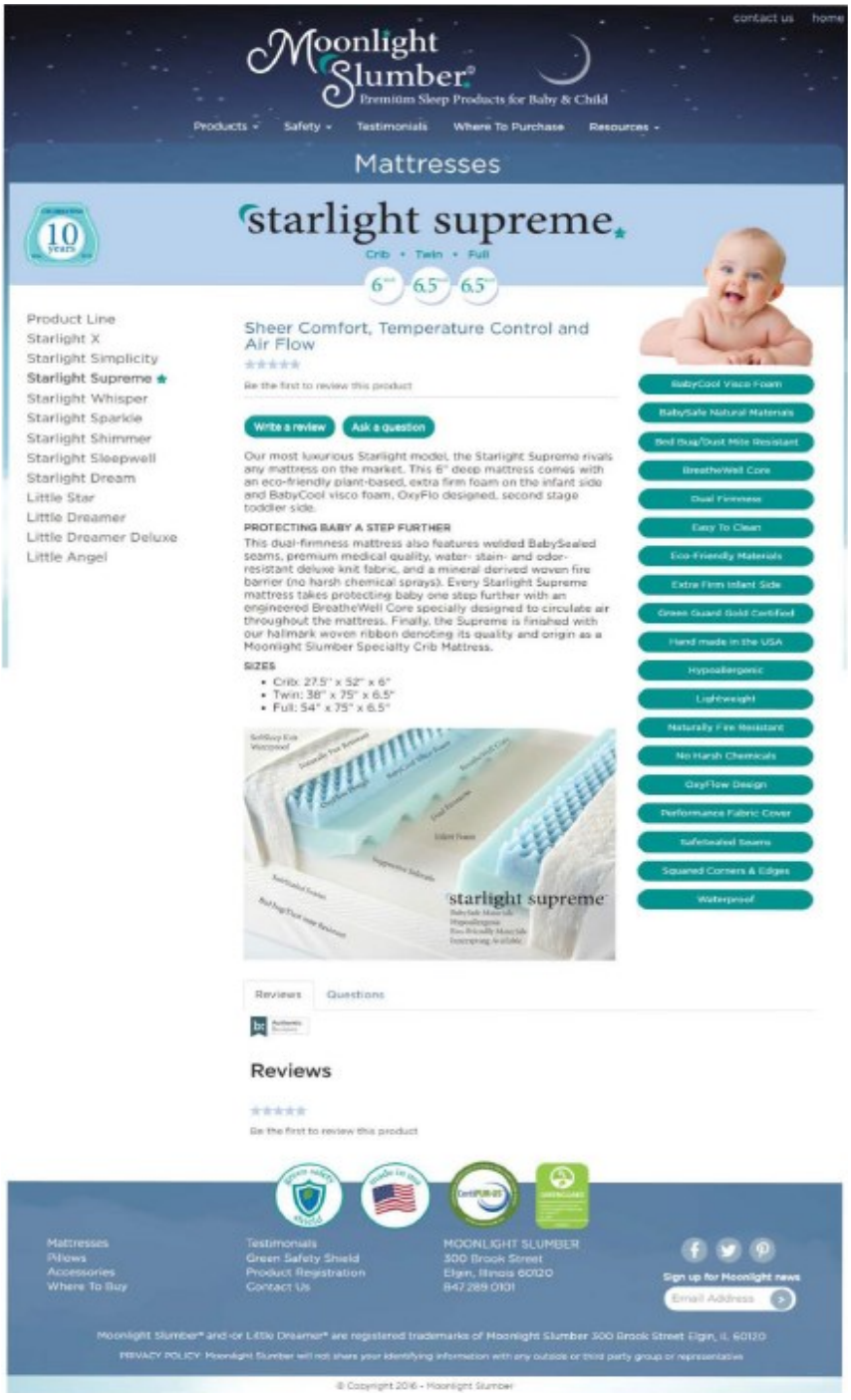
little star
organic crib mattress
Crib 5 inch
Removable Organic Cotton Cover
Dual Firmness
Eco-Friendly, Extra Firm Infant Side
Supple Latex Toddler Side
SafeSewn Seams
Squared Corners & Edges
Bed bug/Dust mite Resistant
BabySafe Materials
Waterproof
No Harsh Chemicals
Hypoallergenic
Naturally Fire Resistant
Eco-Friendly Materials
Lightweight
Easy to Clean
Moonlight Slumber
www.moonlightslumber.com

Complaint

Exhibit 4



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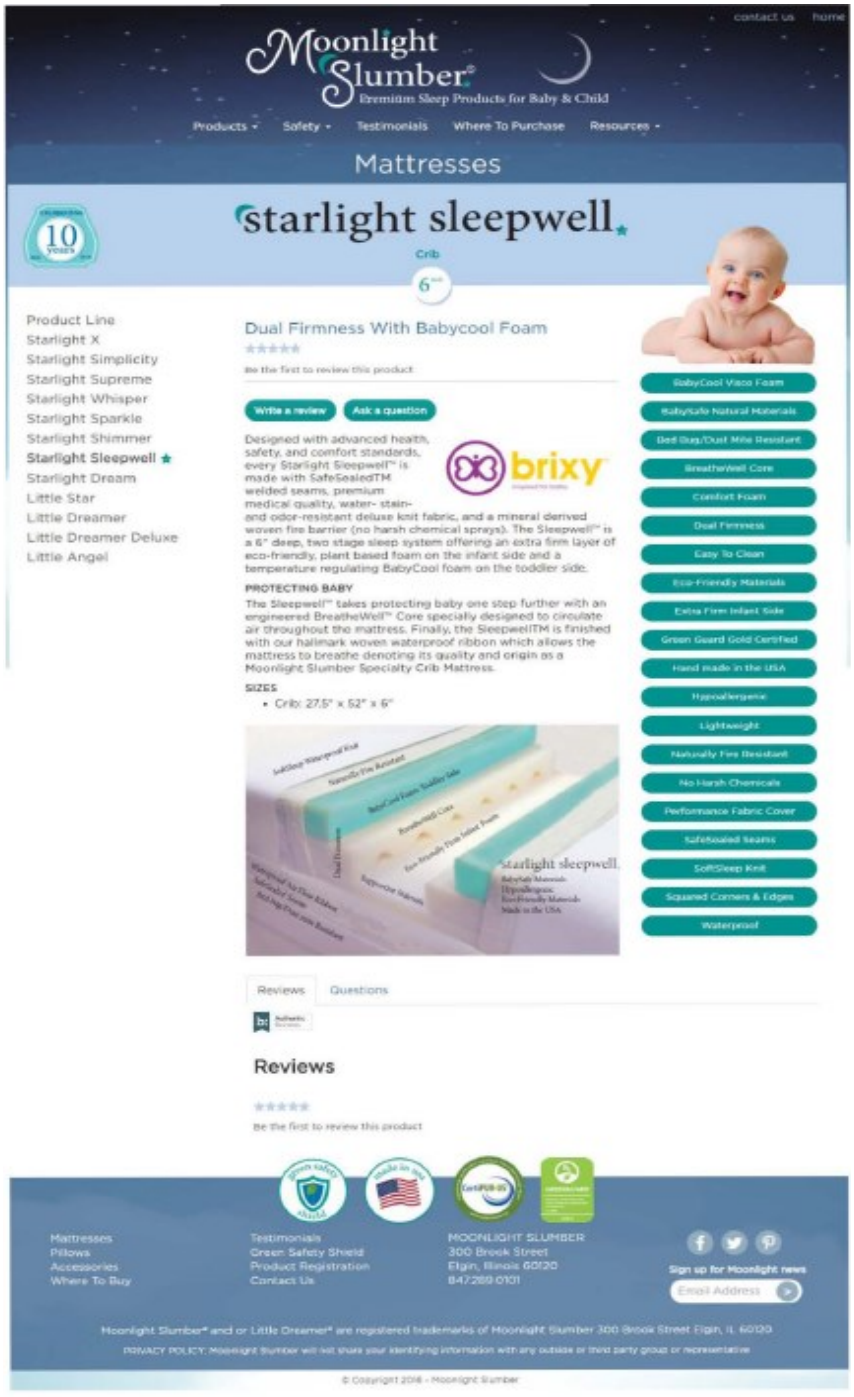
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starlight sleepwell
Crib
6"
10 YEARS
Product Line
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Starlight Simplicity
Starlight Supreme
Starlight Whisper
Starlight Sparkle
Starlight Shimmer
Starlight Sleepwell
Starlight Dream
Little Star
Little Dreamer
Little Dreamer Deluxe
Little Angel
Dual Firmness With Babycool Foam
Be the first to review this product
Write a review
Ask a question
brixy
Designed with advanced health, safety, and comfort standards, every Starlight Sleepwell™ is made with SafeSealedTM welded seams, premium medical quality, water- stain- and odor-resistant deluxe knit fabric, and a mineral derived woven fire barrier (no harsh chemical sprays). The Sleepwell™ is a 6" deep, two stage sleep system offering an extra firm layer of eco-friendly, plant based foam on the infant side and a temperature regulating BabyCool foam on the toddler side.
PROTECTING BABY
The Sleepwell™ takes protecting baby one step further with an engineered BreatheWell™ Core specially designed to circulate air throughout the mattress. Finally, the SleepwellTM is finished with our hallmark woven waterproof ribbon which allows the mattress to breathe denoting its quality and origin as a Moonlight Slumber Specialty Crib Mattress.
SIZES
• Crib: 27.5" x 52" x 6"
BabyCool Visco Foam
BabySafe Natural Materials
Bed Bug/Dust Mite Resistant
BreatheWell Core
Comfort Foam
Dual Firmness
Easy To Clean
Eco-Friendly Materials
Extra Firm Infant Side
Green Guard Gold Certified
Hand made in the USA
Hypoallergenic
Lightweight
Naturally Fire Resistant
No Harsh Chemicals
Performance Fabric Cover
SafeSealed Seams
SoftSleep Knit
Squared Corners & Edges
Waterproof
starlight sleepwell
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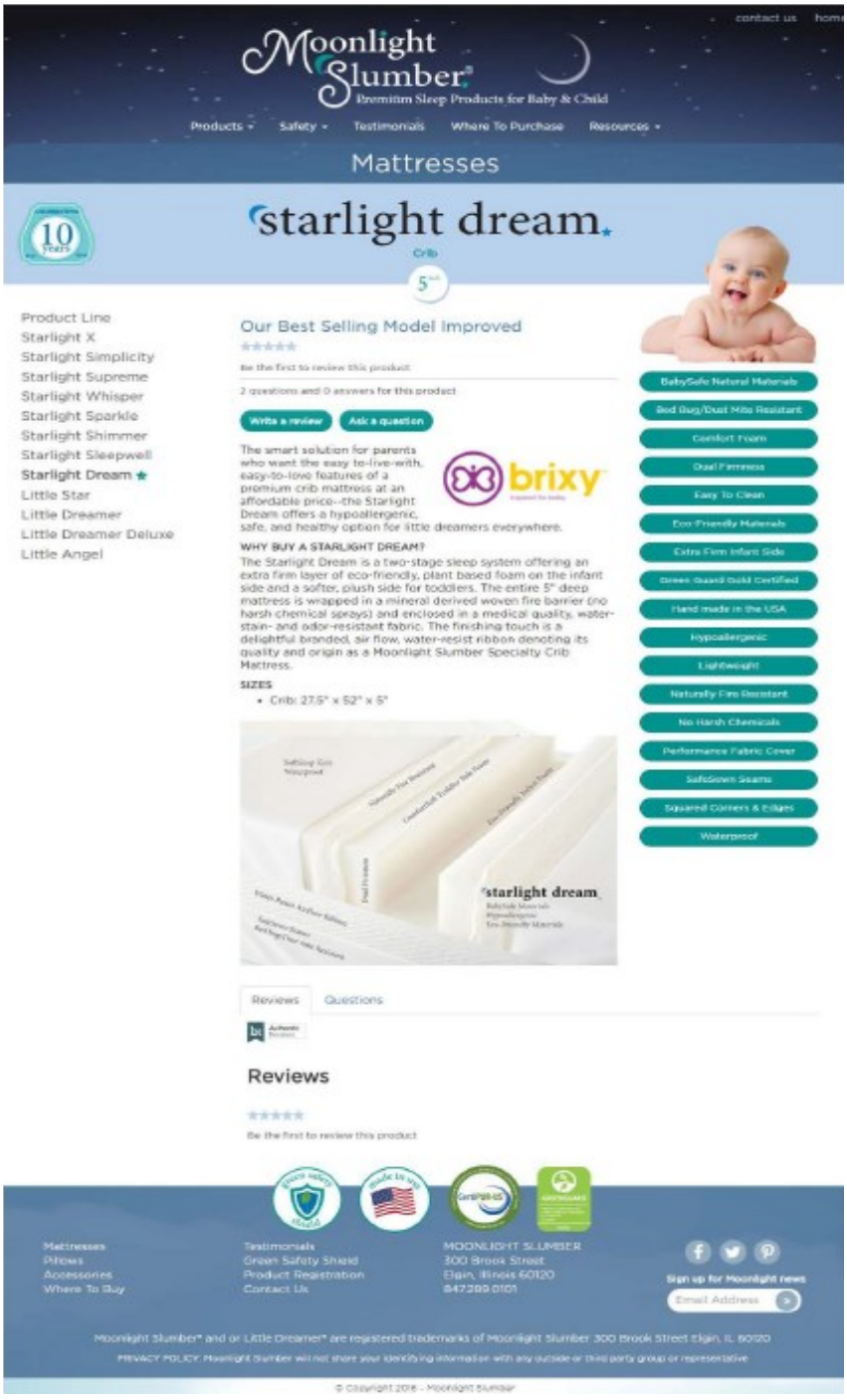
Complaint

Exhibit 6



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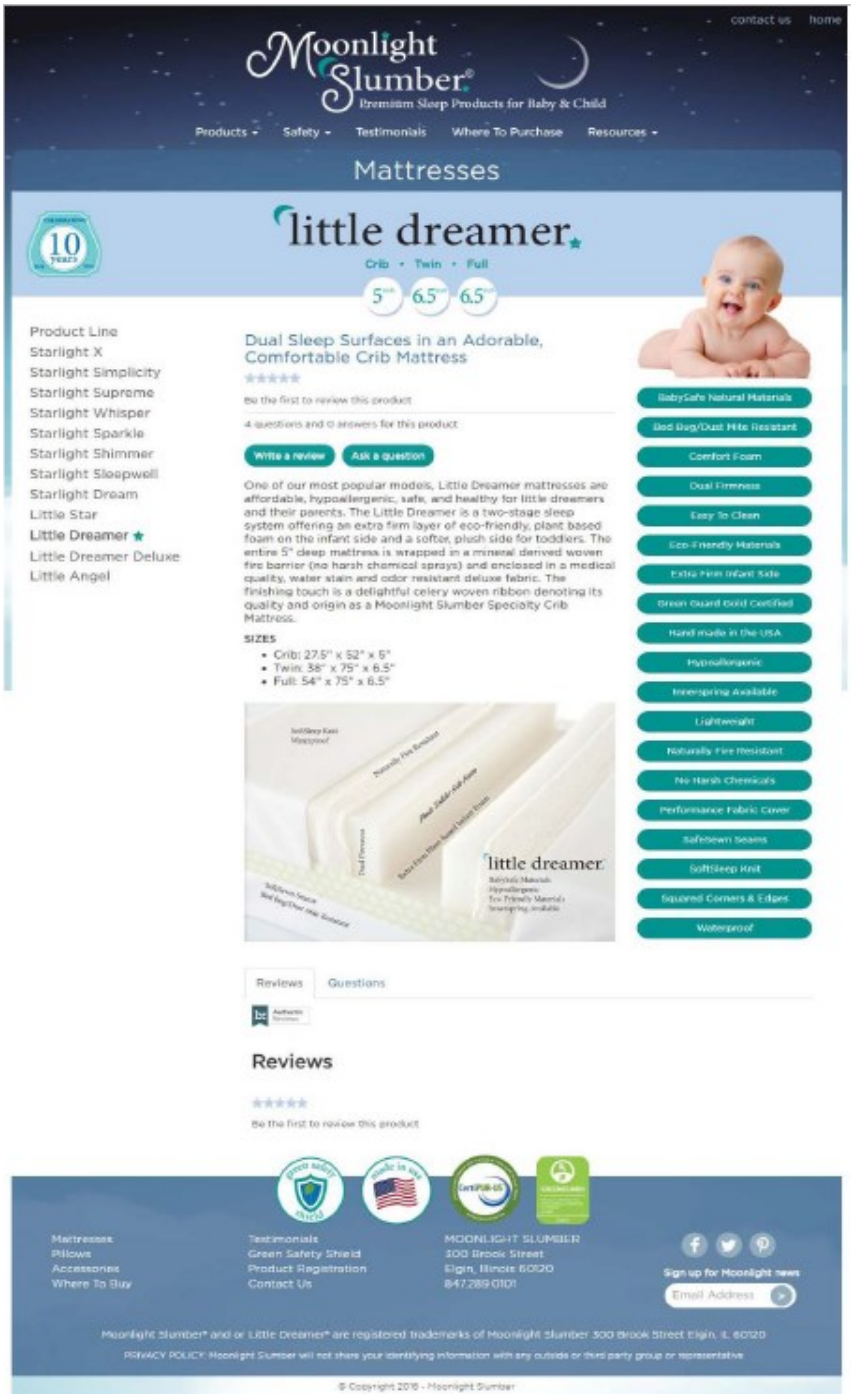

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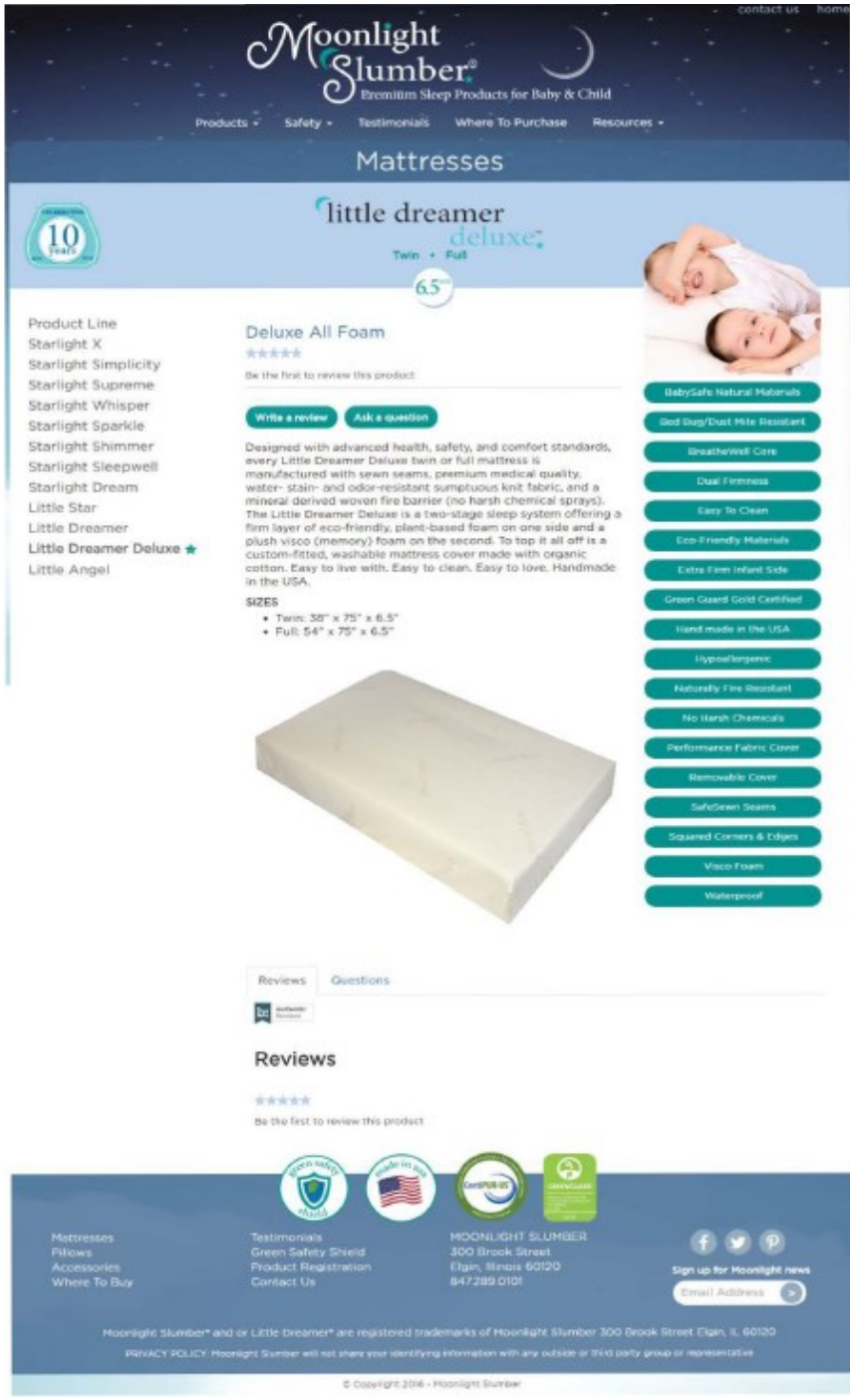
Exhibit 8



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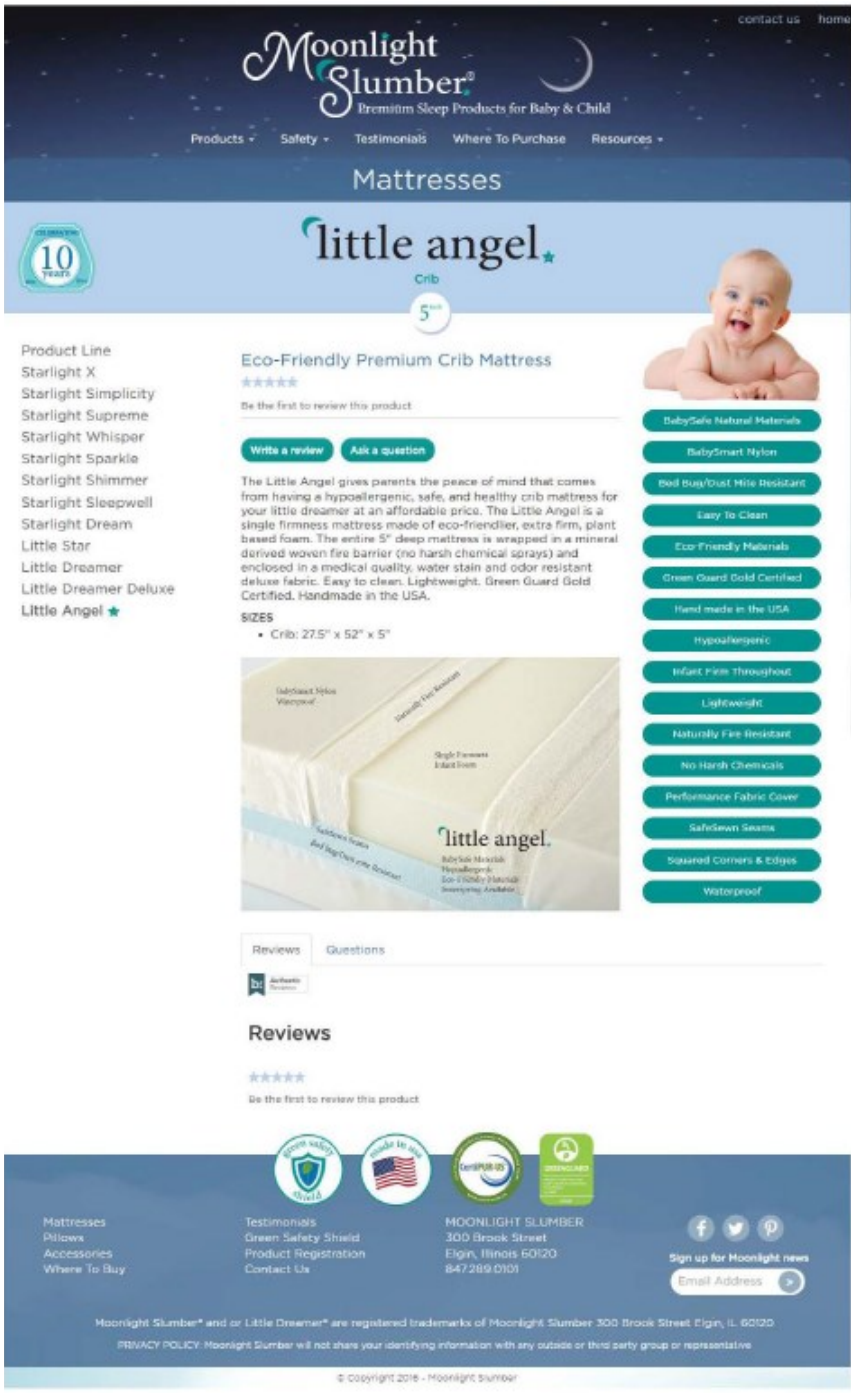
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Starlight Simplicity
Starlight Supreme
Starlight Whisper
Starlight Sparkle
Starlight Shimmer
Starlight Sleepwell
Starlight Dream
Little Star
Little Dreamer
Little Dreamer Deluxe
Little Angel
Eco-Friendly Premium Crib Mattress
Be the first to review this product
Write a review
Ask a question
The Little Angel gives parents the peace of mind that comes from having a hypoallergenic, safe, and healthy crib mattress for your little dreamer at an affordable price. The Little Angel is a single firmness mattress made of eco-friendlier, extra firm, plant based foam. The entire 5" deep mattress is wrapped in a mineral derived woven fire barrier (no harsh chemical sprays) and enclosed in a medical quality, water stain and odor resistant deluxe fabric. Easy to clean. Lightweight. Green Guard Gold Certified. Handmade in the USA.
SIZES
Crib: 27.5" x 52" x 5"
BabySafe Natural Materials
BabySmart Nylon
Bed Bug/Dust Mite Resistant
Easy To Clean
Eco-Friendly Materials
Green Guard Gold Certified
Hand made in the USA
Hypoallergenic
Infant Firm Throughout
Lightweight
Naturally Fire Resistant
No Harsh Chemicals
Performance Fabric Cover
SafeSewn Seams
Squared Corners & Edges
Waterproof
little angel.
Reviews
Questions
Reviews
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Complaint

Exhibit 10

Moonlight Slumber®
Premium Sleep Products for Baby & Child

Products ▾ Safety ▾ Testimonials Where To Purchase Resources ▾

Frequently Asked Questions

FAQ ★
Helpful Links

Are the glues used in Moonlight Slumber products green compliant?
Yes. Simalfa is the only adhesive company committed to offering only environmentally friendly products and services. They have received the coveted GREENGUARD Sustainability Award and is Green Safety Shield™ approved.

Are Moonlight Slumber products tested for safety?
Yes. We surpass the requirements issued by the U.S. Government and only work with certified testing facilities including Berkley Analytical, Element Testing and Green Bear.

Are all Moonlight Slumber mattresses PVC free?
Yes. All Moonlight Slumber mattresses are free of Halogens, Tris, Nanoparticles, PVC, Vinyl, PBDE, PBB, Phthalates, Phosphorous, Arsenic, Antimony, and many other harsh and dangerous chemicals that are commonly used in crib mattresses. We offer the best blend of safe, natural products using advanced manufacturing technology.

Do Moonlight Slumber mattresses off-gas?
No. Testing by Berkley Analytical labs prove that there are no VOCs (Volatile Organic Compounds, commonly known as "Off Gassing") from Moonlight Slumber products. They are Green Safety Shield™ certified to assure no off gassing and also certified through the CertiPUR-US certification program.

What is the Green Safety Shield™ certification program?
Green Safety Shield™ certification is based on the standardized chemical analyses that test: low emissions for indoor air quality, environmental guidelines, physical performance, content testing, and random compliance verifications. This certification is given to approved products made without Tris Talens, Nanoparticles, PBDEs, PBBs Phthalates, Ozone Depleters, Mercury, Lead, Heavy Metals, Formaldehyde and Methylene Chloride and that are Halogen Free.

What is the difference between the Starlight Support and the Starlight Support Supreme mattress?
Both mattresses are constructed exactly the same (dual firmness, internal fire barrier, stretch knit fabric, etc.) with one exception: the Supreme has Gel/Visco elastic memory foam on the toddler side. So when you flip the Starlight Support, you flip from extra firm to firm. When you flip the Supreme, you flip from extra firm to a layer of visco elastic memory foam.

What are the differences between the all-foam and innerspring mattresses?
The all foam models have a core made entirely of foam. Top and bottom layers of foam are added to create dual firmness comfort. The innerspring models have an innerspring coil core, which is encapsulated on all sides, top, and bottom with foam, creating a sandwich-like construction.

When should the mattress be flipped from the infant side (extra firm) to the toddler side (firm)?
While all children progress differently, we recommend that you flip your mattress when your child is approximately nine months old. This is the age when they can typically move freely about the crib, becoming mobile and beginning to pull up into a sitting position. However, should you notice your child becoming restless during the night or naptime, it may be a sign that they are ready for the less firm toddler side.

What is the fire barrier in Moonlight Slumber products?
Moonlight Slumber uses a natural, halogen free, patent pending, internal fire resistant barrier. It is made of inherently fireproof materials with no topically applied chemicals, retardants or other additives. Further, it has been used in the healthcare industry for more years, exceeding all current Federal and State regulations.

What is the difference between a fire retardant and fire resistant materials?
Fire retardant materials slow the spread of fire. Fire resistant materials do not burn. Moonlight Slumber products are 16 CFR Part 1633 compliant, meaning they are fire resistant. They have been proven, by independent tests, to withstand open flame.

Are Nature's Star mattresses organic?
Partially organic. The Nature's Star partially organic mattress has substituted all-natural cotton in place of foam. The cotton is not bleached, dyed, or chemically altered. The Nature's Star partially organic mattress comes with an all-organic zippered cover that can be washed and dried.

Do you need to use a mattress pad or waterproof mattress cover with Moonlight Slumber mattresses?
It is up to personal preference as to whether you use a mattress pad or waterproof mattress cover. All Moonlight Slumber mattresses, even the Nature's Star, are manufactured with a premium, waterproof fabric. This fabric is smooth to the touch, warms under your baby, resists cracking and crunching, and can be cleaned with a damp sponge. Because there may be some stains that can never be removed you may want to use a mattress protector.

Do regular size crib sheets fit Moonlight Slumber mattresses?
Yes.

What is the difference between the contour changing table pads and flat changing table pads?
The contour changing table pad has either two or four raised sides and a security strap to attach to your dresser. The Little Dreamer contour pad has two raised sides while the Starlight Supreme comes with four raised sides. The flat changing table pad is 1" thick, with no strap.

Can Moonlight Slumber make custom crib mattress sizes?
Yes. Our mattresses are domestically made, right in the heart of

"The customer service at Moonlight Slumber is unparalleled. When they say they want you to be 100% satisfied with your mattress, they mean it. Their mattress speaks for itself. I couldn't be happier with our purchase. Thank you so very much."

Marci | Bloomington, IN

Complaint


Illinois, so we have complete control over the production lines. We can create custom crib, cradle and bassinet or pack-n-play mattresses at your request. The Nature's Star Mattress does not allow for customization.
What is the best way to clean a Moonlight Slumber mattress?
Moonlight Slumber recommends the following method to clean a mattress: simply use a damp sponge and warm soapy water when necessary to clean a mattress. Avoid harsh chemicals.
What is the approximate weight of a Moonlight Slumber mattress?
Nature's Star – 35 lbs
Starlight Support Supreme (all foam) – 10.5 lbs
Starlight Support Supreme (Innerspring) – 13 lbs
Starlight Support (all foam) – 9.5 lbs
Starlight Support (Innerspring) – 12 lbs
Little Dreamer – 6 lbs
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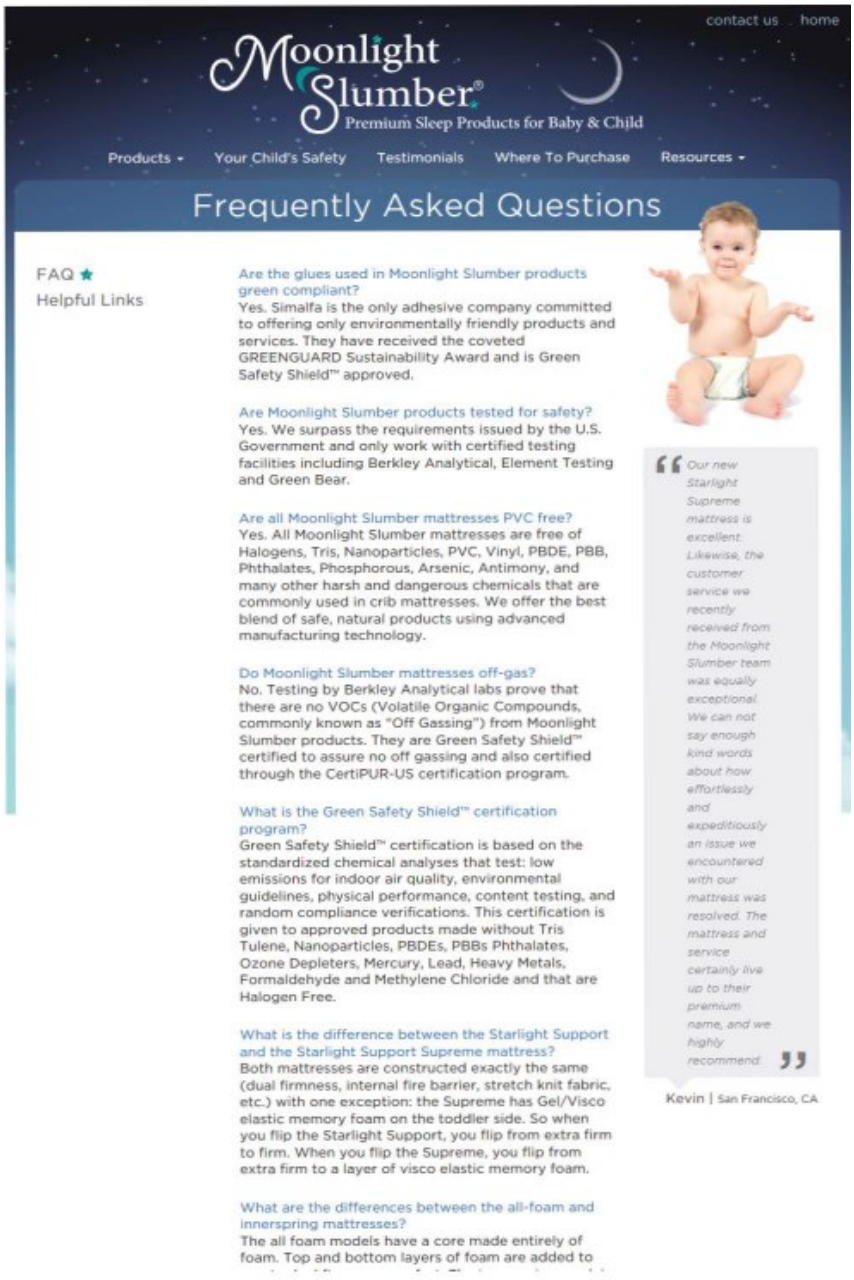
Exhibit 11



create dual firmness comfort. The innerspring models have an innerspring coil core, which is encapsulated on all sides, top, and bottom with foam, creating a sandwich-like construction.

When should the mattress be flipped from the infant side (extra firm) to the toddler side (firm)?
While all children progress differently, we recommend that you flip your mattress when your child is approximately nine months old. This is the age when they can typically move freely about the crib, becoming mobile and beginning to pull up into a sitting position. However, should you notice your child becoming restless during the night or naptime, it may be a sign that they are ready for the less firm toddler side.

What is the fire barrier in Moonlight Slumber products?
Moonlight Slumber uses a natural, halogen free, patent-pending, internal fire resistant barrier. It is made of inherently fireproof materials with no topically applied chemicals, retardants or other additives. Further, it has been used in the healthcare industry for many years, exceeding all current Federal and State regulations.

What is the difference between a fire retardant and fire resistant materials?
Fire retardant materials slow the spread of fire. Fire resistant materials do not burn. Moonlight Slumber products are 16 CFR Part 1633 compliant, meaning they are fire resistant. They have been proven, by independent tests, to withstand open flame.

Are Nature's Star mattresses organic?
Partially organic. The Nature's Star partially organic mattress has substituted all-natural cotton in place of foam. The cotton is not bleached, dyed, or chemically altered. The Nature's Star partially organic mattress comes with an all-organic zippered cover that can be washed and dried.

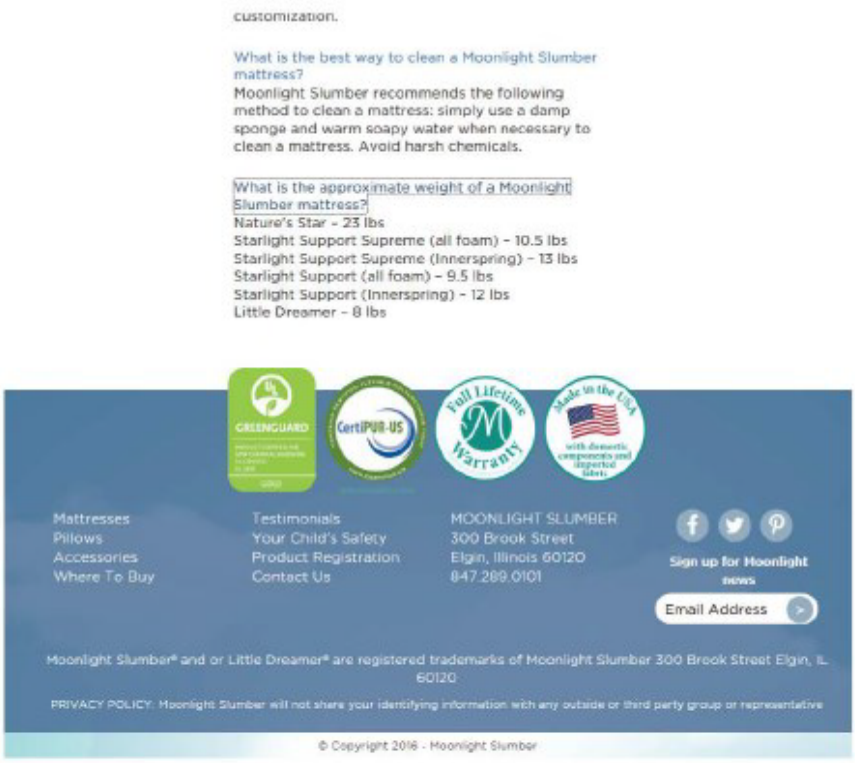
Do you need to use a mattress pad or waterproof mattress cover with Moonlight Slumber mattresses?
It is up to personal preference as to whether you use a mattress pad or waterproof mattress cover. All Moonlight Slumber mattresses, even the Nature's Star, are manufactured with a premium, waterproof fabric. This fabric is smooth to the touch, warms under your baby, resists cracking and crunching, and can be cleaned with a damp sponge. Because there may be some stains that can never be removed you may want to use a mattress protector.

Do regular size crib sheets fit Moonlight Slumber mattresses?
Yes

What is the difference between the contour changing table pads and flat changing table pads?
The contour changing table pad has either two or four raised sides and a security strap to attach to your dresser. The Little Dreamer contour pad has two raised sides while the Starlight Supreme comes with four raised sides. The flat changing table pad is 1" thick, with no strap.

Can Moonlight Slumber make custom crib mattress sizes?
Yes. Our mattresses are domestically made, right in the heart of Illinois, so we have complete control over the production lines. We can create custom crib, cradle and bassinet or pack-n-play mattresses at your request. The Nature's Star Mattress does not allow for

Complaint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What is the best way to clean a Moonlight Slumber mattress?
Moonlight Slumber recommends the following method to clean a mattress: simply use a damp sponge and warm soapy water when necessary to clean a mattress. Avoid harsh chemicals.
What is the approximate weight of a Moonlight Slumber mattress?
Nature's Star - 23 lbs
Starlight Support Supreme (all foam) - 10.5 lbs
Starlight Support Supreme (Innerspring) - 13 lbs
Starlight Support (all foam) - 9.5 lbs
Starlight Support (Innerspring) - 12 lbs
Little Dreamer - 8 lbs
GREENGUARD
CertiPUR-US
Full Lifetime Warranty
Made in the USA
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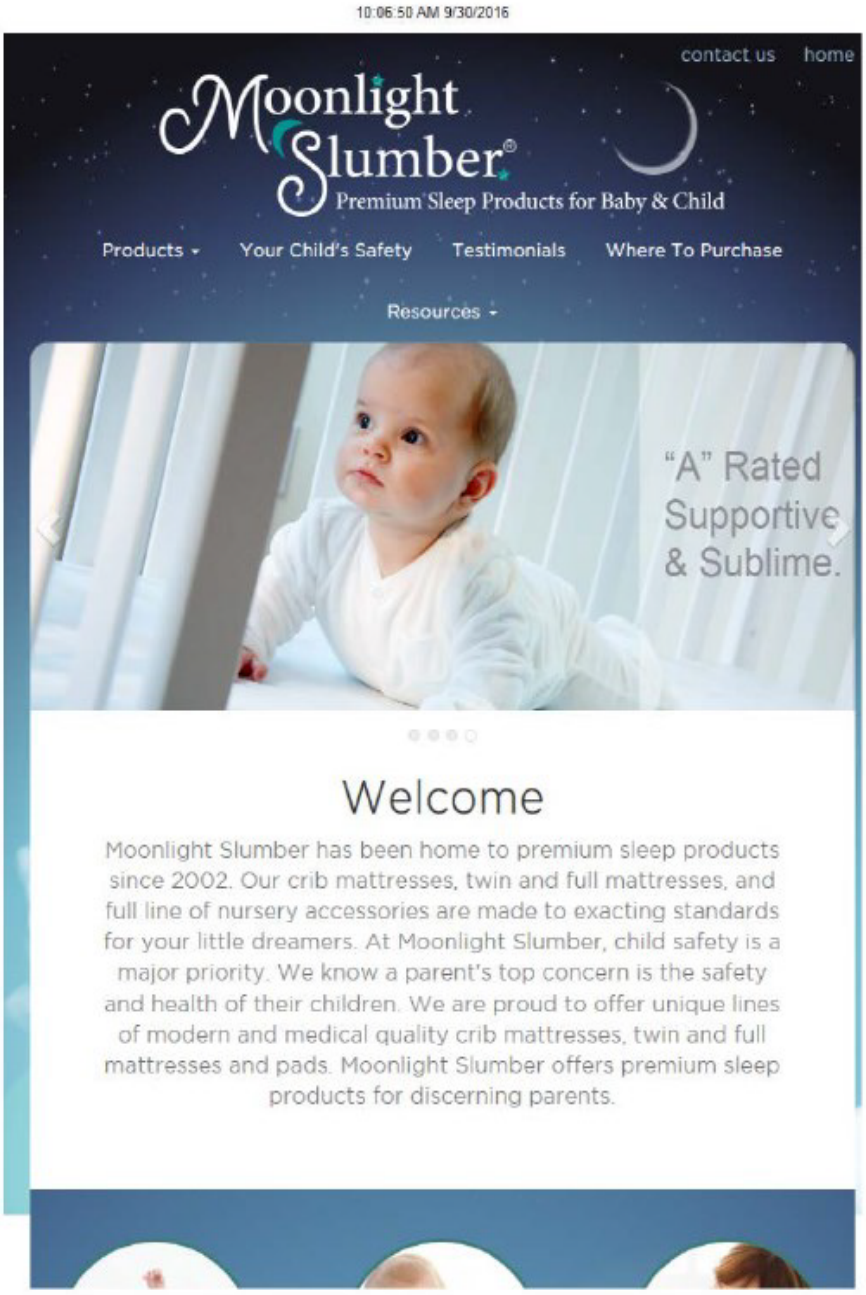
Exhibit 12



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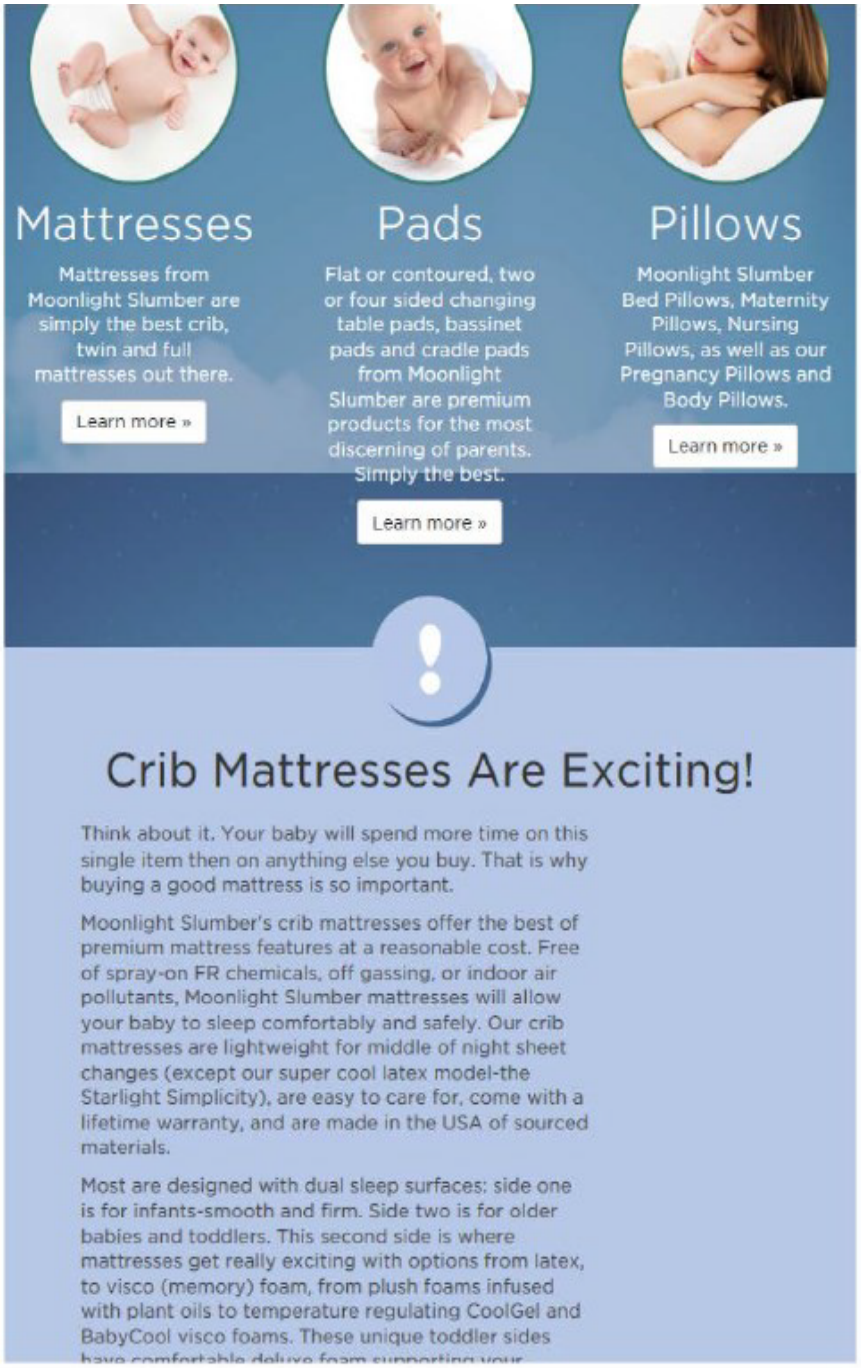
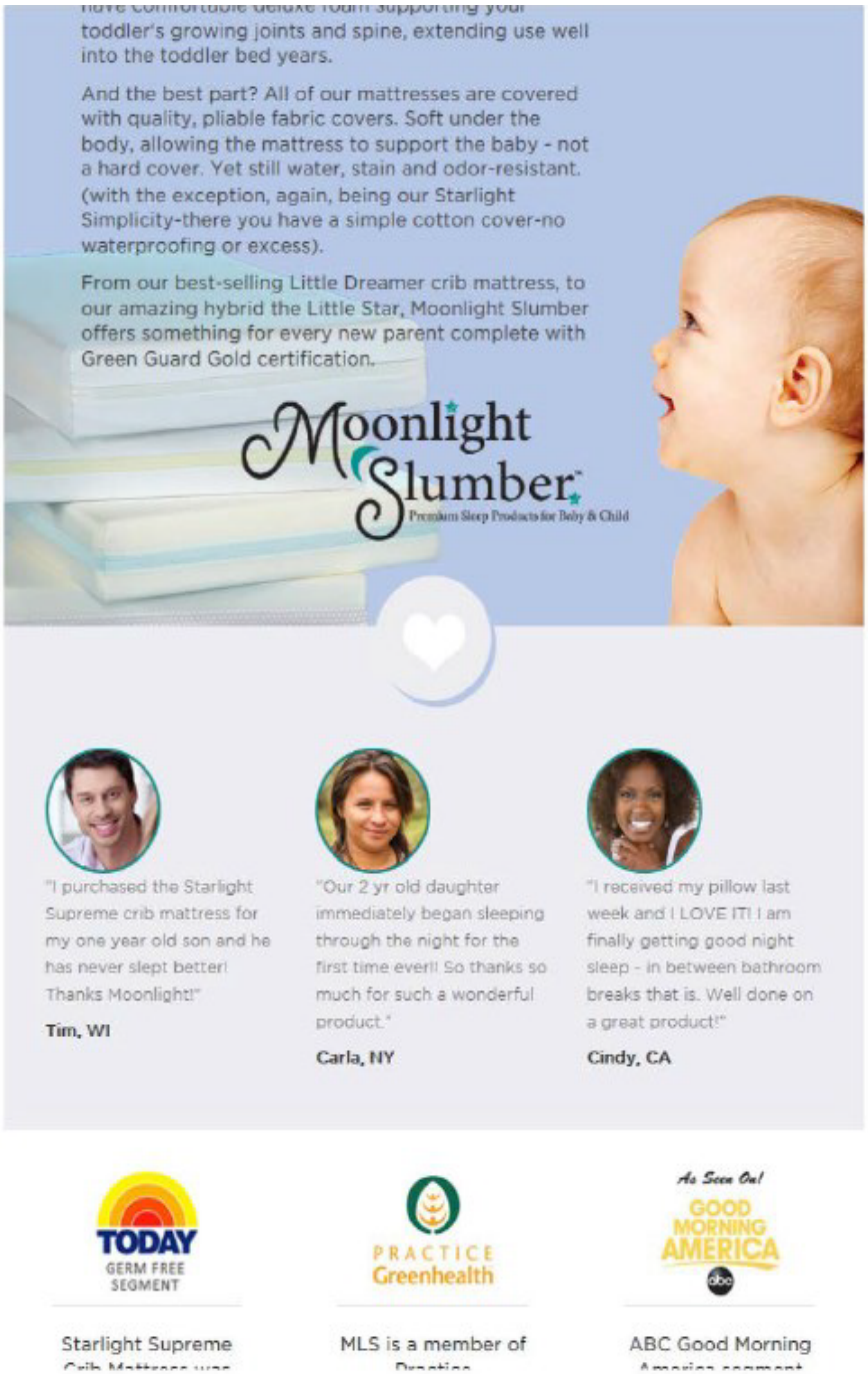

Mattresses
Mattresses from Moonlight Slumber are simply the best crib, twin and full mattresses out there.
Learn more »
Pads
Flat or contoured, two or four sided changing table pads, bassinet pads and cradle pads from Moonlight Slumber are premium products for the most discerning of parents. Simply the best.
Learn more »
Pillows
Moonlight Slumber Bed Pillows, Maternity Pillows, Nursing Pillows, as well as our Pregnancy Pillows and Body Pillows.
Learn more »
Crib Mattresses Are Exciting!
Think about it. Your baby will spend more time on this single item then on anything else you buy. That is why buying a good mattress is so important.
Moonlight Slumber's crib mattresses offer the best of premium mattress features at a reasonable cost. Free of spray-on FR chemicals, off gassing, or indoor air pollutants, Moonlight Slumber mattresses will allow your baby to sleep comfortably and safely. Our crib mattresses are lightweight for middle of night sheet changes (except our super cool latex model-the Starlight Simplicity), are easy to care for, come with a lifetime warranty, and are made in the USA of sourced materials.
Most are designed with dual sleep surfaces: side one is for infants-smooth and firm. Side two is for older babies and toddlers. This second side is where mattresses get really exciting with options from latex, to visco (memory) foam, from plush foams infused with plant oils to temperature regulating CoolGel and BabyCool visco foams. These unique toddler sides


toddler's growing joints and spine, extending use well into the toddler bed years.
And the best part? All of our mattresses are covered with quality, pliable fabric covers. Soft under the body, allowing the mattress to support the baby - not a hard cover. Yet still water, stain and odor-resistant. (with the exception, again, being our Starlight Simplicity-there you have a simple cotton cover-no waterproofing or excess).
From our best-selling Little Dreamer crib mattress, to our amazing hybrid the Little Star, Moonlight Slumber offers something for every new parent complete with Green Guard Gold certification.
Moonlight Slumber
Premium Sleep Products for Baby & Child
"I purchased the Starlight Supreme crib mattress for my one year old son and he has never slept better! Thanks Moonlight!"
Tim, WI
"Our 2 yr old daughter immediately began sleeping through the night for the first time ever!! So thanks so much for such a wonderful product."
Carla, NY
"I received my pillow last week and I LOVE IT! I am finally getting good night sleep - in between bathroom breaks that is. Well done on a great product!"
Cindy, CA
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GERM FREE SEGMENT
Starlight Supreme
PRACTICE
Greenhealth
MLS is a member of
As Seen On!
GOOD MORNING AMERICA
abc
ABC Good Morning

Complaint

http://moonlightslumber.com/

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violations of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, Respondent admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered the comment received from an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent Moonlight Slumber, LLC is an Illinois corporation with its principal office or place of business at 300 Brook Street, Elgin, Illinois 60120.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Certification" means any seal, logo, emblem, shield, or other insignia that expresses or implies approval or endorsement of any product, package, service, practice, or program, or any attribute thereof.

B. "Clearly and conspicuously" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made through only one means.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. On a product label, the disclosure must be presented on the principal display panel.

6. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

7. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

8. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

9. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

C. "Competent and reliable scientific evidence" means 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.

D. "Covered product" means any mattress, blanket, pillow, pad, foam-containing product, or sleep-related product.

E. "Emission" means any substance that is emitted by or produced during any normal use of a covered product.

F. "Respondent" means Moonlight Slumber, LLC and its successor and assigns.

G. "Trace level of emissions" means:

1. Emissions of the substance about which the claim is made do not result in inhalation concentrations

of that substance higher than background levels in the typical residential home.

2. Emissions of the substance about which the claim is made do not cause material harm that consumers typically associate with that substance, including harm to the environment or human health; and

3. The substance about which the claim is made has not been added intentionally to the covered product;

H. "Volatile Organic Compound" ("VOC") means any carbon-containing compound that evaporates at temperatures of 20 degrees to 25 degrees centigrade at air pressure of 101.3 kPa.

I. Prohibited Misleading and Unsubstantiated Representations Regarding Environmental and Health Claims

IT IS ORDERED that Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any covered product must not make any representation, expressly or by implication, including through the use of a product name, regarding:

A. whether such product is in whole or part organic;

B. whether such product is in whole or part natural;

C. whether such product is in whole or part plant-based;

D. the content of such product;

E. the emissions from such product; or

F. the environmental or health benefits of such product,

unless the representation is non-misleading, including that, at the time such 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 is sufficient in quality and quantity based on standards generally accepted in the relevant fields when considered in light of the entire body of relevant and reliable evidence, to substantiate that the representation is true.

II. Prohibited Misleading and Unsubstantiated Representations Regarding Emissions From Covered Products

IT IS FURTHER ORDERED that Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any covered product must not make any representation, expressly or by implication, that:

A. the emissions from a covered product are zero;

B. the VOC emissions from a covered product are zero;

C. the emissions of any individual substance or substances from a covered product are zero; or

D. the emissions, VOC emissions, or emissions of any individual substance or substances from a covered product are zero in a particular circumstance, including at or after a particular point in time;

unless the representation is non-misleading, including that, at the time such representation is made, Respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the covered product does not emit more than a trace level of

emissions of the substance or substances about which the claim is made in the represented circumstance.

III. Prohibited Misrepresentations Regarding Tests, Studies, or Other Research

IT IS FURTHER ORDERED that Respondent and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product must not make any misrepresentation, expressly or by implication, concerning:

A. the existence, contents, validity, results, conclusions, or interpretations of any test, study, or other research, including that studies, research, or trials prove that Respondent's mattresses do not emit volatile organic compounds or off-gas; or

B. any benefit of such product is scientifically or clinically proven or otherwise established.

IV. Prohibited Misleading Certifications

IT IS FURTHER ORDERED that Respondent and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or sale of any covered product must not misrepresent, expressly or by implication:

A. Whether, or the degree to which, a third party has evaluated a product, package, service, practice, or program based on its environmental or health benefits or attributes; or

B. Whether, or the degree to which, a certification is made by an independent person or organization.

V. Disclosure of Material Connection

IT IS FURTHER ORDERED that Respondent and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service, must not make any representation, expressly or by implication, about any consumer, certifier, or other endorser of such product or service without disclosing, clearly and conspicuously, and in close proximity to the representation, any unexpected material connection between such endorser and (1) the Respondent or (2) any other individual or entity affiliated with the product or service. For purposes of this Provision, "unexpected material connection" means any relationship that might materially affect the weight or credibility of the testimonial, certification, or other endorsement and that would not reasonably be expected by consumers. Any certification that is awarded by Respondent to its own product creates an "unexpected material connection."

VI. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days after delivery, a signed and dated acknowledgment of receipt of this Order.

VII. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Ninety days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (1) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (2) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (3) describe the activities of each business; (4) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and (5) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in any designated point of contact or the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including the creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar

proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: Moonlight Slumber, C-.

VIII. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records and retain each such record for 5 years. Specifically, Respondent must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Records of all consumer complaints concerning the subject matter of the Order , including complaints involving representations covered by Parts I, II, III, IV,

or V of the Order, whether received directly or indirectly, such as through a third party, and any response;

D. A copy of each unique advertisement or other marketing material making a representation subject to this Order;

E. For 5 years from the date of the last dissemination of any representation covered by this Order:

1. All materials that were relied upon in making the representation; and

2. All tests, analyses, research, studies, or other evidence in Respondent's possession, custody, or control that contradicts, qualifies, or otherwise calls into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and

F. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

IX. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate

directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

X. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on December 11, 2037, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any provision in this Order that terminates in less than 20 years;

B. This Order's application to any Respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after the Order has terminated pursuant to this provision.

If such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of

the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from Moonlight Slumber, LLC ("respondent").

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

This matter involves the deceptive environmental and health claims respondent made regarding its baby mattresses. According to the FTC complaint, respondent made unsubstantiated representations that its mattresses are organic, natural, or plant-based and that its mattresses will not emit any substance, including volatile organic compounds, or off gas; claimed that testing proved that its mattresses do not emit volatile organic compounds; and represented that its mattresses have been certified by Green Safety Shield, yet failed to disclose that it has a material connection to the Green Safety Shield seal. Consumers likely interpret such seals as a claim that an independent third party certified the product. The complaint alleges that all of these claims are deceptive in violation of Section 5(a) of the FTC Act.

The proposed consent order contains five provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I prohibits misleading representations

regarding whether any mattress, blanket, pillow, pad, foam-containing product, or sleep-related product is organic, natural, or plant-based; regarding the emissions from such product; and regarding the general environmental and health benefits of such product. The order requires respondent to possess competent and reliable evidence, including scientific evidence when appropriate, to substantiate these representations.

Part II prohibits misleading representations regarding emissions-free and VOC-free claims. The order requires competent and reliable scientific evidence to substantiate that a product does not emit more than a trace level of emissions of the substance about which the claim is made. The order defines "emission" to include all emissions (not just VOCs that cause smog). This definition reflects the Commission's Enforcement Policy Statement and consumer expectations: consumers are likely concerned about the potential health effects from exposure to chemical emissions found in indoor air, not just VOCs that affect outdoor air quality. Consistent with the Green Guides, the order defines "trace level of emissions" for claims for a substance to mean that (1) emissions of the substance do not result in inhalation concentrations of that substance higher than background levels in the typical residential home; (2) emissions of the substance do not cause material harm that consumers typically associate with that substance, including harm to the environment or human health; and (3) the substance has not been added intentionally to the covered product.

Part III prohibits respondent from mispresenting the results of any tests or studies, or from misrepresenting that any product benefit is scientifically or clinically proven. Parts IV and V prohibit respondent from misrepresenting certifications or failing to adequately disclose a material connection to a party making a representation, e.g., an endorser.

Parts VI through X are reporting and compliance provisions. Part VI mandates that respondent acknowledge receipt of the order, distribute the order to certain employees and agents, and secure acknowledgments from recipients of the order. Part VII requires that respondent submit compliance reports to the FTC within ninety (90) days of the order's issuance and submit additional reports when certain events occur. Part VIII requires

that respondent create and retain certain records for five (5) years. Part IX provides for the FTC's continued compliance monitoring of respondent's activity during the order's effective dates. Part X is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

LENOVO (UNITED STATES) INC.

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

Docket No. C-4636; File No. 152 3134
Complaint, December 20, 2017 – Decision, December 20, 2017

This consent order addresses Lenovo (United States), Inc.'s preinstallation on certain consumer laptops of VisualDiscovery, an ad-injecting software developed by Superfish, Inc. and customized for Lenovo. The complaint alleges that VisualDiscovery's substitution of digital certificates for https:// websites with its own certificates for those websites created significant security vulnerabilities. The complaint further alleges that Lenovo failed to discover these significant security vulnerabilities because it failed to take reasonable measures to assess and address security risks created by third-party software it preinstalled on its laptops. The consent order prohibits Lenovo from making any misrepresentations about certain preinstalled software on its personal computers and requires Lenovo to obtain a consumer's affirmative express consent, with certain limited exceptions, prior to any preinstalled software a) injecting advertisements into a consumer's Internet browsing session, or b) transmitting, or causing to transmit, the consumer's personal information to any person or entity other than the consumer.

Participants

For the *Commission*: *Tiffany George* and *Linda Holleran Kopp.*

For the *Respondent*: *Rebecca Engrav* and *Janis Kestenbaum, Perkins Coie LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Lenovo (United States) Inc. has violated Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Lenovo (United States) Inc. ("Lenovo") is a Delaware corporation with its principal office or place of business

located at 1009 Think Place, Morrisville, North Carolina 27560-9002.

2. The acts and practices of Respondent alleged in the 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. Respondent is one of the world's largest manufacturers of personal computers, including desktop computers, laptops, notebooks, and tablets. Respondent employs approximately 7,500 people in the United States.

4. In August 2014, Respondent began selling certain laptop models to U.S. consumers with a preinstalled ad-injecting software (commonly referred to as "adware"), known as VisualDiscovery. VisualDiscovery was developed by Superfish, Inc. , a Delaware corporation with its principal office or place of business located in Palo Alto, California.

5. VisualDiscovery delivered pop-up ads to consumers of similar-looking products sold by Superfish's retail partners whenever a consumer's cursor hovered over the image of a product on a shopping website. For example, if a consumer's cursor hovered over a product image while the consumer viewed owl pendants on a shopping website like Amazon.com, VisualDiscovery would overlay pop-up ads onto that website of other similar-looking owl pendants sold by Superfish's retail partners.

6. VisualDiscovery also operated as a local proxy that stood between the consumer's browser and all the Internet websites that the consumer visited, including encrypted https:// websites (commonly referred to as a "man-in-the-middle" or a "man-in-the-middle" technique). This man-in-the-middle technique allowed VisualDiscovery to see all of a consumer's sensitive personal information that was transmitted on the Internet, such as login credentials, Social Security numbers, financial account information, medical information, and web-based email communications. VisualDiscovery then collected, transmitted to Superfish servers, and stored a more limited subset of user

information, including: the URL visited by the consumer; the text appearing alongside images appearing on shopping websites; the name of the merchant website being browsed; the consumer's IP address; and a unique identifier assigned by Superfish to the user's laptop (collectively, "consumer Internet browsing data"). Superfish had the ability to collect additional information from Lenovo users through VisualDiscovery at any time.

THE PREINSTALLATION OF VISUALDISCOVERY ON LENOVO LAPTOPS

7. VisualDiscovery is a Lenovo-customized version of Superfish's ad-injecting software, WindowShopper. During the course of discussions with Superfish, Lenovo required a number of modifications to Superfish's WindowShopper program. The most significant modification resulted from Lenovo's requirement that the software inject pop-up ads on multiple Internet browsers, including browsers that the consumer installed after purchase. This condition required WindowShopper to change the way it delivered ads.

8. To provide Respondent's required functionality, Superfish licensed and incorporated a tool from Komodia, Inc. With this tool, VisualDiscovery operated on every Internet browser installed on consumers' laptops, and injected pop-up ads on both http:// and encrypted https:// websites.

9. To facilitate its injection of pop-up ads into encrypted https:// connections, VisualDiscovery replaced the digital certificates for https:// websites visited by consumers with Superfish's own certificates for those websites. Digital certificates, part of the Transport Layer Security (TLS) protocol, are electronic credentials presented by https:// websites to consumers' browsers that, when properly validated, serve as proof that consumers are communicating with the authentic website and not an imposter.

10. VisualDiscovery was able to replace the websites' digital certificates because it installed a self-signed root certificate in the laptop's operating system, which caused consumers' browsers to automatically trust the VisualDiscovery-signed certificates. This allowed VisualDiscovery to act as a man-in-the-middle, causing

both the browser and the website to believe that they had established a direct, encrypted connection, when in fact, the VisualDiscovery software was decrypting and re-encrypting all encrypted communications passing between them without the consumer's or the website's knowledge.

11. Superfish informed Respondent of its use of the Komodia tool and warned that it might cause antivirus companies to flag or block the software. And in fact, as discussed *infra* at Paragraphs 20-24, the modified VisualDiscovery software (using the Komodia tool) created two significant security vulnerabilities that put consumers' personal information at risk of unauthorized access. Without requesting or reviewing any further information, Lenovo approved Superfish's use of the Komodia tool.

12. After a security researcher reported to Respondent that there were problems with VisualDiscovery's interactions with https:// websites in September 2014, Respondent began to preinstall a second version of VisualDiscovery in December 2014 that did not operate on https:// websites or contain the root certificate that created the security vulnerabilities discussed *infra*. Respondent did not update laptops that had the original version of VisualDiscovery preinstalled or stop the shipment of those laptops. In total, over 750,000 U.S. consumers purchased a Lenovo laptop with VisualDiscovery preinstalled, with over half of those consumers purchasing laptops with the original version of VisualDiscovery preinstalled.

RESPONDENT'S DISCLOSURES ABOUT VISUALDISCOVERY'S PREINSTALLATION AND OPERATION WERE INADEQUATE

13. Respondent did not make any disclosures about VisualDiscovery to consumers prior to purchase. It did not disclose the name of the program; the fact that the program would act as a man-in-the-middle between consumers and all websites with which they communicated, including sensitive communications with encrypted https:// websites; or the fact that the program would collect and transmit consumer Internet browsing data to Superfish.

14. The VisualDiscovery software was designed to have limited visibility on the consumer's laptop. For example, the software was always on and running in the background without the consumer having to do anything to start or otherwise activate the software. There was no desktop icon for VisualDiscovery; there was no icon in the computer's applications tray to indicate that VisualDiscovery was running; and VisualDiscovery was not listed among the 'All Programs' list of installed programs, available when the consumer clicked on the Windows' Start button. The software was only visible on the laptop if consumers navigated to the Control Panel, where consumers could uninstall the program through Windows' 'Add/Remove' feature.

15. After consumers had purchased their laptops, VisualDiscovery displayed a one-time pop-up window the first time consumers visited a shopping website. Respondent worked with Superfish to customize the language of this pop-up window for its users. This pop-up stated:

> Explore shopping with VisualDiscovery: Your browser is enabled with VisualDiscovery which lets you discover visually similar products and best prices while you shop.

The pop-up window also contained a small opt-out link at the bottom of the pop-up that was easy for consumers to miss. If a consumer clicked on the pop-up's 'x' close button, or anywhere else on the screen, the consumer was opted in to the software. An example of the initial pop-up window is attached as Exhibit A.

16. The initial pop-up window failed to disclose, or failed to disclose adequately that VisualDiscovery would act as a man-in-the-middle between consumers and all websites with which they communicated, including sensitive communications with encrypted https:// websites, and collect and transmit consumer Internet browsing data to Superfish. These facts would be material to consumers in their decision of whether or not to use VisualDiscovery.

17. The omitted information was not available to consumers from other sources. VisualDiscovery's Privacy Policy and End

User License Agreement (EULA), available via hyperlinks in the initial pop-up window, similarly omitted the material information.

18. Even if consumers saw and clicked on the opt-out link, the opt-out was ineffective. Clicking on the link would only stop VisualDiscovery from displaying pop-up ads; the software still acted as a man-in-the-middle between consumers and all websites with which they communicated, including sensitive communications with encrypted https:// websites.

VISUALDISCOVERY CREATED SECURITY VULNERABILITIES THAT PUT CONSUMERS' PERSONAL INFORMATION AT RISK OF UNAUTHORIZED ACCESS

19. VisualDiscovery's substitution of websites' digital certificates with its own certificates created two security vulnerabilities related to the TLS protocol. The TLS protocol uses digital certificates that, when properly validated, serve as proof that consumers are communicating with the authentic https:// website. When a user connects to a website with an invalid certificate, the browser will warn the user that the connection is untrusted. An untrusted connection indicates that unknown parties could intercept any information sent over that connection or that the endpoint of the connection may not be the website the consumer intended to visit.

20. Here, however, VisualDiscovery did not adequately verify that websites' digital certificates were valid before replacing them with its own certificates, which were automatically trusted by consumers' browsers. This caused consumers to not receive warning messages from their browsers if they visited potentially spoofed or malicious websites with invalid digital certificates, and rendered a critical security feature of modern web browsers useless.

21. VisualDiscovery created an additional security vulnerability because it used a self-signed root certificate that employed the same private encryption key, with the same easy-to-crack password ("komodia") on every laptop, rather than employing private keys unique to each laptop. This practice violated basic encryption key management principles because

attackers could exploit this vulnerability to issue fraudulent digital certificates that would be trusted by consumers' browsers. Not only was the password easy to crack – security researchers did so in less than hour – but once attackers had cracked the password on one consumer's laptop, they could target every Lenovo user with VisualDiscovery preinstalled with man-in-the-middle attacks that could intercept consumers' electronic communications with any website, including those for financial institutions and medical providers. Such attacks would provide attackers with unauthorized access to consumers' sensitive personal information, such as Social Security numbers, financial account numbers, login credentials, medical information, and email communications. This vulnerability also made it easier for attackers to deceive consumers into downloading malware onto any affected Lenovo laptop.

22. The risk that this vulnerability would be exploited increased after February 19, 2015, when security researchers published information about both vulnerabilities and bloggers described how to exploit the private encryption key vulnerability. The next day, on February 20, 2015, the United States Computer Emergency Readiness Team (US-CERT), a division of the Department of Homeland Security responsible for analyzing and reducing cyber threats and vulnerabilities, issued a public warning about the VisualDiscovery security vulnerabilities. US-CERT recommended that consumers remove VisualDiscovery with a free removal tool offered by Respondent that would also remove its root certificate. Many consumers spent considerable time removing VisualDiscovery and its root certificate from their affected laptops. Merely opting out, disabling, or uninstalling VisualDiscovery would not address the security vulnerabilities.

23. Respondent stopped shipping laptops with VisualDiscovery preinstalled on or about February 20, 2015, although some of these laptops, including laptops with the original version of VisualDiscovery preinstalled, were still being sold through various retail channels as late as June 2015.

RESPONDENT FAILED TO IMPLEMENT REASONABLE SECURITY REVIEWS OF ITS CUSTOMIZED VISUALDISCOVERY SOFTWARE

24. Respondent failed to take reasonable measures to assess and address security risks created by third-party software preinstalled on its laptops. For example,

a. Respondent failed to adopt and implement written data security standards, policies, procedures or practices that applied to third-party software preinstalled on its laptops;

b. Respondent failed to adequately assess the data security risks of third-party software prior to preinstallation;

c. Respondent did not request or review any information about Superfish's data security policies, procedures and practices, including any security testing conducted by or on behalf of Superfish during its software development process, nor did Respondent request or review any information about the Komodia tool after Superfish informed Respondent that it could cause VisualDiscovery to be flagged by antivirus companies;

d. Respondent failed to require Superfish by contract to adopt and implement reasonable data security measures to protect Lenovo users' personal information;

e. Respondent failed to assess VisualDiscovery's compliance with reasonable data security standards, including failing to reasonably test, audit, assess or review the security of VisualDiscovery prior to preinstallation; and

f. Respondent did not provide adequate data security training for those employees responsible for testing third-party software.

25. As a result of these security failures, Respondent did not discover VisualDiscovery's significant security vulnerabilities, as described above. Respondent could have discovered the VisualDiscovery security vulnerabilities prior to preinstallation by implementing readily available and relatively low-cost security measures.

26. Consumers had no way of independently knowing about Respondents' security failures and could not reasonably have avoided possible harms from such failures.

RESPONDENT'S PREINSTALLATION OF VISUALDISCOVERY HARMED CONSUMERS

27. VisualDiscovery harmed consumers with respect to accessing the Internet. Accessing the Internet, including for private, encrypted communications, represents a central use of consumer laptops.

28. VisualDiscovery prevented consumers from having the benefit of basic security features provided by their Internet browsers for encrypted https:// connections, as described above. The non-profit Electronic Frontier Foundation (EFF) found that affected Lenovo laptop users who participated in its SSL Observatory research project visited websites with invalid certificates, but did not receive warnings from their browsers that the potentially malicious websites they visited were improperly authenticated. Some consumers have also complained that they suffered from fraudulent bank account and credit card activity within months of buying their affected Lenovo laptops.

29. VisualDiscovery also caused many websites to load slowly, render improperly, or not load at all. According to a test conducted by Superfish on an affected Lenovo laptop, VisualDiscovery slowed Internet upload speeds by approximately 125 percent and download speeds by almost 25 percent. In one noted incident, a consumer could not use his Lenovo laptop to log onto his employer's Virtual Private Network (VPN) because the employer's network did not recognize the Superfish digital certificate.

30. These harms are not outweighed by countervailing benefits to consumers or competition, and are not reasonably avoidable by consumers.

FTC ACT VIOLATIONS

Count One – Deceptive Failure to Disclose

31. As alleged in Paragraphs 13-18, Respondent represented, directly or indirectly, expressly or by implication, to consumers that VisualDiscovery was enabled on their browser and would allow consumers to discover similar looking products with the best prices.

32. Respondent's representation failed to disclose, or failed to disclose adequately, that VisualDiscovery would act as a man-in-the-middle between consumers and all websites with which communicated, including sensitive communications with encrypted https:// websites, and collect and transmit consumer Internet browsing data to Superfish, as alleged in Paragraph 6.

33. Respondent's failure to disclose the material information described in Paragraph 32, in light of the representation set forth in Paragraph 31, was, and is, a deceptive act or practice.

34. 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, 15 U.S.C. § 45(a).

Count Two – Unfair Preinstallation of Man-in-the-Middle Software

35. As alleged in Paragraphs 13-18, 27 and 29-30, Respondent's preinstallation of ad-injecting software that, without adequate notice or informed consent, acted as a man-in-the-middle between consumers and all the websites with which they communicated, including sensitive encrypted https:// websites, and collected and transmitted consumer Internet browsing data to Superfish, caused or is likely to cause substantial injury to consumers, that is not offset by countervailing benefits to consumers or competition, and is not reasonably avoidable by consumers. This practice was, and is, an unfair act or practice.

36. 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, 15 U.S.C. § 45(a).

Count Three – Unfair Security Practices

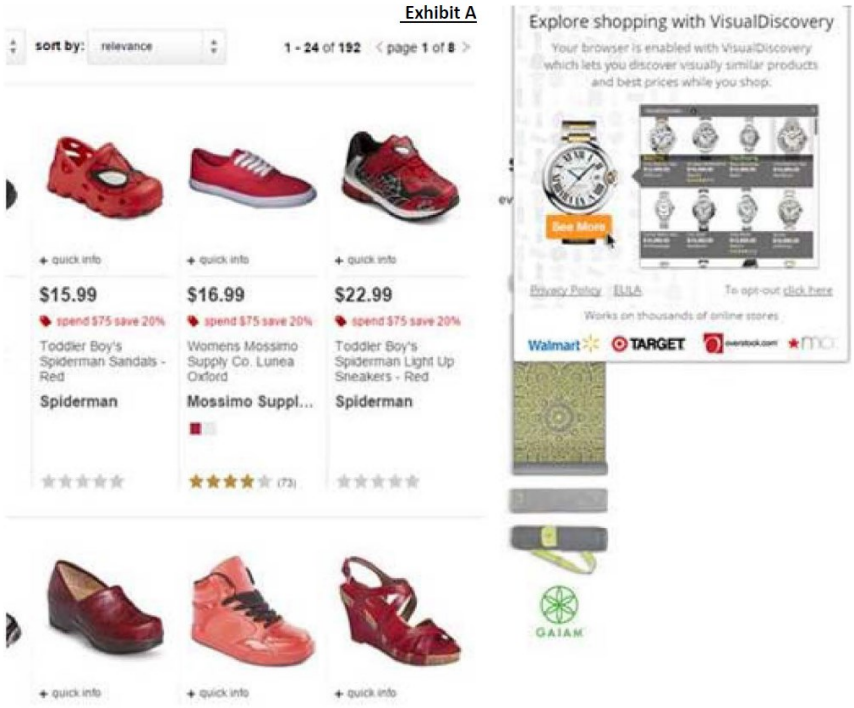
37. As alleged in Paragraphs 19-29, Respondent's failure to take reasonable measures to assess and address security risks created by third-party software preinstalled on its laptops, caused or is likely to cause substantial injury to consumers, that is not offset by countervailing benefits to consumers or competition, and is not reasonably avoidable by consumers. This practice was, and is, an unfair act or practice.

38. 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, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this twentieth day of December, 2017, has issued this complaint against Respondent.

By the Commission.

Exhibit A



DECISION AND ORDER

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statement by Respondent that it neither

admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent is a Delaware corporation, with its principal office or place of business located at 1009 Think Place, Morrisville, North Carolina 27560-9002.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Respondent" means Lenovo (United States) Inc., and its successors and assigns.

B. "Affirmative express consent" means that:

   1. Prior to the initial operation of any covered software, it shall be clearly and conspicuously

disclosed, separate and apart from any "end user license agreement," "privacy policy," "terms of use" page or similar document, the following:

a. For any covered software that displays advertising,

   i. the fact that the covered software will display advertisements, including any pop-up advertisements; and

   ii. the frequency and circumstances under which such advertisements are displayed to the consumer; and

b. For any covered software that transmits, or causes to be transmitted, covered information to a person or entity other than the consumer,

   i. the fact that the software will transmit, or cause to be transmitted, the covered information to a person or entity other than the consumer;

   ii. the types of covered information that will be transmitted to a person or entity other than the consumer;

   iii. the types of covered information that the receiving person or entity will share with third parties, which does not include an entity with a common corporate ownership and branding of Respondent or the software provider, a third party service provider, or any person or entity otherwise excluded by the Proviso in Part II of this Order;

   iv. the identity or specific categories of such third parties; and

   v. the purposes for sharing such covered information.

2. At the time this disclosure is made, a clear and conspicuous mechanism shall be provided for a consumer to indicate assent to the operation of the covered software by taking affirmative action authorizing its operation.

C. "Application software" means any computer program designed for and used by consumers (*e.g.*, database programs, word processing programs, games, Internet browsers, or browser add-ons) that Respondent preinstalls or causes to be preinstalled onto a covered product. Application software does not include device drivers; system software designed to configure, optimize or maintain a computer; operating systems; software bundled, integrated or included with operating systems; or software otherwise provided to Respondent for preinstallation on a covered product by an operating system provider.

D. "Clear(ly) and conspicuous(ly)" means that a required disclosure is difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. On a product label, the disclosure must be presented on the principal display panel.

6. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.

7. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

8. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

9. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

E. "Covered information" means the following information from or about an individual consumer that is input into, stored on, accessed or transmitted through application software: (a) a first and last name; (b) a physical address; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) login credentials and passwords; (e) a telephone number; (f) a Social Security number; (g) a driver's license or other government-issued identification number; (h) a financial institution account number; (i) credit or debit

card information; (j) any portion of the content of a consumer's communications; (k) any portion of the content of a consumer's files (*e.g.*, documents, photos or videos); and (l) precise geolocation information sufficient to identify a street name and name of a city or town.

F. "Covered product" means any personal computer (*i.e.*, desktop computers, laptops, laptops that convert into tablets or vice versa, and notebooks) that is manufactured by or on behalf of Respondent and is sold to U.S. consumers. Covered products do not include servers and server peripherals, mobile handsets or smartphones, or tablets or similar devices that are sold without an integrated or detachable physical keyboard. Covered products also do not include the actual personal computers specifically sold to enterprise customers with over 1,000 employees.

G. "Covered software" means:

1. Application software that injects advertisements into a consumer's Internet browsing session, including pop-up advertisements; or

2. Application software that transmits, or causes to be transmitted, covered information to a person or entity other than the consumer, except when

   a. the covered information is used only in an aggregated and/or de-identified form that does not disclose, report, or otherwise share any individually identifiable information; or

   b. the covered information is transmitted or used solely for one or more of the following purposes:

      i. being reasonably necessary for the software to perform a function or service that the consumer requests or otherwise interacts with;

ii. authenticating the consumer;

iii. configuring or setting up the software; or

iv. assessing or analyzing the software's performance (*e.g.*, to find or fix problems in the software, assess how consumers are using the software, or to make improvements to the software).

Covered software does not include Internet browsers, antivirus software, parental control software, or other computer security software.

H. "Feature" means one or more of the following attributes of covered software: (a) the covered software's benefits, efficacy, or features; (b) the fact that it will display advertising, including pop-up advertisements; (c) the frequency and circumstances under which the covered software will display advertising; and (d) the fact of and extent to which the covered software will transmit, or cause to be transmitted, covered information to a person or entity other than the consumer.

I. "Software provider" means any person or entity other than Respondent that sells, leases, licenses, or otherwise provides application software.

J. "Third party service provider" means any person or entity that is contractually required by Respondent or a software provider to: (a) use or receive covered information collected by or on behalf of Respondent or the software provider for and at the direction of Respondent or the software provider, and for no other individual or entity; (b) not disclose the covered information, or any individually identifiable information derived from it, to any individual or entity other than Respondent or the software provider; and (c) not use the covered information for any other purpose.

I. Prohibited Misleading Representations

IT IS ORDERED that Respondent, its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, sale, or distribution of covered software shall not make a misrepresentation, in any manner, expressly or by implication, about any feature of the covered software.

II. Affirmative Express Consent Provision

IT IS FURTHER ORDERED that, commencing no later than 120 days after the date of service of this Order, Respondent, its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, shall not preinstall or cause to be preinstalled any covered software unless Respondent or the software provider:

A. will obtain the consumer's affirmative express consent;

B. provides instructions for how the consumer may revoke consent to the covered software's operation, which can include uninstalling the covered software; and

C. provides a reasonable and effective means for consumers to opt out, disable or remove all of the covered software's operations, which can include uninstalling the covered software.

Provided, however, that affirmative express consent will not be required if sharing the covered information is reasonably necessary to comply with applicable law, regulation or legal process.

III. Mandated Software Security Program

IT IS FURTHER ORDERED that Respondent must, no later than the date of service of this Order, establish and implement, and thereafter maintain a comprehensive software security program that is reasonably designed to (1) address software security risks related to the development and management of new and existing application software, and (2) protect the security, confidentiality, and integrity of covered information. The content, implementation and maintenance of the software security program must be fully documented in writing. The software security program must contain administrative, technical, and physical safeguards appropriate to Respondent's size and complexity, the nature and scope of Respondent's activities, the nature of the application software, the security policies and practices of the software provider, and the sensitivity of the covered information, including:

A. the designation of an employee or employees to coordinate and be responsible for the software security program;

B. the identification of internal and external risks to the security, confidentiality, or integrity of covered information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment must include consideration of risks in each area of relevant operation, including: (1) employee training and management; (2) application software design, including the processing, storage, transmission and disposal of covered information by the application software; and (3) the prevention, detection, and response to attacks, intrusions, or other vulnerabilities;

C. the design and implementation of reasonable safeguards to control these risks, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures;

D. the development and use of reasonable steps to select and retain software or service providers capable of maintaining security practices consistent with this Order, and requiring software and service providers, by contract, to implement and maintain appropriate safeguards; and

E. the evaluation and adjustment of the software security program in light of the results of the testing and monitoring required by sub-provision C, any changes to Respondent's operations or business arrangements, or any other circumstances that Respondent knows or has reason to know may have an impact on the effectiveness of the software security program.

IV. Software Security Assessments by a Third Party

IT IS FURTHER ORDERED that, in connection with compliance with the Provision of this Order titled Mandated Software Security Program, Respondent must obtain initial and biennial assessments ("Assessments"):

A. The Assessments must be obtained from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. A professional qualified to prepare such Assessments must be a person qualified as a Certified Secure Software Lifecycle Professional (CSSLP) with professional experience with secure Internet-accessible, consumer-grade devices; an individual qualified as a Certified Information Systems Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA) with professional experience with secure Internet-accessible consumer-grade devices; or a qualified individual or entity approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission.

B. The reporting period for the Assessments must cover: (1) the first 180 days after the issuance date of the Order for the initial Assessment, and (2) each 2-year

period thereafter for 20 years after issuance of the Order for the biennial Assessments.

C. Each Assessment must:

1. set forth the specific administrative, technical, and physical safeguards that Respondent has implemented and maintained during the reporting period;

2. explain how such safeguards are appropriate to Respondent's size and complexity, the nature and scope of Respondent's activities, the nature of the application software, the security policies and practices of the application software provider, and the sensitivity of the covered information;

3. explain how the safeguards that have been implemented meet or exceed the protections required by the Provision of this Order titled Mandated Software Security Program; and

4. certify that the Mandated Software Security Program is operating with sufficient effectiveness to provide reasonable assurance that the security of the application software preinstalled on covered products and the security, confidentiality, and integrity of covered information is protected, and that the Mandated Software Security Program has so operated throughout the reporting period.

D. Each Assessment must be completed within 60 days after the end of the reporting period to which the Assessment applies. Respondent must submit the initial Assessment to the Commission within 10 days after the Assessment has been completed. Respondent must retain all subsequent biennial Assessments, at least until the Order terminates. Respondent must submit any biennial Assessments to the Commission within 10 days of a request from a representative of the Commission.

V. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 5 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, and directors; (2) all employees, agents, and representatives with managerial responsibilities related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

VI. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent makes timely submissions to the Commission:

A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's business entities by all of their names; (c) describe the activities of each business, including the goods and services offered; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the costs incurred and changes made by the Respondent to comply with the

Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (a) any designated point of contact; or (b) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____," and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: *In re Lenovo (United States) Inc.*

VII. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for 20 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all covered products sold, the costs incurred in generating those revenues, and resulting net profit or loss;

B. personnel records showing, for each person who must receive a copy of this Order pursuant to Part V.B., that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. copies or records of all U.S. consumer complaints relating to covered software or the security of application software, whether received directly or indirectly, such as through a third party, and any response;

D. a copy of each representation subject to this Order;

E. for 5 years after the date of preparation of each Assessment required by this Order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of Respondent, including all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials concerning Respondent's compliance with related Provisions of this Order, for the compliance period covered by such Assessment; and

F. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

VIII. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with any Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

IX. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on December 20, 2037, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. any Provision in this Order that terminates in less than 20 years;

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

C. this Order if such complaint is filed after the Order has terminated pursuant to this Provision.

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

By the Commission.

Statement of Acting Chairman Maureen K. Ohlhausen
In the Matter of Lenovo, Inc.
September 5, 2017

I support this important case and the strong settlement. I write separately to caution against an over broad application of our failure to disclose (sometimes called "deceptive omission") authority. We should hew to longstanding case law and avoid circumventing congressionally-established limits on our authority. I therefore respectfully disagree with my colleague's position that we should expand Count I to allege additional failures to disclose.

Most FTC deception cases involve an express misrepresentation ("This sugar pill cures cancer") or an express statement that gives rise to an implied claim that is false or misleading ("Many people who take this sugar pill don't die of cancer").

Concurring Statement

Although the FTC and the courts have also recognized that a failure to disclose can be deceptive, this has limits.[1] For every product there is a potentially enormous amount of information that at least some consumers might wish to know when deciding whether to purchase or use it.[2] Copious disclosures would be both impractical and unhelpful, and the law sensibly does not require sellers to disclose all information that a consumer might find important.

Thus, the FTC has generally found a failure to disclose to be deceptive in two categories of cases. First, the FTC has found "half-truths" to be deceptive, where a seller makes a truthful statement that creates a material misleading impression that the seller does not correct.[3] Most of the FTC's failure to disclose cases are half-truth cases, and many could be restyled as cases of implied false or misleading claims. For example, a complaint addressing the claim that "Many people who take this sugar pill don't die of cancer" could allege an implied false claim that the pill cures cancer, or could allege a deceptive failure to disclose that the pill does not reduce the chances of dying from cancer.

Second, and less frequently, the FTC has found a seller's silence to be deceptive "under circumstances that constitute an implied but false representation."[4] Such implied false representations can arise from "ordinary consumer expectations as to the irreducible minimum performance standards of a particular class of good."[5] Stated differently, offering a product for sale implies that the product is "reasonably fit for [its] intended uses,"

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1 *International Harvester Co.*, 104 FTC 949 (1984), represents the Commission's most comprehensive effort to define deceptive omissions, and that framework remains in place today. *See also*, *Cliffdale Associates, Inc.*, 103 FTC 110, App. A at 2 (1984) ("Deception Statement").

2 *International Harvester*, 104 FTC at 1059 (explaining why the FTC does not treat pure omissions as deceptive).

3 *Id.* at 1057-58.

4 *Id.* at 1058.

5 *Id.*

and that it is "free of gross safety hazards."[6] If the product does not meet ordinary consumer expectations of minimum performance, or if the product is not reasonably fit for its intended uses, the seller must disclose that. For example, it would be deceptive for an auto dealer to sell, without a disclosure, a normal-looking car with a maximum speed of 35 miles per hour.[7] Consumers expect cars to be able to reach highway speeds, and thus the dealer must disclose to the buyer that the car does not meet that ordinary expectation.

In such cases, an omission is misleading under the FTC Act if the consumers' ordinary fundamental expectations about the product were violated. Mere annoyances that leave the product reasonably fit for its intended use do not meet this threshold.[8] Thus, a dealer's failure to disclose that some might find a car's seatbelt warning to be annoyingly loud would not be a deceptive omission because consumers have no ordinary expectations about car seatbelt warnings that would mislead them absent a disclosure.

As *International Harvester* sets out at length, a deceptive omission is distinct from an unfair failure to warn or other forms of unfair omissions.[9] The FTC has brought such cases under its unfairness authority where it has met the statutorily mandated higher burden of showing that the conduct causes or is likely to cause substantial consumer injury that is not reasonably avoidable by the consumer and is not outweighed by benefits to consumers or competition.[10]

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6 *Id.* at 1058-59.

7 *Id.* at n.29.

8 *Id.* at 1058; Deception Statement at n.4 ("Not all omissions are deceptive, even if providing the information would benefit consumers.… Failure to disclose that the product is not fit constitutes a deceptive omission.")

9 *Id.* at 1051 ("It is important to distinguish between the circumstances under which omissions are deceptive … and the circumstances under which they amount to an unfair practice.").

10 15 U.S.C. §45(n).

Turning to the case at hand, the complaint alleges that VisualDiscovery advertising software on Lenovo laptops acted as a man-in-the-middle between consumers and the websites they visited. As such, the software had access to all secure and unsecure consumer-website communications and rendered useless a critical security feature of the laptops' web browsers. Such practices introduced gross hazards inconsistent with ordinary consumer expectations about the minimum performance standards of software. As a result, the man-in-the-middle functionality and the problems it generated made VisualDiscovery unfit for its intended use as software. Thus, Count I properly alleges that Lenovo failed to disclose, or disclose adequately, that VisualDiscovery acted as a man-in-the-middle.[11]

Although Commissioner McSweeny and I both support Count I, she would add allegations that Lenovo failed to disclose that VisualDiscovery injected ads into shopping websites and slowed web browsing. She argues that the injected ads and slowed web browsing altered the internet experience of consumers, and thus VisualDiscovery failed to meet "ordinary consumer expectations as to the irreducible minimum performance standards of [that] particular class of good."[12]

I respectfully disagree. Lenovo failed to disclose that VisualDiscovery would act as a man-in-the-middle. However, Lenovo *did* disclose that the software would introduce advertising into consumers' web browsing, although its disclosure could have been better. Furthermore, to the extent ordinary consumers expect anything from advertising software, they likely expect it to affect their web browsing and to be intrusive, as the popularity of ad blocking technology shows. In addition, unlike the man-in-the-middle technique, VisualDiscovery's ad placement and web browsing effects did not introduce gross hazards obviously outside of consumers' ordinary expectations for advertising software. In short, although VisualDiscovery's ad placement and

11 Count I of the complaint is pled in the form of a half-truth, but could also be pled as a failure to correct a false representation implied from circumstances, and so I address Commissioner McSweeny's argument as framed.

12 Statement of Commissioner Terrell McSweeny at 1 (*citing International Harvester*, 104 FTC at 1058).

effect on web browsing may have been irritating to many, those features did not make VisualDiscovery unfit for its intended use. Therefore, I do not find Lenovo's silence about those features to be a deceptive omission.

Fortunately, the outcome in this case does not depend on resolving our disagreement on the application of deceptive omission to advertising software. My goal in writing separately is to maintain the clear distinction set forth in *International Harvester* between deceptive failures to disclose and unfair omissions.[13] When evaluating the legality of a party's silence, we must be careful not to circumvent unfairness's higher evidentiary burden by simply restyling an unfair omission as a deceptive omission.

13 *International Harvester*, 104 FTC at 1051.

Concurring and Dissenting Statement

Statement of Commissioner Terrell McSweeny
In the Matter of Lenovo, Inc.
September 5, 2017

I support the Commission's complaint against Lenovo, but I am troubled by conduct in this case that the Commission fails to challenge. According to the complaint, Lenovo, Inc. preinstalled software on computers that was designed to serve advertisements to consumers while they were browsing websites. The software, called VisualDiscovery, acted as a "man-in-the-middle" between the consumers and all of the websites with which they communicated. It allegedly actively contravened the security posture of consumers' computers, leaving them vulnerable both to attack from cyber-criminals and to transmitting personal information across the web to Superfish, Inc. servers. These unfair practices violate the Federal Trade Commission Act and are appropriately challenged by the FTC in Counts II and III of the complaint.

But Lenovo's unlawful conduct went beyond the data security failings alleged in the complaint. The complaint also describes how the software it preinstalled on computers would: (1) inject pop-up ads every time consumers visited a shopping website; and (2) disrupt web browsing by reducing download speeds by almost 25 percent and upload speeds by 125 percent. These facts were not disclosed to consumers and these omissions were deceptive.

Moreover, the FTC alleges that the VisualDiscovery software was designed to be difficult to discover. Consumers were initially made aware of the existence of the VisualDiscovery software via a pop-up window the first time they visited an ecommerce site. But clicking to close that window *opted consumers into the program*. The initial pop-up window failed to disclose that VisualDiscovery would follow the consumers from shopping site to shopping site; slow the performance and functionality of the web sites they visited; and compromise their security and privacy throughout each online browsing session.

Under Section 5 of the FTC Act, the failure to disclose information necessary to prevent the creation of a false impression

is a deceptive practice.[1] A seller's silence may make an implied representation "based on ordinary consumer expectations as to the irreducible minimum performance standards of a particular class of good."[2] In this case, Lenovo deceptively omitted that VisualDiscovery would alter the very internet experience for which most consumers buy a computer. I believe that if consumers were fully aware of what VisualDiscovery was, how it compromised their system, and how they could have opted out, most would have decided to keep VisualDiscovery inactive.

This is an exceptionally strong case and clearly articulates how the Commission uses its unfairness tools to protect the data security and privacy of consumers. I support Count I, but believe the FTC should have included additional deceptive conduct alleged in the complaint within the count. The FTC should not turn a blind eye to deceptive disclosures and opt-ins, particularly when consumers' privacy and security are at stake.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Lenovo (United States), Inc. ("Lenovo").

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

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1 *FTC Policy Statement on Deception*, 103 F.T.C. 174, 175 (1984) (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)).

2 *Int'l. Harvester Co.*, 104 F.T.C. 949, 1058 (1984).

Analysis to Aid Public Comment

This matter involves Lenovo, one of the world's largest personal computer manufacturers, and its preinstallation on certain consumer laptops of VisualDiscovery, an ad-injecting software developed by Superfish, Inc. and customized for Lenovo. VisualDiscovery injected pop-up ads of similar-looking products sold by Superfish's retail partners whenever a consumer's cursor hovered over a product image while browsing on a shopping website. For example, when a consumer's cursor hovered over an image of owl-shaped pendants on a shopping website like amazon.com, VisualDiscovery would show the user pop-up ads of similar-looking owl pendants. To do so, VisualDiscovery acted as a "man-in-the-middle" between consumers' browsers and the websites they visited, including encrypted https:// websites. This man-in-the-middle technique allowed VisualDiscovery to see all of a consumer's sensitive personal information that was transmitted on the Internet, such as login credentials, Social Security numbers, financial account information, medical information, and email communications. VisualDiscovery then collected, transmitted to Superfish servers, and stored a more limited subset of user information, including the website addresses visited by consumers, consumers' IP addresses, and a unique identifier assigned by Superfish to each user's laptop. Superfish had the ability to collect additional information from Lenovo users through VisualDiscovery at any time.

To facilitate its injection of pop-up ads into encrypted https:// websites, VisualDiscovery installed a self-signed root certificate in the laptop's operating system. This allowed VisualDiscovery to replace the digital certificates for https:// websites with VisualDiscovery's own certificates for those websites and caused consumers' browsers to automatically trust the VisualDiscovery-signed certificates. Digital certificates are part of the Transport Layer Security (TLS) protocol that, when properly validated, serve as proof that consumers are communicating with the authentic https:// website and not an imposter.

As alleged in the complaint, VisualDiscovery's substitution of digital certificates for https:// websites with its own certificates for those websites created two significant security vulnerabilities. First, VisualDiscovery did not adequately verify that websites' digital certificates were valid before replacing them with its own certificates, which were automatically trusted by consumers'

browsers. This rendered a critical browser security function useless because browsers would no longer warn consumers that their connections were untrusted when they visited potentially spoofed or malicious websites with invalid digital certificates.

The complaint also alleges that VisualDiscovery created a second security vulnerability by using a self-signed root certificate with the same private encryption key and the same easy-to-crack password on every laptop rather than employing private keys unique to each laptop. This violated basic encryption key management principles because attackers who cracked the simple password on one consumer's laptop could then target every affected Lenovo user with man-in-the-middle attacks that could intercept consumers' electronic communications with any website, including those for financial institutions and medical providers. Such attacks would provide attackers with unauthorized access to consumers' sensitive personal information, such as Social Security numbers, financial account numbers, login credentials, medical information, and email communications. This vulnerability also made it easier for attackers to deceive consumers into downloading malware onto any affected Lenovo laptop. The risk that this vulnerability would be exploited increased after February 19, 2015, when news of these vulnerabilities became public and bloggers posted instructions on how the vulnerabilities could be exploited.

The complaint alleges that Lenovo failed to discover these significant security vulnerabilities because it failed to take reasonable measures to assess and address security risks created by third-party software it preinstalled on its laptops. Specifically, Lenovo allegedly:

- failed to adopt and implement written data security policies applicable to third-party preinstalled software;

- failed to adequately assess the data security risks of third-party software prior to preinstallation;

- failed to request or review any information prior to preinstallation about Superfish's data security policies, procedures or practices;

Analysis to Aid Public Comment

- failed to require Superfish by contract to adopt and implement reasonable data security measures;

- failed to assess VisualDiscovery's compliance with reasonable data security standards; and

- failed to provide adequate data security training for employees responsible for testing third-party software.

The complaint alleges that Lenovo's failure was an unfair act that caused or was likely to cause substantial consumer injury that consumers could not reasonably avoid, and that there were no countervailing benefits to consumers or competition.

The Commission's complaint also alleges that Lenovo failed to make adequate disclosures about VisualDiscovery to consumers. Lenovo did not disclose to consumers that it had preinstalled VisualDiscovery prior to purchase, and the software had limited visibility on the consumer's laptop. Lenovo only disclosed VisualDiscovery through a one-time pop-up window the first time consumers visited a shopping website that stated,

Explore shopping with VisualDiscovery: Your browser is enabled with VisualDiscovery which lets you discover visually similar products and best prices while you shop.

The pop-up window contained a small opt-out link at the bottom of the pop-up that was easy for consumers to miss. If a consumer clicked on the pop-up's 'x' close button, or anywhere else on the screen, the consumer was opted in to the software.

The complaint alleges that this pop-up window's disclosures were inadequate and violated Section 5 of the FTC Act by failing to disclose, or failing to disclose adequately, that VisualDiscovery would act as a man-in-the-middle between consumers and all the websites they visited, including encrypted https:// websites, and collect and transmit certain consumer Internet browsing data to Superfish. These facts would be material to consumers' decisions whether or not to use VisualDiscovery.

The complaint also alleges that Lenovo's preinstallation of the ad-injecting software that, without adequate notice or informed consent, acted as a man-in-the-middle between consumers and all the websites they visited, including encrypted https:// websites, and collected and transmitted certain consumer Internet browsing data to Superfish was an unfair act that caused or was likely to cause substantial injury to consumers, and that was not offset by countervailing benefits to consumers or competition and was not reasonably avoidable by consumers.

The proposed consent order contains provisions designed to prevent Lenovo from engaging in similar acts and practices in the future.

Part I of the proposed order prohibits Lenovo from making any misrepresentations about certain preinstalled software on its personal computers.

Part II of the proposed order requires Lenovo to obtain a consumer's affirmative express consent, with certain limited exceptions, prior to any preinstalled software a) injecting advertisements into a consumer's Internet browsing session, or b) transmitting, or causing to transmit, the consumer's personal information to any person or entity other than the consumer. Lenovo must also provide instructions for how consumers can revoke their consent to the software's operation by providing a reasonable and effective means for consumers to opt out, disable or remove the software.

Parts III and IV of the proposed order require Lenovo to implement a mandated software security program that is reasonably designed to address security risks in software preinstalled on its personal computers, and undergo biennial software security assessments of its mandated software security program by a third party.

Parts V through IX of the proposed order are standard reporting and compliance provisions. Part V requires dissemination of the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with managerial or supervisory responsibilities relating to Parts I – IV of the order. Part VI mandates that Lenovo submit a

compliance report to the FTC one year after issuance, and then notices, as the order specifies, thereafter. Parts VII and VIII requires Lenovo to retain documents relating to its compliance with the order for a five-year period, and to provide such additional information or documents necessary for the Commission to monitor compliance. Part IX states that the Order will remain in effect for 20 years.

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

INTEGRA LIFESCIENCES HOLDINGS CORPORATION
AND
JOHNSON & JOHNSON

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

Docket No. C-4624; File No. 171 0084
Complaint, September 26, 2017 – Decision, December 21, 2017

This consent order addresses the $1 billion acquisition by Integra LifeSciences Holdings Corporation of certain assets of Johnson & Johnson's Codman Neuro division. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the U.S. markets for intracranial pressure monitoring systems, cerebrospinal fluid collection systems, non-antimicrobial external ventricular drainage catheters, fixed pressure valve shunt systems, and dural grafts. The consent order requires the parties to divest all rights and assets to Natus Medical Incorporated related to Integra's intracranial pressure monitoring systems and fixed pressure valve shunt systems, as well as Codman's cerebrospinal fluid collection systems, non-antimicrobial external ventricular drainage catheters, and dural grafts.

Participants

For the *Commission*: *Anne R. Schenof, Danielle Sims, Aylin M. Skroejer* and *David Von Nirschl.*

For the *Respondents*: *Jessica Bratten, Patrick English, Amanda Reeves* and *E. Marcellus Williamson, Latham & Watkins LLP; Jonathan Cheng, Kristin Sanford* and *Laura Wilkinson, Weil, Gotshal & Manges 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 Integra LifeSciences Holdings Corporation ("Integra"), a corporation subject to the jurisdiction

of the Commission, has agreed to acquire certain assets of the Codman Neuro ("Codman") division of Respondent Johnson & Johnson, 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 Integra is 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 311 Enterprise Drive, Plainsboro, New Jersey 08536.

2. Respondent Johnson & Johnson is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New Jersey, with its principal executive offices located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933.

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.

THE PROPOSED ACQUISITION

4. Pursuant to an Asset Purchase Agreement signed on February 14, 2017, Integra will acquire Codman in a transaction valued at approximately $1.0 billion (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

THE RELEVANT MARKETS

5. The relevant lines of commerce in which to analyze the effects of the Acquisition are the development, manufacture, license, marketing, distribution, and sale of point of: (i) intracranial pressure monitoring systems; (ii) cerebrospinal fluid collection systems; (iii) non-antimicrobial external ventricular drainage catheters; (iv) fixed pressure valve shunt systems; and (v) dural grafts.

6. The United States is the relevant geographic area in which to assess the competitive effects of the Acquisition in the relevant lines of commerce.

THE STRUCTURE OF THE MARKETS

7. Integra and Codman are the only significant suppliers of intracranial pressure monitoring systems in the United States. Integra and Codman control approximately 68% and 26% of the market, respectively.

8. Integra and Codman are two of only three major suppliers of cerebrospinal fluid collection systems in the United States. Integra leads the market with approximately 57% market share, and Codman has a market share of approximately 14%. The other leading supplier, Medtronic, accounts for approximately 27% of the market.

9. Integra and Codman are two of only three major suppliers of non-antimicrobial external ventricular drainage catheters in the United States. Integra has a market share of approximately 29% and Codman has a share of approximately 17%. Medtronic is the only other substantial competitor, with a share of approximately 51%.

10. Integra, Codman, and Medtronic are the only three significant suppliers of fixed pressure valve shunts in the United States. Integra and Codman represent 23% and 15% of the market, respectively. Medtronic accounts for 55% market share. Two other firms, Aesculap and Sophysa, hold fringe positions.

11. Integra is the leading supplier of dural grafts in the United States, with a 66% market share. Medtronic, Codman, and Stryker are the only other significant suppliers, and they account for 11%, 9%, and 8% of the dural grafts market, respectively. Other firms supplying dural grafts have considerably smaller shares.

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 Integra and Codman in the markets at issue, thereby increasing the likelihood in these markets that: (1) a combined Integra-Codman would be able to unilaterally exercise market power; and (2) customers would be forced to pay higher prices.

CONDITIONS OF ENTRY AND EXPANSION

13. 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 product development, U.S. Food and Drug Administration approval, and market adoption times are lengthy. A potential entrant into the relevant markets would need to establish a sales and marketing infrastructure, proven track record of service, and a robust portfolio of neurosurgical products to drive sales of the relevant products.

VIOLATIONS CHARGED

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

15. The Acquisition described in Paragraph 4, if consummated, would constitute a violation of Section 7 of the

Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-sixth day of September, 2017 issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Integra Lifesciences Holdings Corporation ("Integra") of certain assets associated with Respondent Johnson & Johnson's Codman Neuro ("Codman") division (Integra and Johnson & Johnson hereinafter collectively referred to as "Respondents"), and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of 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 Integra is 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 311 Enterprise Drive, Plainsboro, New Jersey 08536.

2. Respondent J & J is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New Jersey, with its principal executive offices located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933.

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

ORDER

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final and effective, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

A. "Integra" means Integra LifeSciences Holding Corporation; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Integra LifeSciences Holdings Corporation, and the respective directors,

officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Integra shall include the Transferred Assets.

B. "J&J" means Johnson & Johnson; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Johnson & Johnson (including, without limitation, Codman Neurosurgery and DePuy Synthes, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Respondent(s)" means Integra and J& J, individually and collectively.

E. "Decision and Order" means the:

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

2. Final Decision and Order following its issuance and service by the Commission in this matter.

F. "Divestiture Product Business(es)" means the Business of a Respondent (as that Respondent is specified in the definition of each Divestiture Product) within the United States of America 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.

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

H. "Transition Period" means, for each Divestiture Product that is marketed or sold in the United States before the Closing Date, the period beginning on the date this Order to Maintain Assets is issued and ending on the earlier of the following dates: (i) the date on which the relevant Acquirer directs the Respondent(s) to cease the marketing, distribution, and sale of such Divestiture Product(s); (ii) the date on which the relevant Acquirer commences the marketing, distribution, and sale of such Divestiture Product(s); or (iii) the date four (4) months after the Closing Date for such Divestiture Product(s).

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 viability, marketability, and competitiveness of such Divestiture Product Businesses and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; 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 the Respondents, including, but not limited to, all research, Development, manufacturing, distribution, marketing, and sales expenditures;

3. providing such resources as may be necessary to respond to competition against each of the Divestiture 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 the date the Respondents entered the agreement to effect the Acquisition (as such agreement is identified in the definition of Acquisition), 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. Not later than one (1) day after the date this Order to Maintain Assets is issued by the Commission, for each Divestiture Product that has been marketed or sold prior to the Closing Date, Respondents shall provide to the Proposed Acquirer of that Divestiture Product, for each High Volume Account, a list by either UPC or DI containing the current net price per UPC or DI, *i.e.*, the final price per UPC or DI, charged by the relevant Respondent (as that Respondent is identified in the definition of each Divestiture Product) net of all customer-level discounts, rebates, or promotions, for that Divestiture Product, as of five (5) business days or

less prior to the date this Order to Maintain Assets is issued.

E. For each Acquirer of a Divestiture Product, Respondents shall:

1. for a period of twelve (12) months from the Closing Date, 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 the relevant Respondent to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by that 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, and (iii) restrict access to the information to such of the Acquirer's or Proposed

Acquirer's employees who need such access in connection with the specified and permitted use;

3. during the 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 Divestiture Product 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 a Respondent that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, a 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 a Respondent from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with a Respondent prior to the date of the written offer of employment from the Acquirer 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 a 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: (i) 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 (ii) hire any Divestiture Product Employee;

provided, however, a 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 that Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided further, however, that this Paragraph does not require nor shall be construed to require a Respondent to terminate the employment of any employee or to prevent a Respondent from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition;

provided further, *however*, that a Respondent may do the following: (i) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Divestiture Product Employees; or (ii) hire a Divestiture Product Employee who contacts a Respondent on his or her own initiative

without any direct or indirect solicitation or encouragement from that Respondent.

F. During the Transition Period, with respect to each Divestiture Product that is marketed or sold in the United States before the Closing Date for that Divestiture Product, Respondents, in consultation with the relevant Acquirer, for the purposes of ensuring an orderly marketing and distribution transition, shall:

1. develop and implement a detailed transition plan to ensure that the commencement of the marketing, distribution, and sale of such Divestiture 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 Divestiture Products who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer to the Acquirer of the Business related to the Divestiture Products;

3. maintain and manage inventory levels of the Divestiture Products in consideration of the marketing and distribution transition to the Acquirer;

4. continue to market, distribute, and sell the Divestiture Products;

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

such Confidential Business Information to the Acquirer;

6. to the extent known or available to the specified Respondent, provide the Acquirer with a list of the inventory levels (weeks of supply) in the possession of each customer (*i.e.*, healthcare provider, hospital, group purchasing organization, wholesaler, or distributor) by UPC or DI on a regular basis and in a timely manner;

7. to the extent known by the specified Respondent, provide the Acquirer with anticipated reorder dates for each customer by UPC or DI on a regular basis and in a timely manner; and

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

G. Pending divestiture of the 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, (iv) the Monitor (if any has been appointed) and *except* to the extent necessary to comply with applicable law; and

3. ensure that Confidential Business Information related exclusively to the Divestiture Products is not disseminated among the employees of the Respondents and institute procedures and requirements to ensure that the Respondents employees:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and

   b. do not solicit, access or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.

H. Not later than thirty (30) days from the earlier of (i) the Closing Date or (ii) the date this Order to Maintain Assets is issued by the Commission, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by that Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information.

I. 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 that Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with,

the acknowledgment program. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.

J. 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.

K. 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. Edward J. Buthusiem shall serve as 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. No later than one (1) day after the Acquisition Date, Respondents shall enter into the Monitor Agreement that is attached as Appendix I and Confidential Appendix I-1 to the Order to Maintain Assets. The Monitor Agreement shall become effective on the date the Order to Maintain Assets is issued. Respondents shall transfer to and confer upon the Monitor all the

rights and powers necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of the Orders. Respondents shall assure, and the Monitor Agreement shall provide, that:

1. The Monitor shall have the 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 Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

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

3. The Monitor shall serve until the latter of:

    a. the date the Respondents complete the transfer of all Divestiture Product Assets, and the transfer and delivery of the related Manufacturing Technology, Product Intellectual Property and Product Licensed Intellectual Property;

    b. the date that each respective Acquirer has obtained all Product Approvals necessary to manufacture and market each Divestiture Product acquired by that Acquirer in the United States of America independently of the Respondents; and

    c. the date of written notification from staff of the Commission that the Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture a Divestiture Product that is being monitored by the Monitor;

provided, however, that the Monitor's service shall not extend more than four (4) years after the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

C. 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 the 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 Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor the Respondents' compliance with the Orders.

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

E. 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.

F. 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 a Respondent, and any reports submitted by each Acquirer with respect to the performance of a Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders; *provided, however*, beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph VII.C. of the Decision and Order, and ninety (90) days thereafter, the 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.

G. 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.

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

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

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

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

K. The Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as the Monitor pursuant to the Decision and Order.

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

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every sixty (60) days thereafter until Respondents have fully complied with this Order to Maintain Assets, 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 its report concerning compliance with the Orders to the Monitor, if any Monitor has been appointed. Respondents shall include in its reports, among other things that are required from time to time, a detailed description of its efforts to comply with the relevant paragraphs of the Orders, including:

A. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, and (ii) transitional services being provided by the relevant Respondent to the relevant Acquirer; and

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

provided, however, that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the reports of compliance required to be submitted by Respondents pursuant to 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 Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

the authorized representative(s) of the Commission and at the expense of that Respondent; and

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

VII.

IT IS FURTHER ORDERED that 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;

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 Manufacturing Technology related to each Divestiture Product has been provided to the Acquirer in a manner consistent with the Technology Transfer Standards and the Monitor (if one has been appointed), in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers, and other transitions related to the provision of the 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 Integra Lifesciences Holdings Corporation ("Integra") of certain assets associated with Respondent Johnson & Johnson's Codman Neuro ("Codman") division (Integra and Johnson & Johnson hereinafter collectively referred to as "Respondents"), and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Integra is 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 311 Enterprise Drive, Plainsboro, New Jersey 08536.

2. Respondent Johnson & Johnson is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New Jersey, with its principal executive offices located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933.

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

I.

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

A. "Integra" means Integra LifeSciences Holding Corporation; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Integra LifeSciences Holdings Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Integra shall include the Transferred Assets.

B. "Johnson & Johnson" means Johnson & Johnson's directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Johnson & Johnson (including, without limitation, Codman and DePuy Synthes, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Respondent(s)" means Integra and Johnson & Johnson, individually and collectively.

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

1. Natus, if 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. Any other Person approved by the Commission to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

F. "Acquisition" means Integra's acquisition of the Transferred Assets pursuant to the Acquisition Agreement.

G. "Acquisition Agreement" means the Asset Purchase Agreement dated as of February 14, 2017, between Depuy Synthes, Inc. and Integra LifeSciences Holdings Corporation that was submitted by Integra to the Commission in this matter. The Acquisition Agreement is contained in Non-Public Appendix I.

H. "Acquisition Date" means the date on which Integra acquires any of the Transferred Assets.

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

J. "Application(s)" means all submissions and applications for a Product filed or to be filed by the

holder, the applicant, and/or the sponsor of a Product with the FDA pursuant to 21 C.F.R. Parts 800 to 898 (entitled "Regulations Subchapter H—Medical Devices"), including, without limitation, the following:

1. Premarket Notification ("510(k) Submission");

2. Premarket Approval Application ("PMA");

3. Investigational Device Exemption Application ("IDE");

4. Device Master File ("MAF");

5. Device History File ("DHF");

6. Device History Record ("DHR");

7. Device Master Record ("DMR");

8. authorizations to the holder, applicant, and/or sponsor of a Product from any Third Party to incorporate the information contained in an application or submission held by that Third Party to the FDA into a 510(k) Submission, PMA, or IDE submitted or to be submitted by the holder, applicant, and/or sponsor;

9. supplements, amendments, and revisions to the abovementioned submissions and applications;

10. preparatory work, registration dossier, drafts, and data necessary for the preparation of the abovementioned submissions and applications; and

11. all correspondence between the FDA and the holder, the applicant, and/or the sponsor related to the abovementioned submissions and applications.

K. "Business" means the research, Development, manufacture, commercialization, distribution,

marketing, importation, advertisement, and sale of a Product.

L. "Categorized Assets" means the following assets and rights of the Respondents (identified in the definition of the Divestiture Product), as such assets and rights are in existence as of the date that Respondent signs the Consent Agreement in this matter:

1. all rights to all of the Applications related to the specified Divestiture Products;

2. all rights to all of the Device Studies related to the specified Divestiture Products;

3. all Product Intellectual Property related to the specified Divestiture Products that is not Product Licensed Intellectual Property;

4. all Product Approvals related to the specified Divestiture Products;

5. all Manufacturing Technology exclusively related to the specified Divestiture Products;

6. all Marketing Materials related to the specified Divestiture Products;

7. all Scientific and Regulatory Material related to the specified Divestiture Products;

8. all Website(s) related exclusively to the specified Divestiture Products;

9. the content related exclusively to the specified Divestiture Products that is displayed on any Website that is not dedicated exclusively to the specified Divestiture Products;

10. all Product Development Reports related to the specified Divestiture Products;

11. at the option of the Acquirer of the specified Divestiture Products, all Product Contracts to the extent related to the specified Divestiture Products; *provided, however*, that for any Product Contract that also relates to any Retained Product(s), Respondents' rights under those Product Contracts continue with regard to the relevant Retained Products.

12. all patient registries related to the specified Divestiture Products, and any other systematic active post-marketing surveillance program to collect patient data, laboratory data, and identification information required to be maintained by the FDA to facilitate the investigation of the precision or accuracy of the specified Divestiture Products;

13. for each specified Divestiture Product that has been marketed or sold by a Respondent prior to the Closing Date:

    a. a list of all customers for the specified Divestiture Product and a listing of the net sales (in units and dollars) of the specified Divestiture Product to such customers during the one (1) year period immediately prior to the Closing Date, stated on either an annual, quarterly, or monthly basis, including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of the specified Divestiture Product on behalf of the High Volume Account and his or her business contact information;

    b. for each High Volume Account, a list by either UPC or DI containing the following: (i) the net price per UPC or DI as of the Closing Date, *i.e.*, the final price per UPC or DI, charged by

the specified Respondent net of all customer-level discounts, rebates, or promotions; (ii) the net price per UPC or DI charged by the specified Respondent at the end of each quarter during the one (1) year immediately prior to the Closing Date; (iii) any supply outages by UPC or DI during the one (1) year period immediately prior to the Closing Date the result of which caused the specified Respondent to make a financial payment to the customer or to incur a penalty for a failure to supply;

c. for each month for the one (1) year period immediately prior to the Closing Date, a list containing the following historical information for the specified Divestiture Product:

i. wholesale acquisition cost; and

ii. backorders by UPC or DI as of the Closing Date;

14. a list of each specified Divestiture Product that has had any finished Product batch or lot determined to be out-of-specification during the three (3) year period immediately preceding the Closing Date, and, for each such Divesture Product: (i) a detailed description of the nonconformity with respect to any out-of-specification batch or lot; (ii) the corrective actions or reworking taken to remediate the cGMP deficiencies in the Divestiture Product; and (iii) to the extent known by the specified Respondent, the employees (whether current or former) responsible for taking such corrective actions or reworking;

15. for each specified Divestiture Product:

a. to the extent known or available to the specified Respondent, a list of the inventory levels (weeks of supply) in the possession of each customer (*i.e.*, healthcare provider,

hospital, group purchasing organization, wholesaler, or distributor) as of the date prior to and closest to the Closing Date as is available;

b. to the extent such records are in existence as of the Closing Date, records of all sales calls, visits, or contacts with current or prospective customers of the Divestiture Product(s) within the one (1) year period immediately preceding the Closing Date;

c. to the extent known to the specified Respondent, a summary or description of the discussions related to any potential future sales of the Divestiture Product(s) with current or prospective customers; and

d. to the extent known by the specified Respondent, any pending reorder dates for a customer as of the Closing Date;

16. at the option of the Acquirer of the specified Divestiture Products and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the Closing Date including, but not limited to, raw materials, packaging and labeling materials (including FDA-approved Product labeling and currently used or planned product inserts), work-in-process, replacement and spare parts, operating supplies and inventory on consignment, and finished and semi-finished products used or intended for use in the specified Divestiture Product and, for a limited period of time sufficient for that Acquirer to market or sell any finished or semi-finished inventory as of the Closing Date and to the extent required for that specific purpose, a license to the corporate names or corporate trade dress of the specified Respondent, or the related corporate logos thereof; or the corporate names or corporate trade dress of any other corporations or

companies owned or controlled by that Respondent or the related corporate logos thereof; or general registered images or symbols by which that Respondent can be identified or defined that the Respondent has been using on the final Product or its packaging prior to the Closing Date;

17. the quantity and delivery terms in 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, the right to fill any or all unfilled customer purchase orders for the specified Divestiture Product as of the Closing Date; and

19. all of a Respondent's books, records, and files related to the foregoing;

provided, however, that "Categorized Assets" shall not include: (i) documents relating to a Respondent's general business strategies or practices relating to the conduct of its Business outside of the Divestiture Products, where such documents do not discuss with particularity the specified Divestiture Product; (ii) information that is exclusively related to the Retained Products; and (iii) all Product Licensed Intellectual Property;

provided further, *however*, that in cases in which documents or other materials included in the assets to be divested contain information: (i) that relates both to the specified Divestiture Product and to Retained Products or Businesses of the specified Respondent and cannot be segregated in a manner that preserves 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, that Respondent shall be required to provide

only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer of the specified Divestiture Product, the Respondents shall provide that Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the Respondents provide the Acquirer with the above-described information without requiring a Respondent completely to divest itself of information that, in content, also relates to Retained Product(s).

M. "Cerebrospinal Fluid Collection Systems" means all Products researched, Developed, in Development, marketed, sold, owned, or controlled by Johnson & Johnson (prior to Acquisition) that are a part of, used with, or intended to be used with, Codman's cerebrospinal fluid collection systems product line, listed by device name and 510(k) Number in Non-Public Appendix III.A., and all improvements or modifications thereto.

N. "Cerebrospinal Fluid Collection Systems Assets" means all rights, title, and interest in and to all assets related to the Business of Johnson & Johnson related to each of the Cerebrospinal Fluid Collection Systems, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Cerebrospinal Fluid Collection Systems.

O. "cGMP" means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act (21 C.F.R. 820), as amended, and includes all rules and regulations promulgated by the FDA thereunder.

P. "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.

Q. "Confidential Business Information" means all information owned by, or in the possession or control of, a Respondent that is not in the public domain and to the extent that it is directly related to the conduct of the Business related to a Divestiture Product(s). The term "Confidential Business Information" *excludes* the following and the Respondents are not required to submit this information to an Acquirer:

1. information relating to a 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 a 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.

R. "Contract Manufacture" means the following:

1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer; or

2. to provide, or to cause to be provided, any part of the manufacturing process including, without limitation, the components or packaging of a

Contract Manufacture Product on behalf of an Acquirer.

S. "Contract Manufacture Products" means the following Products, individually and collectively:

1. Intracranial Pressure Monitors;

2. Ventricular Tunnel Catheters;

3. Cerebrospinal Fluid Collection Systems;

4. Non-Antimicrobial External Ventricular Drainage Catheters;

5. Fixed Pressure Valve Shunt Systems;

6. Dural Graft Products; and

7. Cranial Access Kits.

T. "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 United States of America, 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 all 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 Device Studies of that Product, all case report forms relating thereto, and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze 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.

U. "Cranial Access Kits" means all Products researched, Developed, in Development, marketed, sold, owned, or controlled by Integra (prior to Acquisition) that are a part of, used with, or intended to be used with, Integra's cranial access kits product line, listed by device name and SKU Number in Appendix IV, and all improvements or modifications thereto.

V. "Cranial Access Kits Supply Agreement" means the *Supply Agreement* by and between Integra LifeSciences Holdings Corporation and Natus Medical Incorporated, dated as of the Closing Date.

W. "Current Operation Condition" means that, as of the date of delivery to the Acquirer, the equipment meets or exceeds all current operational (including, without limitation, electrical), functional, productive and manufacturing capabilities required to manufacture the Fixed Pressure Valve Shunt Systems within the United

States and meets all current U.S. Agency-approved protective workplace safety standards for the operation of such equipment by workers.

X. "Development" means all research and development activities, including, without limitation the following: design; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; mechanical properties testing; performance testing; safety testing; conducting Device Studies for the purpose of obtaining or achieving 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). "Develop" means to engage in Development.

Y. "Device Study(ies)" means a controlled study of the quality, safety, efficacy, precision, or accuracy of a Product (including any or all such investigations conducted *in vitro*, *in vivo*, and/or *in silico*) and includes, without limitation, such studies as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval and any other such study used in research and Development of a Product.

Z. "DI" means that mandatory portion of the unique device identifier (*i.e.*, an identifier number that identifies a device through its distribution and use by meeting the requirements of 21 C.F.R. 830.20) that identifies the specific version or model of a device and the labeler of that device.

AA. "Direct Cost" means a cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance, service, or Contract Manufacture Product. "Direct Cost" to the Acquirer for (1) its use of any of a Respondent's employees' labor shall not

exceed the average hourly wage rate for such employee and (2) any Contract Manufacture Product shall expressly exclude any intracompany business transfer profit;

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.

BB. "Divestiture Agreement(s)" means the following:

1. *Asset Purchase Agreement* by and between Integra LifeSciences Holdings Corporation and Natus Medical Incorporated, dated as of September 8, 2017;

2. *Integra Shunts Transitional Supply Agreement* by and between Integra LifeSciences Holdings Corporation and Natus Medical Incorporated, to be executed on or before the Closing Date;

3. *Integra Transitional Services Agreement* by and between Integra LifeSciences Holdings Corporation and Natus Medical Incorporated, to be executed on or before the Closing Date;

4. *Supply Agreement* by and between Integra LifeSciences Holdings Corporation and Natus Medical Incorporated, to be executed on or before the Closing Date;

5. *Transition Manufacturing Agreement* by and between Integra LifeSciences Holdings Corporation and Natus Medical Incorporated, to be executed on or before the Closing Date;

6. *Transition Manufacturing Services Agreement* by and between Depuy Synthes, Inc. and Natus

Medical Incorporated, to be executed on or before the Closing Date;

7. *Transition Services Agreement* by and between Depuy Synthes, Inc. and Natus Medical Incorporated, to be executed on or before the Closing Date; and

8. all amendments, exhibits, attachments, agreements, and schedules attached to and submitted to the Commission with the foregoing listed agreement.

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

CC. "Divestiture Product(s)" means the following, individually and collectively:

1. Intracranial Pressure Monitoring Systems;

2. Cerebrospinal Fluid Collection Systems;

3. Non-Antimicrobial External Ventricular Drainage Catheters;

4. Fixed Pressure Valve Shunt Systems; and

5. Dural Graft Products.

DD. "Divestiture Product Assets" means the following, individually and collectively within the United States of America:

1. Intracranial Pressure Monitoring Systems Assets;

2. Cerebrospinal Fluid Collection Systems Assets;

3. Non-Antimicrobial External Ventricular Drainage Catheters Assets;

4. Fixed Pressure Valve Shunt Systems Assets; and

5. Dural Graft Product Assets.

EE. "Divestiture Product Core Employees" means the Sales and Marketing Employees, Research and Development Employees, and the Manufacturing Employees.

FF. "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 Manufacturing Technology used in the manufacture of the specified Divestiture Product(s) that is also used in the manufacture of Retained Products (*i.e.*, Manufacturing Technology that is used in, but not exclusively used in, the manufacture of the Divestiture Product(s) being acquired by a particular Acquirer) that was owned, licensed, held, or controlled by a Respondent:

1. to research and Develop the specified Divestiture Product(s) for marketing, distribution, or sale within the United States of America;

2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the specified Divestiture Product(s) within the United States of America;

3. to import or export the specified Divestiture Product(s) to or from the United States of America to the extent related to the marketing, distribution, or sale of the specified Divestiture Products in the United States of America; and

4. to have the specified Divestiture Product(s) made anywhere in the world for distribution or sale

within, or import into the United States of America;

provided, however, that for any Product Licensed Intellectual Property or Manufacturing Technology that is the subject of a license from a Third Party entered into by a Respondent prior to the Acquisition, the scope of the rights granted hereunder shall only be required to be equal to the scope of the rights granted by the Third Party to that Respondent.

GG. "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 Designee(s), licensees, sublicensees, manufacturers, suppliers, distributors, and customers of that Acquirer, or of such Acquirer-affiliated entities.

HH. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

II. "Domain Name" means the domain name(s) (uniform resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration; *provided, however*, "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Trademarks required to be divested.

JJ. "Dural Graft Product(s)" means all Products researched, Developed, in Development, marketed, sold, owned, or controlled by Johnson & Johnson (prior to the Acquisition) that are a part of, used with, or intended to be used with, the Duraform® product

line, listed by device name and 510(k) Number in Non-Public Appendix III.B., and all improvements or modifications thereto.

KK. "Dural Graft Product Assets" means all rights, title, and interest in and to all assets related to the Business of Johnson & Johnson related to each of the Dural Graft Products, to the extent legally transferable, including, without limitation, the following:

1. the Categorized Assets related to the Dural Graft Products; and

2. all U.S. rights and assets to the *Supply Agreement* between Depuy Synthes Products, Inc. and Lyophilization Services of New England, Inc.

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

1. real property at the specified location, including all rights, title, and interests in and to owned or leased land and all improvements thereon, including buildings, fixtures, improvements, easements, rights of way, appurtenances, and the rights and privileges appertaining thereto ("Facility");

2. all Manufacturing Equipment related to the Divestiture Product Assets located at the Facility;

3. all other equipment, machinery, tools, spare parts, vehicles, personal property, furniture, fixtures, and supplies related to the Divestiture Product Assets located at the Facility;

4. all other tangible property, owned, leased or operated on or behalf of a Respondent, and related to the Divestiture Product Assets, located at the Facility; and

5. to the extent transferable by Law, all permits, registrations, and applications to or from a

Government Entity related to the Respondent's use of the Facility.

MM. "Fixed Pressure Valve Shunt Systems" means all Products researched, Developed, in Development, marketed, sold, owned, or controlled by Integra (prior to the Acquisition) that are a part of, used with, or intended to be used with, the Novus™, UltraVS™, Contour-Flex™, Equi-Flow™, DP™ (sold using the Integra name), LPV II™ product lines and lumbar shunts, listed by device name and 510(k) Number in Non-Public Appendix III.C., and all improvements or modifications thereto.

NN. "Fixed Pressure Valve Shunt Systems Assets" means all rights, title, and interest in and to all assets related to the Business of Integra related to each of the Fixed Pressure Valve Shunt Systems, to the extent legally transferable, including, without limitation, the following:

1. the Fixed Pressure Valve Shunt Systems Equipment; and

2. the Categorized Assets related to the Fixed Pressure Valve Shunt Systems.

OO. "Fixed Pressure Valve Shunt Systems Equipment" means all equipment in Current Operation Condition used in the production of Fixed Pressure Valve Shunt Systems, listed by product name and location of facility in Non-Public Appendix III.F., and all improvements or modifications thereto.

PP. "Government Entity" means any Federal, state, local, or non-U.S. government; any court, legislature, government agency, or government commission; or any judicial or regulatory authority of any government.

QQ. "High Volume Account(s)" means any healthcare provider, group purchasing organization, hospital, wholesaler, or distributor whose annual or projected

annual purchase amounts, in units or in dollars, of a Divestiture Product in the United States of America from a Respondent, was or was forecasted (prior to the public announcement of the Acquisition and subsequent divestiture) to be among the top twenty (20) highest such purchase amounts of that Respondent's total sales of that Divestiture Product to U.S. customers on any of the following dates: (i) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (ii) the end of the last quarter that immediately preceded the Acquisition Date; (iii) the end of the last quarter that immediately preceded the Closing Date for the relevant assets; or (iv) for forecasts of purchases of the Divestiture Product, the quarter immediately following the Closing Date.

RR. "Intracranial Pressure Monitors" are one of the components of Intracranial Pressure Monitoring Systems.

SS. "Intracranial Pressure Monitoring Systems" means all Products researched, Developed, in Development, marketed, sold, owned, or controlled by Integra that are a part of, used with, or intended to be used with, the Camino® product line, including, without limitation, Intracranial Pressure Monitors and catheters, including Ventricular Tunnel Catheters, listed by device name and 510(k) Number in Non-Public Appendix III.D., and all improvements or modifications thereto.

TT. "Intracranial Pressure Monitoring Systems Assets" means all rights, title, and interest in and to all assets related to the Business of Integra related to each of the Intracranial Pressure Monitoring Systems, to the extent legally transferable, including, without limitation, the following:

1. the Categorized Assets related to the Intracranial Pressure Monitoring Systems; and

2. the Intracranial Pressure Monitoring Systems Product Facility.

UU. "Intracranial Pressure Monitoring Systems Product Facility" means all the Facility Assets located at 5955 & 5965 Pacific Center Boulevard, San Diego, California 92121.

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

WW. "Manufacturing Designee" means any Person other than a Respondent that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer.

XX. "Manufacturing Equipment" means all fixtures, equipment (including, without limitation, technical equipment, lab equipment, and computers), and machinery that is being used or has been used at any Facility that is subject to transfer to an Acquirer pursuant to this Order at any time since the Respondents entered into the Acquisition Agreement, in the research, Development or manufacture of a Divestiture Product and that is suitable for use in the research, Development, or manufacture of a Divestiture Product as of the Closing Date.

YY. "Manufacturing Employees" means all full-time, part-time, or contract employees of a Respondent who have directly participated in any of the following: (i) defining the commercial manufacturing process, (ii) confirming that the manufacturing process is capable of reproducible commercial manufacturing, (iii) formulating the manufacturing process performance qualification protocol, (iv) controlling the manufacturing process to assure performance Product quality, (iv) assuring that during routine manufacturing the process remains in a state of control, (v) collecting and evaluating data for the purposes of providing scientific evidence that the manufacturing process is

capable of consistently delivering quality Products, (vi) managing the operation of the manufacturing process, or (vii) managing the technological transfer of the manufacturing process to a different facility, with respect to the 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.

ZZ. "Manufacturing Technology" means all technology, trade secrets, know-how, designs, ideas, concepts, and proprietary information (whether patented, patentable, or otherwise) owned by the Respondent (identified in the definition of the respective Divestiture Product) to manufacture each specified Divestiture Product, including, but not limited to, the following:

1. all product specifications, product designs and design protocols, including without limitation, the exact combination, design, array, and identity and specifications of all components that achieve a particular set of application and end-use characteristics in a final Product;

2. to the extent applicable to the specified Divestiture Product, antibody generation and reagent formulation;

3. manufacturing processes, analytical methods, flow diagrams, and other related manuals and drawings;

4. standard operating procedures;

5. quality assurance and control procedures;

6. control history;

7. research and Development records;

8. annual product reviews;

9. supplier lists;

10. labeling and product manuals;

11. manuals and technical information provided to employees, customers, distributors, suppliers, agents, and licensees, including, without limitation, manufacturing, equipment and engineering manuals and drawings;

12. repair and performance records related to the Manufacturing Equipment for the two (2) year period immediately preceding the Closing Date;

13. records related to the protective workplace safety standards related to the Manufacturing Equipment for the two (2) year period immediately preceding the Closing Date;

14. audits of manufacturing methods for the Products conducted by any Agency; and

15. all other information related to the manufacturing process.

AAA. "Marketing Materials" means all marketing materials used specifically in the marketing or sale of the specified Divestiture Product in the United States of America as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of dollars and/or units for each month, quarter, or year), sales forecasting models, educational materials, advertising and display materials, speaker lists,

promotional and marketing materials, Website content, and artwork for the production of packaging components, television masters, and other similar materials related to the specified Divestiture Product.

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

CCC. "Natus" means Natus Medical Incorporated, a corporation organized, existing, and doing business under and by virtue of the state of Delaware with its principal executive offices located at 6701 Koll Center Parkway, Suite 120, Pleasanton, California 94566.

DDD. "Non-Antimicrobial External Ventricular Drainage Catheters" means all Products researched, Developed, in Development, marketed, sold, owned, or controlled by Johnson & Johnson (prior to Acquisition) that are a part of, used with, or intended to be used with, Codman's non-antimicrobial external ventricular drainage catheter product line, listed by device name and 510(k) Number in Non-Public Appendix III.E., and all improvements or modifications thereto.

EEE. "Non-Antimicrobial External Ventricular Drainage Catheters Assets" means all rights, title, and interest in and to all assets related to the Business of Johnson & Johnson related to each of the Non-Antimicrobial External Ventricular Drainage Catheters, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Non-Antimicrobial External Ventricular Drainage Catheters.

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

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

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

III. "Patent(s)" means all patents and patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

JJJ. "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.

KKK. "Product(s)" means any medical device as defined by the FDA pursuant to the United States Federal Food, Drug, and Cosmetic Act (*i.e.,* any instrument, apparatus, appliance, software, material, or other article, whether used alone or in combination, including the software intended by its holder, applicant, and/or sponsor to be used specifically for diagnostic and/or therapeutic purposes and necessary for its proper application) which is:

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

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

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

LLL. "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.

MMM. "Product Contracts" means all contracts or agreements:

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 a Respondent;

2. pursuant to which a Respondent has as of the Closing Date the ability to independently purchase the raw materials, inputs or component(s) from any Third Party, for use in connection with the specified Divestiture Product;

3. relating to any Device Studies 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 specific 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 in finished form in order to provide it to a Respondent;

7. pursuant to which a Third Party provides or plans to provide any part of the manufacturing process including, without limitation, the assembly or packaging of the specified Divestiture Product;

8. pursuant to which a Third Party provides the Manufacturing Technology related to the specified Divestiture Product to a Respondent;

9. pursuant to which a Third Party collaborates with a Respondent in the research and development of any Manufacturing Technology related to the specified Divestiture Product;

10. pursuant to which a Third Party is licensed by a Respondent to use the Manufacturing Technology related to the specified Divestiture Product;

11. constituting confidentiality agreements involving the specified Divestiture Product;

12. involving any royalty, licensing, covenant not to sue, or similar arrangement involving the specified Divestiture Product;

13. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture, or distribution of the specified Divestiture Product to a Respondent

including, but not limited to, consultation arrangements;

14. pursuant to which any Third Party collaborates with a Respondent in the performance of research, Development, marketing, distribution, or selling of the specified Divestiture Product or the Business related to such Divestiture Product;

15. pursuant to which a Respondent leases buildings or equipment that is subject to transfer to the Acquirer pursuant to this Order; and/or

16. pursuant to which a Respondent licenses Software related to the specified Divestiture Product;

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

NNN. "Product Development Reports" means:

1. 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;

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

3. FDA-approved Product labeling related to the specified Divestiture Product;

4. currently used or planned product package inserts related to the specified Divestiture Product;

5. FDA-approved circulars and information related to the specified Divestiture Product;

6. adverse event reports, adverse experience information, and descriptions of material events and matters concerning safety or lack of accuracy related to the specified Divestiture Product;

7. summary of Product complaints from physicians or clinicians related to the specified Divestiture Product;

8. Product recall reports filed with the FDA related to the specified Divestiture Product, and all reports, studies, and other documents related to such recalls;

9. investigation reports and other documents related to any out of specification results for any impurities or defects found in the specified Divestiture Product;

10. 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 or defects;

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

12. analytical methods development records related to the specified Divestiture Product;

13. manufacturing batch or lot records related to the specified Divestiture Product;

14. stability testing records related to the specified Divestiture Product;

15. change in control history related to the specified Divestiture Product; and

16. executed validation (including design validation and process validation) and qualification protocols and reports related to the specified Divestiture Product.

OOO. "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; and

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. the base salary or current wages;

   d. the most recent bonus paid, aggregate annual compensation for the relevant Respondent'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); and

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

PPP. "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, held, or controlled by a Respondent as of the Closing Date:

1. Patents;

2. Copyrights;

3. Software;

4. Trademarks;

5. Trade Dress;

6. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information; and

7. rights to obtain and file for patents, trademarks, and copyrights and registrations thereof, and to bring suit against a Third Party for the past, present, or future infringement, misappropriation, dilution, misuse, or other violation of any of the foregoing;

provided, however, that "Product Intellectual Property" does not include the corporate names or corporate trade dress of "Integra", "Johnson & Johnson", "Codman", or the related corporate logos thereof; or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by a Respondent or the related corporate logos thereof; or general registered images or symbols by which Integra or Johnson & Johnson can be identified or defined.

QQQ. "Product Licensed Intellectual Property" means all of the following intellectual property related to a Divestiture Product that is owned, licensed, held, or controlled by a Respondent as of the Closing Date, as follows:

1. Patents that are related to a Divestiture Product that a Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product that is the subject of an active Application; and

2. Copyrights, Software, Trademarks, Trade Dress, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information, and all rights in the United States of America to limit the use or disclosure thereof, that are related to a Divestiture Product and that a Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product that is the subject of an active (not discontinued or withdrawn) Application as of the Acquisition Date.

RRR. "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.

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

1. any agreement between a Respondent and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including, without limitation, any agreement to supply specified Products or components thereof, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

2. any agreement between a Respondent and a Third Party to effect the assignment of assets or rights of that Respondent related to a 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 and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including, without limitation, any agreement by that Respondent to supply specified Products or components thereof, and that has been approved by the Commission to accomplish the requirements of this Order; and/or

4. any agreement between a Respondent and a Third Party to effect the assignment of assets or rights of that Respondent related to a 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.

TTT. "Research and Development Employees" means all full-time, part-time, and contract employees of a Respondent who have directly participated in the research, Development, regulatory approval process, or Device 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.

UUU. "Retained Product(s)" means any Product(s) other than a Divestiture Product.

VVV. "Sales and Marketing Employees" means all full-time, part-time, and contract employees of a Respondent whose primary work responsibilities were in the Business of the Divestiture Products within the eighteen (18) month period immediately prior to the Closing Date and who directly have participated in the sales, marketing, or technical support (including installation) of the specified Divestiture Product directly to distributors or end-use customers, including, without limitation, the regional sales managers.

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

XXX. "Software" means computer programs related to the Business of the specified Divestiture Product, including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any of the foregoing, and the content and information contained on any Website; *provided, however*, that "Software" does not include software that is readily purchasable or licensable from sources other than the Respondents and which has not been modified in a manner material to the use or function thereof (other than user preference settings).

YYY. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered to an Acquirer

pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, *inter alia*:

1. designating employees of a Respondent knowledgeable about the Manufacturing Technology (and all related intellectual property) related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer or its Manufacturing Designee, and the Monitor (if one has been appointed), for the purpose of effecting such delivery *unless* such Persons are hired by the Acquirer;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified Divestiture Product that are acceptable to the Acquirer to the extent that any such technology is either (i) not maintained and fully available at a facility that is being transferred to the Acquirer pursuant to this Order or (ii) not maintained and fully available at a facility operated by the Acquirer's Manufacturing Designee;

3. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Manufacturing Technology (including all related intellectual property) to the Acquirer or its Manufacturing Designee to the extent that any such technology is either (i) not maintained and fully available at a facility that is being transferred to the Acquirer pursuant to this Order or (ii) not maintained and fully available at a facility operated by the Acquirer's Manufacturing Designee;

4. permitting employees of the relevant Acquirer to visit the Respondent's facility from which the Divestiture Product will be transferred for the purposes of evaluating and learning the manufacturing process of such Divestiture Product and/or discussing the process with employees of a Respondent involved in the manufacturing process (including, without limitation, use of equipment and components, manufacturing steps, time constraints for completion of steps, and validation of the manufacturing of the Divestiture Product at the Respondent's facility); and

5. to the extent that Persons with the relevant knowledge remain employees of a Respondent (*i.e.*, are not hired by the Acquirer), 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 a 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 Manufacturing Technology and all such intellectual property related to the specified Divestiture Product.

ZZZ. "Third Party(ies)" means any non-governmental Person other than the following: a Respondent; or an Acquirer of particular assets or rights pursuant to this Order.

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

BBBB. "Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof), and all common law rights, and the goodwill symbolized thereby and associated therewith, for a Product.

CCCC. "Transferred Assets" means the properties of Johnson & Johnson set forth or described as Transferred Assets in the Acquisition Agreement.

DDDD. "Transition Services" means technical services, personnel, assistance, training, and other logistical, administrative and transitional support as required by an Acquirer and approved by the Commission to facilitate the transfer of the Divestiture Product Assets from the Respondents to the Acquirer, including, but not limited to, services, training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, information technology and systems, maintenance and repair of facilities and equipment, manufacturing, purchasing, quality control, research and Development support, technology transfer, regulatory compliance, sales and marketing, customer service, and supply chain management and customer transfer logistics.

EEEE. "Transition Services Agreement(s)" means any agreement(s) that receives the prior approval of the Commission between the Respondents and an Acquirer to provide, at the option of the Acquirer, Transition Services (or training for the Acquirer to provide services for itself) necessary to transfer the Divestiture Product Assets to the Acquirer in a manner consistent with the purposes of this Order.

FFFF. "United States of America" means the United States of America, and its territories, districts, commonwealths, and possessions.

GGGG. "UPC" means the Universal Product Code (*i.e.*, the product identifier used to identify an item sold at retail in the United States of America).

HHHH. "Ventricular Tunnel Catheters" are one of the components of Intracranial Pressure Monitoring Systems.

IIII. "Website" means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by a Respondent; *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 Divestiture Product Licenses related to the Divestiture Products, absolutely and in good faith, to Natus 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 Natus 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 Natus 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 Natus is not an acceptable purchaser of any of the Divestiture Product Assets, then Respondents shall immediately rescind the transaction with Natus in whole or in part, as directed by the Commission, and shall divest the relevant Divestiture Product Assets within one hundred eighty (180) days after the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, that if Respondents have divested the Divestiture Product Assets to Natus 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 Natus (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Prior to the Closing Date for each respective Divestiture Product, Respondents shall provide the Acquirer with the opportunity to review all contracts or agreements that are Product Contracts related to the Divestiture Products being acquired by that Acquirer for the purposes of the Acquirer's determination whether to assume such contracts or agreements.

C. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the Divestiture Product Assets to an Acquirer, and to permit the relevant Acquirer to continue the Business of the Divestiture Products being acquired by that Acquirer;

provided, however, Respondents may satisfy this requirement by certifying that the relevant Acquirer for the Divestiture Product Assets has executed all such agreements directly with each of the relevant Third Parties, and

provided, further, that to the extent such consents and waivers cannot be secured prior to the Closing Date, Respondents agree to cooperate and provide Acquirer with assistance in securing such consents and waivers for a period of eighteen (18) months following the Closing Date.

D. Respondent Integra shall:

1. Deliver the Fixed Pressure Valve Shunt Systems Equipment to the Acquirer in Current Operating Condition; *provided however*, that, subject to the consent of the Acquirer on a piece-by-piece basis, Respondents, at Respondents' own expense, may substitute equipment in Current Operating Condition that:

   a. is suitable for the same use as the particular piece of Fixed Pressure Valve Shunt Systems Equipment that is the subject of the proposed substitution; and

   b. meets or exceeds the operational, functional, productive, and manufacturing capabilities of the particular piece of Fixed Pressure Valve Shunt Systems Equipment that is the subject of the proposed substitution; and

2. At the Acquirer's option, provide such technical assistance as is necessary to integrate the Fixed Pressure Valve Shunt Systems Equipment (or any equipment substituted pursuant to the immediately preceding Paragraph) in the Acquirer's chosen facility for use in the manufacture of the Fixed Pressure Valve Shunt Systems.

E. Respondents shall:

1. submit to the Acquirer, at Respondents' expense, all Confidential Business Information related to the Divestiture Products being acquired by that Acquirer;

2. deliver or provide direct electronic access that is fully accessible by the Acquirer to 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 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 Monitor (if any has been appointed) and *except* to the extent necessary to comply with applicable Law;

6. ensure that Confidential Business Information related exclusively to the Divestiture Products is not disseminated among the employees of the Respondents; and

7. after the delivery of the Confidential Business Information to Acquirer of the particular Divestiture Products and upon request of that Acquirer, destroy any copies of Confidential Business Information exclusively related to the particular Divestiture Products acquired by that Acquirer (other than electric copies of Confidential Business Information created as a result of automatic back-up procedures) within thirty (30) days of such request except as otherwise agreed to between the Respondents and the Acquirer or to the extent necessary to comply with applicable Law;

provided, however, that Respondents shall be allowed to retain and use copies of Confidential Business Information, in the ordinary course and outside of the United States of America, in connection with Retained Products, or Businesses related to Divestiture Products, that Respondents can demonstrate relate to such Retained Products or Businesses related to such Retained Products.

F. Respondents shall provide, or cause to be provided, to the Acquirer in a manner consistent with the Technology Transfer Standards the following:

1. all Manufacturing Technology (including all related intellectual property) related to the Divestiture Product(s) being acquired by that Acquirer; and

2. all rights to all Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed to a Respondent related to the Divestiture Product(s) being acquired by that Acquirer.

Respondents shall obtain any consents from Third Parties required to comply with this provision. Respondents shall not enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of that Acquirer to use or to acquire from the Third Party the Manufacturing Technology (including all related intellectual property) 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 Manufacturing Technology. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to such agreements that allows the Third Party to provide the relevant Manufacturing Technology to that Acquirer. Within five (5) days of the execution of each

such release, Respondents shall provide a copy of the release to that Acquirer.

G. Respondents shall, at the option of the Acquirer, and subject to the prior approval of the Commission, provide Transition Services to the Acquirer pursuant to a Transition Services Agreement for a period of (1) year following the Closing Date, with an opportunity to extend for up to one (1) year at the option of the Acquirer; *provided, however*, that such Agreement shall provide that (1) the Acquirer may terminate the Agreement at any time, without cost or penalty to the Acquirer, upon commercially reasonable notice to Respondents; and (2) at the Acquirer's request, Respondents shall file with the Commission any request for prior approval for any additional extension of the term of a Transition Services Agreement as provided in this Paragraph (*i.e.*, in addition to the initial term plus an extension at the option of the Acquirer). The Transition Services provided pursuant to a Transition Services Agreement shall be at no greater than Respondents' Direct Costs for such personnel, technical support, assistance, training, and other services as are necessary to transfer the Divestiture Product Assets to the Acquirer in a manner consistent with the purposes of this Order.

H. Respondents shall employ a staff of sufficient size, training, and expertise as is necessary to complete all of the transfers of the Manufacturing Technology to each of the Acquirers in a timely manner and to ensure that the Acquirer has sufficient assistance from Respondents to manufacture the Divestiture Products being acquired by that Acquirer in commercial quantities, and in a manner consistent with cGMP at a facility chosen by the Acquirer.

I. For each Contract Manufacture Product, Respondents shall:

1. upon reasonable written notice and request from the Acquirer to Respondent Integra, Contract

Manufacture and deliver, or cause to be manufactured and delivered, to the Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products at Direct 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 product independently of Respondent Integra, and to secure sources of supply of the components listed in Application(s) of a Respondent from Persons other than Respondent Integra;

2. make representations and warranties to the Acquirer that the Contract Manufacture Product(s) supplied by Respondent Integra pursuant to a Remedial Agreement meet the relevant Agency-approved specifications;

3. for each Contract Manufacture Product to be marketed or sold in the United States of America, 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 any Contract Manufacture Product 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 the supplying Respondent prompt written notice of such claim and cooperating fully in the defense of such claim;

provided, however, that the supplying 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 supplying Respondent's responsibilities to supply each Contract Manufacture Product in the manner required by this Order;

provided further, however, that this obligation shall not require such 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 supplying Respondent to the Acquirer in an agreement to Contract Manufacture;

provided further, however, that the indemnification provisions of this Paragraph II.I.3. shall not apply to any losses alleged to have resulted from the failure of any component included in any Cranial Access Kit to meet cGMP.

4. give *pro rata* priority to supplying a Contract Manufacture Product to the Acquirer over manufacturing and supplying of Products for the supplying Respondent's own use or sale;

5. agree to hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure of any Contract Manufacture Product to be delivered in a timely manner *unless* (i) the supplying Respondent can demonstrate that the failure was beyond the control of that Respondent and in no part the result of negligence or willful misconduct by that Respondent, and (ii) the supplying Respondent is able to cure the supply failure not later than thirty (30) days after the receipt of notice from the Acquirer of a supply failure;

6. during the term of any agreement to Contract Manufacture, upon written request of that Acquirer or the Monitor (if any has been appointed), make available to the Acquirer and the 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;

7. for each Contract Manufacture Product for which the supplying Respondent purchases the components(s) from a Third Party, provide that Acquirer with the actual price paid by the supplying Respondent for each component(s) used to manufacture that Contract Manufacture Product;

8. for each Contract Manufacture Product for which the supplying Respondent is the source of the component(s), not charge the Acquirer any intracompany transfer profit for such component(s) in calculating the total price for the final finished Contract Manufacture Product to the Acquirer, and assure such charges shall only reflect the supplying Respondent's actual cost;

9. during the term of any agreement to Contract Manufacture, take all actions as are reasonably necessary to ensure an uninterrupted supply of the Contract Manufacture Product(s);

10. provide access to all information and facilities, and make such arrangements with Third Parties, as are necessary to allow the Monitor to monitor compliance with the obligations to Contract Manufacture;

11. not be entitled to terminate any agreement to Contract Manufacture due to an Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency Law;

12. shall notify the Commission at least sixty (60) days prior to terminating any agreement with an Acquirer to Contract Manufacture for any reason, and shall submit at the same time a copy of such notice to the Monitor; and

13. during the term of any agreement to Contract Manufacture, provide consultation with knowledgeable employees of the supplying 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 acquired by that Acquirer in the same quality achieved by, or on behalf of, a Respondent and in commercial quantities, and in a manner consistent with cGMP, independently of the supplying Respondent 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 requirements to Contract Manufacture 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 such Contract Manufacture Product for sale in the United States and able to manufacture such Contract Manufacture Product in commercial quantities, in a manner consistent with cGMP, independently of the supplying Respondent; (ii) the date the Acquirer notifies the Commission and the supplying 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 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, for any Contract Manufacturing Product, excluding Crainial Access Kits, (iv) five (5) years after the Closing Date.

J. Respondents shall designate employees of Respondents knowledgeable about the marketing,

distribution, warehousing, and sale (including administrative logistics of sales to the respective High Volume Accounts) related to each of the Divestiture Products to assist the Acquirer, in the transfer and integration of the Business related to the Divestiture Products into that Acquirer's business *unless* such employees of the Respondents are hired by that Acquirer in connection with the Acquirer's acquisition of the Divestiture Product(s).

K. Respondents shall require, as a condition of continued employment post-divestiture of the Divestiture Product Assets, 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 perform the same or similar function as 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 the Respondents (other than as necessary to comply with the requirements of this Order).

L. 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 that Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. 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 the Respondents' registered office within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications, and reminders sent to the Respondents' personnel.

M. Respondents shall:

1. for a period of twelve (12) months after the Closing Date, provide the 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 Divestiture Product 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 the relevant Respondent to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer or Proposed Acquirer(s), provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by that 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, (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, and (iii) restrict access to the information to such of the Acquirer's or Proposed Acquirer's employees who need such access in connection with the specified and permitted use;

3. during the 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 a 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 a Respondent that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, a Respondent shall not make any counteroffer to any 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 a Respondent from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with a Respondent prior to the date of the written offer of employment from the Acquirer 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 Business related to 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 a Respondent until the Closing Date(s) for the divestiture of the Divestiture Product Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that this Paragraph does not require nor shall be construed to require a Respondent to terminate the employment of any employee or to prevent a Respondent from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year after the Closing Date, not: (i) directly or indirectly solicit or otherwise attempt to induce any employee of the Acquirer 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 (ii) hire any Divestiture Product Employee;

provided, however, a 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 that Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided further, however, that a Respondent may do the following: (i) advertise for employees in

newspapers, trade publications, or other media not targeted specifically at the Divestiture Product Employees; or (ii) hire a Divestiture Product Employee who contacts a Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from that Respondent.

N. Until Respondents complete the divestitures required by this Order and fully provide, or causes to be provided, the 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 Manufacturing Technology; and

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

O. Respondents shall not, in the United States of America:

1. use any of the Trademarks related to Divestiture Products or any mark confusingly similar to the Trademarks as a trademark, tradename, or service mark *except* as may be necessary to sell inventory of Divestiture Products in existence as of the Acquisition Date or as otherwise specifically permitted by the Acquirer of the relevant Divestiture Product;

2. attempt to register the Trademarks;

3. attempt to register any mark confusingly similar to the Trademarks;

4. challenge or interfere with an Acquirer's use and registration of the Trademarks acquired by that Acquirer; or

5. challenge or interfere with an Acquirer's efforts to enforce its trademark registrations for and trademark rights in the relevant Trademarks against Third Parties.

P. 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 import, export,

use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) acquired by that Acquirer, into, from, or within the United States of America.

Q. For any patent infringement suit filed prior to the Closing Date in which a Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that a Respondent has prepared or is preparing to defend against as of the Closing Date, and where such a suit would have the potential directly to limit or interfere with the relevant Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the 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 import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) acquired by that Acquirer, into, from, or within the United States of America, that Respondent shall:

1. cooperate with that Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses from that Respondent in connection with obtaining resolution of any pending patent litigation related to that 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.

R. The purpose of the divestiture of the Divestiture Product Assets and the provision of the related

Manufacturing Technology and the related obligations imposed on the Respondents by this Order is:

1. to ensure the continued use of such assets for the purposes of the Business associated with each Divestiture Product within the United States of America;

2. to create a viable and effective competitor that is independent of Respondents in the Business of each Divestiture Product within the United States of America; and

3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

A. Edward J. Buthusiem shall serve as 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. No later than one (1) day after the Acquisition Date, Respondents shall enter into the Monitor Agreement that is attached as Appendix V. and Non-Public Appendix V.A to the Order to Maintain Assets. The Monitor Agreement shall become effective on the date the Order to Maintain Assets is issued. Respondents shall transfer to and confer upon the Monitor all the rights and powers necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of the Orders. Respondents shall assure, and the Monitor Agreement shall provide, that:

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

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

3. The Monitor shall serve until the latter of:

   a. the date the Respondents complete the transfer of all Divestiture Product Assets, and the transfer and delivery of the related Manufacturing Technology, Product Intellectual Property, and Product Licensed Intellectual Property;

   b. the date that each respective Acquirer has obtained all Product Approvals necessary to manufacture and market each Divestiture Product acquired by that Acquirer in the United States of America independently of the Respondents; or

   c. the date of written notification from staff of the Commission that the Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture a Divestiture Product that is being monitored by the Monitor;

provided, however, that the Monitor's service shall not extend more than four (4) years after the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

C. 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 that Respondent's 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 Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor that Respondent's compliance with the Orders.

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

E. 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.

F. Respondents shall report to the Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any

reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days after the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order; *provided, however*, beginning ninety (90) days after Respondents have filed its final report pursuant to Paragraph VII.C., and ninety (90) days thereafter, the Monitor shall report in writing to the Commission concerning progress by the 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.

G. 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.

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

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

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

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

IV.

IT IS FURTHER ORDERED that:

A. If the Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the 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(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets

that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by 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(s) shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of

Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however*, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

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

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

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

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

V.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, Respondents 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 Respondents may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement, or arrangement;

provided further, *however*, that pursuant to this Paragraph, Respondents 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 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 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. Respondents shall include in each Remedial Agreement related to each of the Divestiture Products 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 Respondents, all as soon as reasonably practicable.

E. Respondents 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. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

VII.

IT IS FURTHER ORDERED that:

A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition Date occurred.

B. Within five (5) days of each Closing Date, Respondents shall submit to the Commission a letter certifying the date on which that particular divestiture occurred.

C. Within thirty (30) days after the Order Date, and every ninety (90) days thereafter until Respondents have (i) transferred all of the Divestiture Assets to the relevant Acquirer(s); and (ii) fully provided the Manufacturing Technology, Product Intellectual Property, and Product Licensed Intellectual Property to the relevant Acquirers, 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 these requirements of the Orders. Respondents shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor, if any Monitor has been appointed. 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 Orders, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, and (ii) any transitional services being provided by Respondents to the relevant Acquirer; and

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

D. One (1) year after the Order Date, annually for the next four (4) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

VIII.

IT IS FURTHER ORDERED that 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 a Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

the authorized representative(s) of the Commission and at the expense of that Respondent; and

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

X.

IT IS FURTHER ORDERED that Respondent Johnson & Johnson's obligations under the Orders, other than the provisions regarding employment contained in Paragraph II of this Order, shall terminate on the date on which all of the following have occurred:

A. the Transferred Assets are completely owned and controlled either by Integra or an Acquirer;

B. with respect to any Divestiture Product or related Product Intellectual Property or Manufacturing Technology, that is owned or controlled by Johnson & Johnson prior to the Acquisition, Johnson & Johnson has:

1. transferred all rights and assets that were owned or controlled by Johnson & Johnson prior to the Acquisition and necessary to effect the related divestitures to either Integra or the Acquirer;

2. transferred or otherwise provided all rights, assets or other resources that were owned or controlled by Johnson & Johnson prior to the Acquisition and necessary for Integra to provide the technical services and assistance to the Acquirer; and

3. secured all consents and waivers from all Third Parties that are necessary to divest the Divestiture Assets to an Acquirer or certified that the Acquirer has executed all such agreements directly with each of the relevant Third Parties;

C. with respect to any Product Licensed Intellectual Property, Johnson & Johnson has granted or otherwise provided the rights to use such intellectual property either directly to the Acquirer, or to Integra for the purposes of providing such rights to the Acquirer;

D. Johnson & Johnson has completed its obligations as specified in the *Transition Manufacturing Services Agreement* and the *Transition Services Agreement* by and between Depuy Synthes, Inc. and Natus Medical Incorporated; and

E. Johnson & Johnson certifies to the Commission that all of the above-described services, acquisitions and transfers have occurred and all of the above-described consents and waivers from Third Parties have been provided to the Acquirer.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on December 21, 2027.

By the Commission.

NON-PUBLIC APPENDIX I
ACQUISITION AGREEMENT

[Cover Page]

NON-PUBLIC APPENDIX II
DIVESTITURE AGREEMENTS

[Cover Page]

NON-PUBLIC APPENDIX III
DIVESTITURE PRODUCTS

[Cover Page]

NON-PUBLIC APPENDIX III.A.
CEREBROSPINAL FLUID COLLECTION SYSTEMS

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NON-PUBLIC APPENDIX III.B.
DURAL GRAFT PRODUCTS

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NON-PUBLIC APPENDIX III.C.
FIXED PRESSURE VALVE SHUNT SYSTEMS

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NON-PUBLIC APPENDIX III.D.
INTRACRANIAL PRESSURE MONITORING SYSTEMS

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NON-PUBLIC APPENDIX III.E.
NON-ANTIMICROBIAL EXTERNAL VENTRICULAR DRAINAGE CATHETERS

[Cover Page]

NON-PUBLIC APPENDIX III.F.
FIXED PRESSURE VALVE SHUNT SYSTEMS EQUIPMENT

APPENDIX IV
CRANIAL ACCESS KITS

Product Description	SKU
CRANIAL KIT - NO DRUGS	INS5HND
CRANIAL DRILL KIT 1/4"	INS7040
CRANIAL KIT WITH THREE DRILL BITS	INS7250
CRANIAL KIT WITH TWO DRILL BITS	INS7260
CRANIAL KIT WITH VARIABLE BITS	INS7270
CRANIAL KIT WITH 5.31MM BIT	INS7280
HITH KIT	INSHITH
INS5HND without ventricular needle and razor, and 31" x 51" drape	INSHITH ND
INSHITH with ventricular needle and razor, and 31" x 51" drape	INSHITH RZN

APPENDIX V
MONITOR AGREEMENT

MONITOR AGREEMENT

THIS AGREEMENT is made on **September 12, 2017**

BETWEEN:

Integra LifeSciences Holdings Corporation, a Delaware corporation ("Integra")

- and –

Johnson & Johnson, a New Jersey corporation ("Johnson & Johnson")

- and –

Berkeley Research Group, LLC, a corporation governed by the laws of Nevada ("BRG")

RECITALS:

A. Integra and DePuy Synthes, Inc.—a Delaware corporation controlled by Johnson & Johnson—have entered into an Asset Purchase Agreement, dated as of February 14, 2017, pursuant to which Integra agrees to buy certain products for use in connection with neurosurgery procedures;

B. Integra and Johnson & Johnson (collectively, "Respondents") have entered—or will shortly enter—into an Agreement Containing Consent Order with the Commission (the "Consent Agreement");

C. The Consent Agreement requires Respondents to divest certain assets to Natus Medical Incorporated pursuant to, and in accordance with, certain divestiture agreements, and provides that Edward J. Buthusiem shall serve as a Monitor, to ensure that Respondents comply with their obligations under the Consent Agreement;

D. BRG has consented to the appointment of Edward Buthusiem, a managing director of BRG's Healthcare Analytics Practice, to act as the Monitor; and

E. Respondents seek to transfer to BRG, and BRG agrees to assume, all rights and powers necessary to permit BRG to monitor Respondents' compliance with the terms of the Consent Agreement.

THEREFORE the Parties agree as follows:

I. DEFINITIONS

[1] Whenever used in this Monitor Agreement, the following words and terms have the meanings set out below:

(a) **"BRG"** means Berkeley Research Group, LLC, its directors, officers, agents, employees, representatives, successors and assigns;

(b) **"Commission"** means the Federal Trade Commission;

(c) **"Consent Agreement"** means Consent Agreement as defined in the recitals to this Monitor Agreement;

(d) **"Respondents"** means Integra and Johnson & Johnson;

(e) **"Monitor Agreement"** means this Monitor Agreement, including Schedule I hereto, and references to any "Section", "Part" or "Paragraph" shall, unless otherwise indicated, mean a section, part or paragraph of this Monitor Agreement;

(f) **"Integra"** means Integra LifeSciences Holdings Corporation; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Integra LifeSciences Holdings Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each;

(g) **"Johnson & Johnson"** means Johnson & Johnson's directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Johnson & Johnson (including, without limitation, Johnson & Johnson's Codman Neuro division and DePuy Synthes, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; and

(h) **"Natus"** means Natus Medical Incorporated, a Delaware corporation

(i) **"Parties"** means Integra, Johnson & Johnson, and BRG collectively, and "**Party**" means any one of them.

[2] Capitalized terms used and not specifically defined herein shall have the definitions given to them in the Consent Agreement.

II. RIGHTS AND OBLIGATIONS OF THE PARTIES

[3] This Monitor Agreement is entered into pursuant to the terms of the Consent Agreement. BRG shall have all of the rights, powers, duties, obligations, responsibilities and protections that are possessed by or apply to the Monitor under the Consent Agreement. In the event of any discrepancy between the rights, powers, duties, obligations, responsibilities and protections that are possessed by or apply to the Monitor as set out in the Monitor Agreement and the Consent Agreement, the Consent Agreement shall prevail. Without limiting the generality of the foregoing, Respondents hereby grant to BRG all rights and powers necessary to permit BRG to monitor Respondents' compliance with the Consent Agreement including Respondents' compliance with the Consent Agreement's requirement that Respondents preserve and maintain the Divestiture Products and Divestiture Product Businesses.

[4] A reference in this Monitor Agreement to specific monitoring functions or tasks that are to be undertaken by BRG shall in no way detract from BRG's general right, power and duty to monitor all aspects of Respondents' compliance with the Consent Agreement.

[5] Respondents and BRG consent to the following terms and conditions regarding BRG's rights, powers and duties:

(a) BRG shall have the power and authority to monitor each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Consent Agreement, and any Remedial Agreement, including any Divestiture 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 Consent Agreement and in consultation with the Commission.

(b) BRG shall act in a fiduciary capacity for the benefit of the Commission, maintain all confidences and avoid any conflict of interest.

(c) BRG shall have the authority to employ, at the expense of Integra, such consultants, accountants, attorneys, and other representatives and assistants as BRG believes are reasonably necessary to carry out its duties and responsibilities.

(d) BRG shall have no obligation or authority to operate or maintain the Divestiture Products.

(e) BRG shall have no duties of good faith, of a fiduciary nature, or otherwise, to Respondents.

(f) Respondents shall report to BRG in accordance with the requirements of the Consent Agreement and as otherwise provided in any agreement

approved by the Commission. BRG shall evaluate the reports submitted to BRG by a Respondent, and any reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Consent Agreement or the Remedial Agreement(s). Within thirty (30) days after the date BRG receives these reports, BRG shall report in writing to the Commission concerning performance by Respondents of their obligations under the Consent Agreement; *provided, however*, beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph VII.C. of the Decision and Order, which is part of the Consent Agreement, and ninety (90) days thereafter, BRG shall report in writing to the Commission concerning progress by the 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. BRG shall, within 3 Business Days, respond to any request by the Commission for additional information regarding any Respondent's compliance.

[6] Subject to any demonstrated legally recognized privilege, BRG 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 BRG may reasonably request, related to that Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of BRG and shall take no action to interfere with or impede BRG's ability to monitor that Respondent's compliance with the Orders.

[7] Respondents shall fully and promptly respond to all requests from BRG and shall provide all information BRG may request that is relevant to monitoring Respondents' compliance with the Consent Agreement. Each Respondent shall identify an individual who shall have primary responsibility for responding fully and promptly to such requests from BRG on behalf of that Respondent.

[8] Respondents shall provide to BRG electronic or hard copies, as appropriate, of all reports submitted by Respondents to the Commission pursuant to the Consent Agreement, simultaneously with the submission of such reports to the Commission, for the duration of BRG's term under this Monitor Agreement.

[9] Respondents and BRG shall be reasonably available to one another to discuss any questions or issues either Party may have concerning compliance with the Consent Agreement.

[10] BRG shall report to the Commission in accordance with the terms of the Consent Agreement. Respondents acknowledge that BRG will not provide to Respondents copies of its reports to the Commission, nor will BRG provide to Respondents any information respecting BRG's dealings with the Commission.

III. COMPENSATION

[11] Integra shall be responsible for all reasonable fees and expenses properly charged or incurred by BRG in the course of carrying out BRG's duties under the Consent Agreement. BRG shall serve, without bond or security, on the terms set out in Schedule I to this Monitor Agreement, and shall account for all fees and expenses incurred. Integra shall pay all reasonable invoices submitted by BRG within 60 days after receipt and, without limiting this obligation, Integra shall comply with any agreement it reaches with BRG regarding interest on late payments. In the event of any dispute: (i) such invoice shall be subject to the approval of the Commission; and (ii) Integra shall promptly pay any invoice approved by the Commission. Any outstanding monies owed to BRG by Integra shall be paid out of the proceeds of the Divestiture.

IV. CONFIDENTIALITY

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

[13] The Commission may, among other things, require BRG and each of BRG'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 BRG's duties.

[14] BRG shall maintain the confidentiality of all Confidential Business Information provided to BRG by Respondents or any Purchaser approved by the Commission pursuant to the Consent Agreement. Such information shall be used by BRG only in connection with the performance of BRG's duties pursuant to this Monitor Agreement. Such Confidential Business Information shall not be disclosed by BRG to any Third Party other than:

(a) employees of BRG who have signed a confidentiality acknowledgement requiring them to abide by the confidentiality terms of this Monitor Agreement;

(b) consultants, attorneys or other representatives or assistants employed by BRG who have signed a confidentiality agreement requiring them to abide by the terms of this Monitor Agreement;

(c) the Commission and any Commission staff or counsel;

(d) the Divestiture Trustee; or

(e) other persons if consented to by Respondents and the Commission.

[15] BRG shall maintain a record of and inform the Commission of all Persons (other than representatives of the Commission) to whom Confidential Business Information related to this Monitor Agreement has been disclosed.

[16] Upon termination of BRG's duties under this Monitor Agreement, BRG shall promptly (i) return to Respondents all Records provided to BRG by Respondents; and (ii) destroy any Records prepared by Respondents that contain or reflect any Confidential Business Information of Respondents. BRG shall make no use of any Confidential Business Information of Respondents, or any information derived directly or indirectly from any Confidential Business Information of Respondents, following termination of its duties. Nothing herein shall abrogate BRG's duty of confidentiality, including the obligation to keep any Confidential Business Information of Respondents confidential in perpetuity after the termination of this Monitor Agreement.

[17] BRG shall keep confidential in perpetuity its reports to, and any other correspondence with, the Commission. BRG shall maintain the confidentiality, for a period of ten (10) years after the termination of this Monitor Agreement, of all other aspects of the performance of BRG's responsibilities under this Monitor Agreement and not disclose any Confidential Business Information relating thereto except as required by law. In the event that BRG is requested pursuant to subpoena or other legal process to produce any documents or to provide testimony relating to this matter in judicial or administrative proceedings to which BRG is not a party, Integra shall reimburse BRG at standard billing rates for all professional time and expenses, including reasonable attorney's fees, incurred in preparing for and responding to requests for documents and providing testimony.

V. INDEMNITIES AND RIGHTS OF ACTION

[18] Respondents shall indemnify BRG and hold BRG harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of BRG's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defence 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 BRG. In addition, except to extent arising from BRG's gross negligence, willful or wanton acts, or bad faith, BRG shall not be liable to Respondents for any consequential, incidental, special or punitive damages and BRG shall not be liable to Respondents for direct compensatory damages in excess of the fees actually received by BRG for the performance of services hereunder.

[19] BRG shall have no claim against the Commission arising out of the performance of BRG's duties under this Monitor Agreement or the Consent Agreement.

VI. TERM AND TERMINATION

[20] BRG shall serve until the latter of:

(i) the date the Respondents complete the transfer of all Divestiture Product Assets, and the transfer and delivery of the related Manufacturing Technology, Product Intellectual Property, and Product Licensed Intellectual Property;

(ii) the date that each respective Acquirer has obtained all Product Approvals necessary to manufacture and market each Divestiture Product acquired by that Acquirer in the United States of America independently of the Respondents; or

(iii) the date of written notification from staff of the Commission that BRG, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture a Divestiture Product that is being monitored by BRG;

provided, however, that BRG's service shall not extend more than four (4) years after the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders or otherwise terminate the monitor's service.

[21] BRG may terminate this Agreement without penalty upon 30 days' notice to Respondents and to the Commission. In such instance, BRG shall provide reasonable support to the Commission, Respondents and to any substitute Monitor appointed in accordance with the Consent Agreement (the "Substitute Monitor") to facilitate the transition of BRG's monitoring role to the Substitute Monitor.

[22] Parts IV and V of this Monitor Agreement shall survive its termination.

[23] If, during the term of this Monitor Agreement, BRG becomes aware that BRG has or may have a conflict of interest that may affect or could have the appearance of affecting the performance by BRG of any of its duties under this Monitor Agreement, BRG shall immediately inform both Respondents and the Commission of such conflict or potential conflict.

[24] If the Commission determines that BRG has ceased to act or has failed to act diligently, the Commission may remove BRG and appoint a Substitute Monitor. The provisions of the Consent Agreement respecting the Monitor shall apply in the same manner to any Substitute Monitor.

[25] If the Commission advises BRG and Respondents that he has determined, in its sole discretion, that there is cause for removal of BRG and appointment of a Substitute Monitor, whether due to an actual or perceived conflict of interest or otherwise in accordance with the Consent Agreement, this Monitor Agreement

shall immediately terminate without notice or penalty. Notwithstanding such termination, BRG shall provide reasonable support to the Commission, Respondents, and to any Substitute Monitor to facilitate the transition of BRG's monitoring role to the Substitute Monitor.

VII. GENERAL

[26] In the event that there is a disagreement or dispute between Respondents and BRG concerning Respondents' obligations under the Consent Agreement, and such disagreement or dispute cannot be resolved by the Parties, either Party may seek the assistance of the Commission to resolve the dispute.

[27] This Monitor Agreement shall be governed by and interpreted in accordance with the law of the state of New York without applying any otherwise applicable conflict of law rules.

[28] It is understood that BRG will serve under this Monitor Agreement as an independent contractor and that the relationship of employer and employee shall not exist between BRG and Respondents.

[29] This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, but all of which shall constitute one and the same Agreement.

[30] The Commission may on its own initiative, or at the request of BRG, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Consent Agreement.

[31] The Monitor appointed pursuant to the Consent Agreement may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Consent Agreement.

VIII. NOTICES

[32] The Parties shall rely on the procedures and addresses for giving notice contained in the Consent Agreement. Communications addressed to BRG shall be addressed to:

Edward Buthusiem
Berkeley Research Group, LLC
1800 M St. NW, Second Floor
Washington, DC 20036

Decision and Order

IN WITNESS OF WHICH the Parties have executed this Agreement.

DATED this 12th day of September 2017

INTEGRA LIFESCIENCES HOLDINGS CORPORATION

Name:

Title: Corporate Vice President, General Counsel, Administration & Secretary

JOHNSON & JOHNSON

Name:

Title: Asst. Secretary

BERKELEY RESEARCH GROUP, LLC

Name:

Title: Managing Director

Analysis to Aid Public Comment

NON-PUBLIC APPENDIX V.A
MONITOR AGREEMENT

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

INTRODUCTION

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Integra LifeSciences Holdings Corporation ("Integra") and Johnson & Johnson designed to remedy the anticompetitive effects resulting from Integra's proposed purchase of certain assets of Johnson & Johnson's Codman Neuro ("Codman") division. The proposed Decision and Order ("Order") contained in the Consent Agreement requires the parties to divest all rights and assets to Natus Medical Incorporated ("Natus") related to Integra's intracranial pressure monitoring systems and fixed pressure valve shunt systems, as well as Codman's cerebrospinal fluid collection systems, non-antimicrobial external ventricular drainage catheters, and dural grafts.

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

Under the terms of the Asset Purchase Agreement signed on February 14, 2017, Integra will acquire Codman in a transaction valued at approximately $1.0 billion (the "Acquisition"). The Commission's Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially

lessening competition in the U.S. markets for intracranial pressure monitoring systems, cerebrospinal fluid collection systems, non-antimicrobial external ventricular drainage catheters, fixed pressure valve shunt systems, and dural grafts. 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 Acquisition.

THE PARTIES

Integra, headquartered in Plainsboro, New Jersey, is a medical device company with worldwide operations and one of the largest surgical instrument suppliers in the United States. The company has two U.S. business units: Specialty Surgical Solutions and Orthopedics and Tissue Technologies. The Specialty Surgical Solutions division offers instruments and systems for, among other specialties, neurosurgery and critical care.

Codman, part of Johnson & Johnson's DePuy Synthes Inc. business unit, is a global medical device company that offers a diverse portfolio of neurosurgery, neurovascular, and drug delivery products, including instruments and systems for hydrocephalus management, neurointensive care, and cranial surgery, as well as implantable drug infusion systems. The proposed transaction excludes Codman's neurovascular and drug delivery businesses.

THE RELEVANT PRODUCTS AND STRUCTURE OF THE MARKETS

I. Intracranial Pressure Monitoring Systems

Intracranial pressure monitoring systems are used in intensive care units and operating rooms to measure pressure inside the skull, which can increase in the event of traumatic brain injury, hydrocephalus, intracranial tumors, and other medical conditions. An increase in intracranial pressure can severely damage the brain or spinal cord and is a common cause of death in neurosurgical patients, making quick detection of pressure buildup critical. Intracranial pressure monitoring systems use a pressure-sensitive probe inserted through the skull to send measurements via a transducer cable to a monitor at the patient's bedside. Customers

would not switch to an alternative product in response to a small but significant increase in the price of intracranial pressure monitoring systems.

Integra and Codman are the only significant suppliers in the U.S. market for intracranial pressure monitoring systems, accounting for 68% and 26% of 2016 sales, respectively. The remainder of the market is comprised of small, fringe competitors that have limited competitive significance.

II. Cerebrospinal Fluid Collection Systems

Cerebrospinal fluid collection systems drain excess cerebrospinal fluid and monitor pressures within the fluid. They consist of a plastic drainage bag, tubing, and other accessories that connect to a patient through an external ventricular drainage catheter. There are no viable alternatives to cerebrospinal fluid collection systems.

Integra, Codman, and Medtronic are the only competitively significant suppliers of cerebrospinal fluid collection systems in the United States. Integra is the leading supplier with 57% of the market. Medtronic accounts for an additional 27% of the market, and Codman has a share of 14%. The next closest competitor is Möller Medical, which offers a more complex technology and only accounts for a nominal share of the market.

III. Non-Antimicrobial External Ventricular Drainage Catheters

External ventricular drainage catheters funnel excess cerebrospinal fluid from the brain to cerebrospinal fluid collection systems to relieve intracranial pressure. External ventricular drainage catheters are either antimicrobial or non-antimicrobial, and the two types constitute distinct antitrust markets because of the substantial differences between them. Non-antimicrobial external ventricular drainage catheters lack an antibiotic coating and are suitable for less critical patients; they also may be used to avoid the risk of antibiotic interference when diagnosing infections. They are significantly less expensive than antimicrobial external ventricular drainage catheters. Customers would not switch from non-antimicrobial external ventricular

drainage catheters to the antimicrobial versions or any other product in response to a 5% to 10% increase in the price of non-antimicrobial external ventricular drainage catheters, in part because even with such a price increase, antimicrobial external ventricular drainage catheters would still be considerably more expensive.

Integra and Codman account for 29% and 17% of the relevant market in the United States. The only other competitively significant firm is Medtronic, with a 51% share.

IV. Fixed Pressure Valve Shunt Systems

Shunts are the primary tool that neurosurgeons use to treat hydrocephalus, or excessive accumulation of cerebrospinal fluid. Shunt systems redirect excess cerebrospinal fluid from the brain or spinal cord to another area of the body, usually the abdomen, for reabsorption. Shunt systems consist of three components: a ventricular catheter inserted into the brain, a valve to regulate the flow of the fluid, and another catheter that is threaded to the location where the fluid is emptied. Once implanted, the one-way valve in the shunt system regulates the pressure in the brain by governing the amount and pressure of cerebrospinal fluid passing through the catheter.

There are two main types of hydrocephalus shunts: fixed pressure valve shunts and programmable valve shunts. Fixed pressure valve shunts allow cerebrospinal fluid to pass through the shunt only when the pressure has exceeded some predetermined setting, which medical providers cannot adjust once implanted without another surgery. The settings on a programmable valve shunt system, which is significantly more expensive, can be adjusted non-invasively using specially designed magnetic tools. An insufficient number of customers are likely to switch to programmable valve shunts to prevent a small but significant increase in the price of fixed pressure valve shunt systems.

Integra, Codman, and Medtronic are the only significant suppliers of fixed pressure valve shunt systems. Medtronic accounts for 55% of U.S. sales, and Integra follows at 23% share and Codman at 15% share. Aesculap and Sophysa hold small,

fringe positions in the market and their products are not close substitutes to those of Integra and Codman.

V. Dural Grafts

Dural grafts are used to repair or replace a patient's dura mater, the thick membrane that surrounds the brain and spinal cord and keeps cerebrospinal fluid in place. Integra leads the U.S. market with 66% share of 2016 sales. In addition, Integra manufactures approximately 77% of the dural grafts sold in the United States. Medtronic, Codman, and Stryker account for 11%, 9%, and 8% of sales, respectively. Other suppliers account for only a nominal share of the market.

THE RELEVANT GEOGRAPHIC MARKET

The United States is the relevant geographic market in which to analyze the effects of the proposed Acquisition. 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.

COMPETITIVE EFFECTS OF THE ACQUISITION

The proposed Acquisition would cause substantial competitive harm in the relevant markets. The parties are the only significant suppliers of intracranial pressure monitoring systems in the U.S. market, and two of only three significant suppliers of cerebrospinal fluid collection systems, non-antimicrobial external ventricular drainage catheters, and fixed pressure valve shunt systems in the United States. In the dural grafts market, a combined Integra/Codman would control the vast majority of the U.S. market and eliminate the close competition that exists between the parties today. Eliminating the head-to-head competition between Integra and Codman in all of these highly concentrated markets would allow the combined firm to exercise market power unilaterally, resulting in higher prices and reduced choice for customers in these markets.

Analysis to Aid Public Comment

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 Acquisition. New entry would require significant investment of time and money to design and develop an effective product, obtain FDA approval, and develop clinical history supporting the long-term efficacy of a product. A new entrant must also establish a sales and marketing infrastructure, have or develop a track record of service and support, and offer a robust line of neurosurgical products sufficient to convince potential customers of the viability of its new product offerings. Such development efforts are difficult, time-consuming, and expensive, and often fail to result in a competitive product reaching the market.

THE CONSENT AGREEMENT

The proposed Consent Agreement and Order remedy the competitive concerns raised by the proposed Acquisition by requiring the parties to divest to Natus all assets and rights to research, develop, manufacture, market, and sell Integra's intracranial pressure monitoring systems and fixed pressure valve shunt systems, as well as Codman's cerebrospinal fluid collection systems, non-antimicrobial external ventricular drainage catheters, and dural grafts. Integra is also required to divest its San Diego, California facility that manufactures a key component of its intracranial pressure monitoring systems. Additionally, to further ensure the divestitures are successful, the proposed Order requires the parties to supply Natus with cranial access kits for a limited time until Natus is able to secure supply of that product independently. The kit, which is often sold with the divestiture assets, includes items such as a hand drill, forceps, and sutures used during cranial surgery. The provisions of the Consent Agreement ensure that Natus becomes an independent, viable, and effective competitor in the respective U.S. markets in order to maintain the competition that currently exists.

Based in Pleasanton, California, Natus is a global healthcare company that provides screening, diagnostic, and monitoring solutions for its three business units: neurology, newborn care, and hearing and balance care. Its neurology business includes

systems that are highly complementary to the divestiture assets and test for a variety of medical conditions, including epilepsy, head injury, tumors, Parkinson's, and sleep apnea. Natus is well positioned to restore the competition that otherwise would have been lost pursuant to the proposed Acquisition.

The parties must accomplish the divestitures and relinquish their rights to Natus no later than ten days after consummating the proposed Acquisition. If the Commission determines that Natus 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 Natus and then divest the products to a Commission-approved acquirer(s) within six months of the date the Order becomes final.

To ensure compliance with the Order, the Commission has agreed to appoint a Monitor to ensure that Integra and Johnson & Johnson comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the rights and assets to Natus. The proposed Order further allows the Commission to appoint a trustee in the event the parties fail to divest the products as required.

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.

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

ENDO INTERNATIONAL PLC

Docket No. C-4539. Order, July 3, 2017

Letter appointing Quantic Regulatory Services LLC as Monitor.

LETTER APPOINTING MONITOR

George G. Gordon
Dechert LLP

RE: *In re Endo Pharmaceuticals, et al.*, Case No. 17-cv-00312

Dear Mr. Gordon,

This letter notifies Defendants that pursuant to Paragraph IV of the Stipulated Order for Permanent Injunction entered in the above-referenced matter the Federal Trade Commission has appointed Quantic Regulatory Services LLC as Monitor. The Commission has also approved the Monitor Agreement entered into among Quantic Regulatory Services, LLC and Endo Pharmaceuticals Inc. and Endo International plc.

In according its approval, the Commission has relied upon the information submitted, and representations made, by Defendants and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

MALLINCKRODT ARD, INC.
AND
MALLINCKRODT PLC

Docket No. X170029. Order, July 12, 2017

Letter approving Mallinckrodt's Synacthen Sublicense with West Therapeutic Development, LLC.

LETTER APPROVING SUBLICENSE AGREEMENT

Kenneth S. Reinker, Esq.
Cleary Gottlieb Steen & Hamilton LLP

Re: Stipulated Order for Permanent Injunction and Equitable Monetary Relief, *FTC v. Mallinckrodt ARD, Inc. and Mallinckrodt plc*, No. 1:17-cv-120 (D.D.C. Jan. 30, 2017); FTC File No. 131 0172; FTC Matter No. X170029

Dear Mr. Reinker:

This is in reference to the Application for Approval of Proposed Synacthen Sublicense ("Application") filed by Mallinckrodt ARD, Inc. and Mallinckrodt plc (collectively, "Mallinckrodt") and received on June 30, 2017. Pursuant to the Stipulated Order for Permanent Injunction and Equitable Monetary Relief ("Order") in this matter, Mallinckrodt requests that the Commission approve its proposed Synacthen Sublicense by and between Mallinckrodt and West Therapeutic Development, LLC ("West").

After consideration of Mallinckrodt's Application and other available information, the Commission has approved the proposed Synacthen Sublicense to West as required by the Synacthen Sublicense and Order. In according its approval, the Commission has relied upon the information submitted and the representations made by Mallinckrodt in connection with Mallinckrodt's Application and has assumed them 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 12, 2017

Letter Order approving amendments to the Essroc Divestiture Agreement.

LETTER ORDER APPROVING PETITION

Andrew M. Lacy, Esquire
Simpson Thacher & Bartlett LLP

Re: *Holcim Ltd. and Lafarge S.A.,* Docket No. C-4519

Dear Mr. Lacy:

This letter is in reference to the Petition of LafargeHolcim For Approval of Amendments Related to the Essroc Divestiture Agreement ("Petition") that you filed with the Commission on behalf of LafargeHolcim Ltd. on May 19, 2017.

Pursuant to Rule 2.41(f) of the Commission's Rules of Practice, the Commission has determined to approve the Petition of LafargeHolcim to amend the Essroc Divestiture Agreement, as proposed in the Petition. In according its approval, the Commission has relied upon the information submitted and the representations made in connection with the Petition, and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

TEVA PHARMACEUTICAL INDUSTRIES LTD.
AND
ALLERGAN PLC

Docket No. C-4589. Order, July 18, 2017

Letter notifying Teva Pharmaceutical Industries Ltd. of the Commission's decision to waive prior approval and public comment regarding modifications to the supply agreement.

LETTER WAIVING PRIOR APPROVAL AND COMMENT FOR MODIFICATIONS TO A SUPPLY AGREEMENT

Ian R. Conner, Esq.
Kirkland & Ellis LLP

Re: *In the Matter of Teva Pharmaceutical Industries Ltd, et al.*
Docket No. C.4589

Dear Mr. Conner:

This.is in reference to a request for approval filed by Teva Pharmaceutical Industries Ltd. ("Teva") and received on June 27, 2017 ("Request"). Pursuant to the Decision and Order in Docket No. C-4589, Teva requests Commission approval of its proposal to make certain modifications to the supply agreement between Dr. Reddy's, a Commission-approved acquirer in this matter, and Teva.

After consideration of Teva's Request and pursuant to the authority delegated to me under Rule 2.41(f)(5)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 2.4l(f)(5)(ii), I hereby waive the requirements for Commission approval and the public comment period for the modifications to the supply agreement described in Teva's Request

If you have further questions, please contact David von Nirschl, the Compliance staff attorney assigned to this matter. Mr..von Nirschl can be reached at 202-326-3213 or dnirschl@ftc.com.

Interlocutory Orders, Etc.

IN THE MATTER OF

IMPAX LABORATORIES, INC.

Docket No. 9373. Order, August 14, 2017

Order granting respondent's motion seeking a revised deadline for its Opposition to Complaint Counsel's Motion for Partial Summary Decision.

ORDER GRANTING RESPONDENT'S MOTION FOR EXTENSION OF TIME

On August 8, 2017, Respondent Impax Laboratories, Inc. ("Impax") filed a Motion and Memorandum of Law in Support of Motion for Extension of Deadline for Opposing Complaint Counsel's Motion for Partial Summary Decision. Impax seeks a revised deadline of August 31, 2017 for its Opposition to Complaint Counsel's August 4, 2017 Motion for Partial Summary Decision.

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 Motion. Accordingly,

IT IS ORDERED that Respondent's Motion is **GRANTED**. Respondent must file its response to Complaint Counsel's Motion for Partial Summary Decision on or before August 31, 2017.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

IMPAX LABORATORIES, INC.

Docket No. 9373. Order, August 29, 2017

Order granting complaint counsel's motion seeking a four-day extension of its reply deadline.

ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR EXTENSION OF TIME

On August 28, 2017, Complaint Counsel filed an Unopposed Motion for Extension of Time to File a Reply in Support of its Motion for Summary Decision. Complaint Counsel seeks a four-day extension of its reply deadline to September 15, 2017.

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 Motion. Accordingly,

IT IS ORDERED that Complaint Counsel's Motion is **GRANTED**. Complaint Counsel must file its reply on or before September 15, 2017.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

GRIFOLS, S.A.
AND
TALECRIS BIOTHERAPEUTICS HOLDINGS CORP.

Docket No. C-4322. Order, September 5, 2017

Letter Order approving the Application filed by Grifols, S.A. to modify the Contract Manufacturing Agreement.

LETTER ORDER APPROVING MODIFICATION

John R. Ingrassia, Esq.
Proskauer Rose LLP
Counsel for Grifols, S.A.

Re: *In the Matter of Grifols, S.A., and Talecris Biotherapeutics Holdings Corp. Docket No. C-4322*

Dear Mr. Ingrassia:

Pursuant to Rule 2.41(f) of the Commission Rules of Practice, the Commission has determined to approve the Application filed by Grifols, S.A., on June 12, 2017, to modify the Contract Manufacturing Agreement ("CMA") incorporated into the Decision and Order in this matter by approving the draft Amendment to the CMA. In according its approval to Grifol's Application, the Commission has relied upon the information submitted by Grifols S.A., and the Commission has assumed that information to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

CHINA NATIONAL CHEMICAL CORPORATION, ADAMA AGRICULTURAL SOLUTIONS LTD., AND MAKHTESHIM AGAN OF NORTH AMERICA, INC. D/B/A ADAMA

Docket No. C-4610. Order, September 26, 2017

Letter notifying China National Chemical Corporation of the Commission's decision to waive prior approval and public comment regarding modifications to the formulation services agreement.

LETTER WAIVING PRIOR APPROVAL AND COMMENT FOR MODIFICATIONS TO AN AGREEMENT

Peter Guryan, Esq.
Simpson Thacher & Bartlett LLP

Re: In the Matter of China National Chemical Corporation, et al., Docket No. C-4610

Dear Mr. Guryan:

This is in reference to an application for approval of a modification filed by China National Chemical Corporation ("ChemChina") and received on September 14, 2017 ("Application"). Pursuant to the Decision and Order in Docket No. C-4610, ChemChina requests Commission approval of its proposal to modify the formulation services agreement between Makhteshim Agan of North America, Inc. (a subsidiary of ChemChina) and Amvac Chemical Corporation.

After consideration ofChemChina's Application and pursuant to the authority delegated to me under Rule 2.41(t)(5)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 2.41(t)(5)(ii), I hereby waive the requirements for Commission approval and the public comment period for the modifications to the formulation services agreement described in ChemChina's Application.

If you have further questions, please contact Jeff Dahnke, the Compliance staff attorney assigned to this matter. Mr. Dahnke can be reached at 202-326-2111 or jdahnke@ftc.gov.

Very truly yours,

Interlocutory Orders, Etc.

IN THE MATTER OF

JERK, LLC D/B/A JERK.COM,
AND
JOHN FANNING

Docket No. 9361. Order, September 28, 2017

Order revising a compliance monitoring provision, which the United States Court of Appeals for the First Circuit remanded to the Commission for further consideration

ORDER ON REMAND REVISING COMPLIANCE MONITORING REQUIREMENT

On March 13, 2015, the Commission issued an Opinion deciding that Respondents Jerk, LLC ("Jerk") and John Fanning had engaged in deceptive conduct in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). *Jerk, LLC*, 159 F.T.C. 885 (2015). An accompanying Final Order imposed cease-and-desist and other relief. *Id*. at 939-44. The United States Court of Appeals for the First Circuit affirmed the Commission's finding of liability and sustained all aspects of the Commission's remedial order other than a compliance monitoring provision, which it remanded to the Commission for further consideration. *Fanning v. FTC*, 821 F.3d 164 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 627 (Jan. 9, 2017). This Order addresses the remanded issue and modifies the compliance monitoring requirement to reflect the court's rulings.

I. BACKGROUND

This proceeding arose from an administrative complaint, which alleged that Respondents had engaged in deceptive acts or practices through the operations of their website, Jerk.com. Jerk.com was a social media website that invited users to create profiles of other individuals and to rate them as a "jerk" or "not a jerk." The Commission found that Respondents had falsely represented that content on Jerk.com, including the names and photographs in profiles, had been created by the website's users and reflected users' views of the profiled individuals, when in fact that content was almost entirely "scraped" from Facebook by Jerk

itself or those under Jerk's control. 159 F.T.C. at 902-06. The Commission further determined that Jerk.com had falsely claimed that consumers who paid a $30 membership fee would receive additional benefits, including the ability to dispute information posted on the site, but in fact had provided nothing in return for the membership fees. *Id.* at 912-16. The Commission found that Mr. Fanning had the authority to control, and controlled and participated directly in, Jerk's unlawful conduct and concluded that he was individually liable for Jerk's deceptive acts. *Id.* at 917-27.

Mr. Fanning sought judicial review.[1] The court of appeals sustained the Commission's findings that the Jerk.com website contained material and false representations about the source of its content and the benefits of the $30 paid membership. *Fanning*, 821 F.3d at 170-74. It observed that Mr. Fanning had developed no argument as to why the Commission's finding of personal liability was wrong and ruled that this contention had been waived. *Id.* at 169 n.4. As to remedy, the court affirmed the core of the Commission's Final Order, which enjoined Mr. Fanning from making any misrepresentation about the source of any content on a website or regarding the benefits of joining any service. *Id.* at 174-75. The court also affirmed, *inter alia*, provisions requiring that for five years Mr. Fanning notify the Commission of any complaints or inquiries relating to any website or other online service and that he maintain and make available advertisements and promotional materials containing any representations covered by the order. *Id.* at 175-76.

The court of appeals, however, remanded one portion of the Commission's Final Order, Paragraph VI, which reads:

VI.

COMPLIANCE MONITORING – JOHN FANNING

IT IS FURTHER ORDERED that respondent John Fanning, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his

1 Jerk did not file a petition for review.

current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities.

The court was unable to find a reasonable relation between this provision and Mr. Fanning's violation. 821 F.3d at 176. It noted that the provision requires that Mr. Fanning notify the Commission of business affiliations and employment "regardless of whether or not the affiliate or employer has responsibilities relating to the order." *Id.* at 177 (stating that the provision "would ostensibly require Fanning to report if he was a waiter at a restaurant"). It observed that while courts in a number of previous FTC Act cases had imposed orders requiring individuals to report any change of business for twenty years, none of the cited orders required individuals to also provide descriptions of their employers and business for more than five years. *Id.* at 177 & n.9. It found that the prior compliance monitoring orders had been "almost entirely bereft of analysis that might explain the rationale for such a requirement." *Id.* at 177. "Without any guidance from the Commission," the court concluded, "we cannot find these provisions are reasonably related to Fanning's violation. As a result, we conclude the Commission's order, in this respect, must be vacated and remanded." *Id.*

II. Analysis

On remand Mr. Fanning first argues that "[t]he First Circuit's Order and Judgment does not permit the FTC another opportunity to formulate a new Compliance Monitoring sanction against Fanning," so that Paragraph VI of the Commission's Final Order "should be stricken in its entirety and excised from a revised Final Order consistent with the First Circuit's ruling." Respondent John Fanning's Response to Order Scheduling Briefing Following Remand, Docket No. 9361, at 2 (F.T.C. Apr. 12, 2017) (hereinafter "Fanning Brief"). The First Circuit's ruling, however, permits the Commission to reinstate an appropriate compliance monitoring provision so long as it demonstrates that the relief is reasonably related to Mr. Fanning's violation. Indeed, the First Circuit has already heard and directly rejected Mr. Fanning's contentions regarding the scope of the remand. On

March 17, 2017, Mr. Fanning filed with the court of appeals a Motion for Clarification, in which he (i) argued that "the Court's Order and Judgment does not permit the FTC another opportunity to formulate a new Compliance Monitoring sanction against Fanning that the FTC deems appropriate" and (ii) asked the court "to clarify th[e] Court's Opinion and Judgment to express that the Federal Trade Commission on remand shall strike in its entirety Paragraph VI - Compliance Monitoring from the revised final administrative order that shall enter against John Fanning." Petitioner's Mot. for Clarification, at 4, *Fanning v. FTC*, No. 15-1520 (1st Cir. Mar. 17, 2017). Four days later, the court of appeals ruled, "Appellant's motion to clarify is denied. The reconsideration of compliance monitoring provisions is permissibly within the scope of the remand." Order of Court, *Fanning*, No. 15-1520 (1st Cir. Mar. 21, 2017). In view of the First Circuit's express holding to the contrary, Mr. Fanning's continued insistence that the court has required the FTC to strike the entire Compliance Monitoring provision is unpersuasive.

Mr. Fanning further argues that – if the Commission retains any compliance monitoring provision – it must significantly revise both the scope and duration of the requirement. He urges that (i) the required notification regarding affiliations with any new business or employment be limited to any new business or employment "that may affect compliance obligations arising under this order" and (ii) the compliance monitoring requirement be reduced from ten to three years. Fanning Brief at 3. Complaint Counsel respond that a robust compliance monitoring mechanism that includes notification of new business affiliations and new employment is necessary to prevent recidivism. They argue that the specific facts of this case warrant maintaining the original scope of the compliance monitoring provision. Complaint Counsel's Response to Resp't's Briefing on Remand, Docket No. 9361, at 2-3 (F.T.C. May 3, 2017) ("Complaint Counsel Brief"). Complaint Counsel concede, however, that the duration of the compliance monitoring requirement could be reduced to five years while still providing appropriate protection. *Id.* at 7-8.

Requiring individual respondents who have previously controlled or participated in deceptive conduct to report changes in employment and business affiliation is generally an important

element in remedying deception. It has long been recognized that, once the Commission has found a respondent to have engaged in deceptive practices, it may impose remedies that reach broadly enough "to prevent respondent[] from engaging in similarly illegal practices in [the] future." *FTC v. Colgate Palmolive Co.*, 380 U.S. 374, 395 (1965); *cf. FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (noting, in a price discrimination case, that the Commission "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity") (citations omitted). Thus, the Commission's Final Order prohibits Mr. Fanning not just from future deceptive use of Jerk.com, but rather from misrepresenting the source of any content on a website and the benefits of joining any service.

With an individual respondent, the first step in monitoring such future conduct requires knowledge as to where the individual is employed or otherwise conducting business. Consumer complaints regarding deceptive conduct typically identify the allegedly offending company, not the individuals behind it. Having the ability to connect Mr. Fanning to any such consumer complaints is a prerequisite for identifying signs of recidivistic deception that would again harm consumers.

Numerous courts that have imposed remedial orders for FTC Act violations have recognized the contribution of compliance monitoring to achieving remedial goals.[2] In particular, requiring individual respondents to report changes in their employment or business activities has been found "necessary in order for the FTC to monitor Defendants' compliance," *FTC v. Wellness Support Network, Inc.*, 2014 WL 644749, at *22 (N.D. Cal. Feb. 19, 2014); "appropriate to permit the Commission to police" compliance, *FTC v. Capital Choice Consumer Credit, Inc.*, 2004

2 *See, e.g.*, *United States Dep't of Justice v. Daniel Chapter One*, 89 F.Supp. 3d 132, 145-46 (D.D.C. 2015), *aff'd*, 650 F. App'x 20 (D.C. Cir. 2016) (monitoring provisions "provide an oversight mechanism to better ensure that the defendants do not engage in future recidivism"); *FTC v. Alcoholism Cure Corp.*, 2012 WL 12903173, at *5 (M.D. Fla. July 3, 2012) (providing that "[b]road compliance monitoring provisions are necessary to ensure Defendants' compliance"); *FTC v. Slimamerica, Inc.*, 77 F. Supp. 2d 1263, 1276 (S.D. Fla. 1999) (finding monitoring provisions "appropriate to permit the Commission to police the defendants' compliance with the order").

WL 5141452, at *4 (M.D. Fla. May 4, 2004) (internal quotation marks omitted) (retaining employment reporting provision in *FTC v. Capital Choice Consumer Credit, Inc.*, 2004 WL 5149998, at *52 (M.D. Fla. Feb. 20, 2004)); and "necessary to effectuate enforcement of Section 5 of the FTC Act and to deter future violations by the[] Defendants," *FTC v. US Sales Corp.*, 785 F. Supp. 737, 753 (N.D. Ill. 1992).[3] Similarly, in *FTC v. Direct Mktg Concepts, Inc.*, 648 F. Supp. 2d 202 (D. Mass. 2009), *aff'd*, 624 F.3d 1 (1st Cir. 2010), the trial court characterized monitoring provisions of two orders that, *inter alia*, required defendants to inform the FTC of changes in their employment or business activities as "reasonable and necessary to ensure that . . . the FTC has the ability to monitor compliance with the orders and prevent future illegal conduct."[4]

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3 Other cases in which the courts have imposed or affirmed orders requiring individual defendants to report changes in employment status or business activities include *POM Wonderful, LLC*, 155 F.T.C. 1, 196 (Jan. 10, 2013), *aff'd in relevant part*, *POM Wonderful LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015); *FTC v. Think Achievement Corp.*, 144 F.Supp. 2d 1013, 1027 (N.D. Ind. 2000); *FTC v. Micom Corp.*, 1997 WL 226232, at *7 (S.D.N.Y. Mar. 12, 1997); *FTC v. Freedom Med., Inc.*, 1996 WL 86826, at *5 (S.D. Ohio Jan. 5, 1996); *FTC v. Alliance Commc'n, Inc.*, 1996 WL 812939, at *3 (S.D.N.Y. Nov. 6, 1996); *FTC v. Renaissance Fine Arts, Ltd.*, 1995 WL 523620, at *4 (N.D. Ohio Aug. 10, 1995); *FTC v. Fed. Coin Repository, Inc.*, 1993 WL 356177, at *4 (E.D.N.Y. Aug. 9, 1993); *FTC v. T.G. Morgan, Inc.*, 1992 WL 88162, at *3 (D. Minn. Mar. 4, 1992), *aff'd* sub nom. *FTC. v. Blodgett*, 54 F.3d 782 (8th Cir. 1995) (without reported opinion); *FTC v. U.S. Rarities, Inc.*, 1992 WL 696962, at *6 (S.D. Fla. May 26, 1992); *FTC v. Oak Tree Numismatics, Inc.*, 1991 WL 11242190, at *4 (D.N.J. Sept. 10, 1991).

4 648 F. Supp. 2d at 216-17 (referencing, *inter alia*, ¶ XIV.A.1 of the proposed Order and Judgment for Permanent Injunction and other Equitable Relief against Defendants Direct Marketing Concepts, Inc., ITV Direct, Inc., and Donald W. Barrett, and Robert Maihos at 21-22, *FTC v. Direct Marketing Concepts, Inc.*, 648 F. Supp. 2d 202 (D. Mass. 2009) (Civ. No. 04-11136-GAO), and ¶ IX.A.1 of the proposed Order and Judgment for Permanent Injunction and other Equitable Relief against Defendants Allen Stern, King Media, Inc., and Triad ML Marketing, Inc., and Relief Defendants Lisa Stern, Steven Ritchey, and BP International, Inc. at 13-14, *FTC v. Direct Marketing Concepts, Inc.*, 648 F. Supp. 2d 202 (D. Mass. 2009) (Civ. No. 04-11136-GAO)). The First Circuit found the trial court's remedy "appropriate," 624 F.3d at 18, but the monitoring provisions were not topics of appeal.

Here, the Commission has good reason to require that Mr. Fanning report changes in his employment or business activities as part of the Commission's compliance monitoring. The Commission found Mr. Fanning individually liable for multiple deceptive acts that affected several aspects of Jerk.com's website. *See Jerk, LLC*, 159 F.T.C. at 917-27 (finding liability for misrepresentations concerning (i) website content and (ii) membership benefits). The Commission also found that over time Mr. Fanning had shifted his deceptive activity from Jerk.com to a new website and had applied similar techniques to new iterations of his business activity. *Id.* at 934 (finding that Jerk and Mr. Fanning had moved content from Jerk.com to Jerk.org and used automatically generated profiles to populate reper.com). Of particular concern, Mr. Fanning has demonstrated a proclivity to disregard compliance obligations. For example, Paragraph VII of the Final Order required Mr. Fanning and Jerk to file a compliance report with the Commission within sixty days after service of the order. More than two years after the Final Order was served,[5] no compliance report had been filed. *See* Declaration of Kelly Ortiz at ¶ 3.[6] Mr. Fanning's failure to file the required compliance report simultaneously establishes a history of disregard for the Final Order's constraints and deprives the Commission of information it needs to protect the public interest. It illustrates and reinforces the Commission's ongoing need for knowledge of changes in Mr. Fanning's places of

5 The Commission's Opinion and Final Order was served on March 30, 2015. *See* Petition for Review, *Fanning v. FTC*, No. 15-1520, (1st Cir. 2015). The sixty day period allotted for filing a compliance report ran to May 29, 2015. On that day, the Court of Appeals for the First Circuit temporarily stayed the Commission's order pending review of Mr. Fanning's motion for a stay pending appeal. On July 14, 2015, the court denied the motion and vacated the temporary stay. The temporary stay was in place for only 47 days.

6 The Ortiz Declaration, dated May 2, 2017, and attached to Complaint Counsel's Brief, states that in 2015, the FTC's Division of Enforcement sent several letters to Mr. Fanning reminding him of his obligation to submit a compliance report. Ortiz Exhibit B is copy of a September 16, 2015 letter from the Division of Enforcement to Mr. Fanning's attorney, reminding him that Mr. Fanning's failure to file a compliance report placed him in violation of the Final Order. According to the Declaration, "To date, Complaint Counsel and the FTC's Division of Enforcement have not received any compliance reports from Respondents John Fanning or Jerk, LLC." Ortiz Decl. at ¶ 3.

employment and business activities in order to monitor his future compliance.

Mr. Fanning argues that if the FTC refuses to strike his compliance monitoring obligations in their entirety, the requirement that he report his affiliation with any new business or employment should be limited to affiliations "that may affect compliance obligations arising under [the Final] [O]rder." Fanning Brief at 3. Mr. Fanning, however has demonstrated a pattern of evasiveness about his employment and affiliations that leaves us unwilling to rely solely on his discretion as to what affiliations need to be reported. For example, in his September 4, 2014, deposition, Mr. Fanning dodged questions about his then current employment, stating that he was "not sure" what type of work he did for compensation or who paid him to work. *See* CX0092-0012 (exhibit to Complaint Counsel's Mot. for Summ. Decision). Mr. Fanning also evaded questions about his business affiliations, stating that he was "not sure" what the terms "businessman," and "your business address" meant and whether the word "business" covered his transactions. *See* CX0092-005-006. Mr. Fanning further testified that he was "not sure" what Jerk LLC was, CX0092-0015, and when asked what Jerk LLC "did for a business," his answer was "I'm not sure what you mean by 'for a business.'" CX0092-0016.

In view of Mr. Fanning's demonstrated refusal to assign common meanings to common terms and his wholesale default on compliance reporting obligations, we cannot rely on him to determine what affiliations "may affect compliance obligations" under the Final Order. Indeed, these considerations could arguably justify maintaining the full scope of compliance reporting obligations provided by the Final Order. Nonetheless, we can address the concerns expressed by the court of appeals through a revised order provision focused on the types of activities carried on by Mr. Fanning and Jerk while limiting new opportunities for verbal gamesmanship. Accordingly, we will narrow Paragraph VI of the Final Order to require notification of affiliations with any new business or employment "that involves electronic commerce, social media, or the online collection or use of consumer data that can be reasonably linked to a specific consumer, computer, or other device."

With regard to duration of the reporting, courts have recognized that "a sustained period of monitoring" may sometimes be needed for the FTC "to ensure adequate compliance." *US Sales Corp.*, 785 F.Supp. at 754. Here, Complaint Counsel urge that the Final Order's remedial purposes may be served by a five-year requirement. This corresponds to the five-year period endorsed by the court of appeals for other reporting and monitoring provisions of the Final Order. *See Fanning*, 821 F.3d at 175-76 (affirming five-year requirements for notifications regarding complaints or inquiries and for the maintenance and availability of advertisements and promotional materials). In view of the totality of concerns raised by Mr. Fanning's conduct, including his deceptive conduct in connection with Jerk.com and his failure to file a required compliance report, we find a five-year compliance monitoring requirement – running from the time of issuance of the Final Order and requiring retroactive notification for the specified changes of business or employment that occurred between issuance of the Final Order and the effective date of this order – necessary and appropriate for the continued protection of the public. Accordingly,

IT IS ORDERED THAT:

1. Section VI of the Commission's Final Order in this proceeding, issued on March 13, 2015, is hereby amended to read:

VI.

COMPLIANCE MONITORING – JOHN FANNING

IT IS FURTHER ORDERED that John Fanning, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment that involves electronic commerce, social media, or the online collection or use of consumer data that can be reasonably linked to a specific consumer, computer, or other device. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to

Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington DC 20580. The subject line must begin: In re Jerk, LLC.

2. All portions of the Commission's Final Order in this proceeding, issued on March 13, 2015, other than Section VI, shall remain in effect without modification.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

PROMEDICA HEALTH SYSTEM, INC.

Docket No. 9346. Order, October 16, 2017

Letter notifying the Respondent of the Commission's approval of the Monitor and Monitor Agreement.

LETTER APPROVING MONITOR AND MONITOR AGREEMENT

Stephen Y. Wu, Esquire
McDermott Will & Emery LLP

Re: *ProMedica Health System, Inc.*
Docket No. 9346

Dear Mr. Wu:

This letter notifies ProMedica Health System, Inc., the Respondent in the above-referenced matter, that the Federal Trade Commission has approved Alan R. Yordy as the Monitor in this matter, and the Monitor Agreement entered into on September 13, 2017, pursuant to Paragraph VI. of the Decision and Order.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

BALL CORPORATION
AND
REXAM PLC

Docket No. C-4581. Order, October 19, 2017

Letter notifying Ball Corporation of the Commission's decision to waive prior approval and public comment regarding amendments to the Equity and Asset Purchase Agreement.

LETTER WAIVING PRIOR APPROVAL AND COMMENT FOR MODIFICATIONS TO AN AGREEMENT

Nicholas E.O. Gaglio, Esquire
Axinn, Veltrop & Harkrider LLP

Re: In the matter of *Ball/Rexam,* FTC Docket No. C-4581

Dear Mr. Gaglio:

This letter is in reference to the request of Ball Corporation, dated September 12, 2017, submitted to the Federal Trade Commission, with respect to proposed amendments to the Equity and Asset Purchase Agreement, incorporated by reference into the above-referenced Order. Ball requests waiver of the Commission's approval process with respect to Amendment No. 3, which is attached to the September 12th request.

After consideration of Ball's request and pursuant to the authority delegated to me under Rule 2.4l(f)(5)(ii) of the Commission's Rules of Practice, 16 C.F.R. §2.41(f)(5)(ii), I hereby waive the requirements for Commission approval and the public comment period for the modification to the Equity and Asset Purchase Agreement as described in Ball's request.

If you have further questions, please contact Jennifer Lee, the Compliance staff attorney assigned to this matter. Ms. Lee can be reached at 202-326-2246 or jlee@ftc.gov.

Interlocutory Orders, Etc.

IN THE MATTER OF

LOUISIANA REAL ESTATE APPRAISERS BOARD

Docket No. 9374. Order, October 26, 2017

Order extending the Administrative Law Judge's order staying this proceeding for 90 days.

ORDER CONTINUING STAY AND POSTPONING THE EVIDENTIARY HEARING

On May 30, 2017, the Commission issued a Part 3 Administrative Complaint in this proceeding against the Louisiana Real Estate Appraisers Board ("Respondent" or "Board"), alleging that the Board has unreasonably restrained competition, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.[1] The Complaint provides that the administrative hearing in this proceeding should begin on January 30, 2018.[2] On July 18, 2017, Respondent filed a motion to stay this proceeding for 120 days, arguing that an executive order issued by the Governor of Louisiana that required the Board to take certain actions within 90 days – and the Board's issuance of a resolution in response to that order – supported staying the proceeding until the required actions had been taken.[3] On July 24, Complaint Counsel filed an opposition, arguing, *inter alia*, that even if the Board were to fully implement the executive order and its own resolution, that would not yield an effective supervision regime, and would not eliminate the need for Commission intervention.[4] On July 28, Chief Administrative Law Judge Chappell issued an order staying this proceeding for 90 days, based on "recent

1 *In the Matter of Louisiana Real Estate Appraisers Board, Docket No. 9374* (hereinafter "*LREAB*"), Complaint (May 30, 2017).

2 *Id*. at 9.

3 *LREAB,* Respondent LREAB's Motion To Stay Part 3 Administrative Proceedings and Memorandum In Support Thereof at 1-2 (July 18, 2017).

4 *LREAB*, Complaint Counsel's Opposition To Respondent's Motion To Stay at 3, 6 (July 24, 2017).

developments in the state law challenged in the Complaint that fundamentally change the factual and legal basis of this proceeding," and that may "help narrow the claims, defenses, and discovery to those limited issues, and avoid wasteful effort and expense."[5] The 90-day stay granted by Judge Chappell will expire on October 30, 2017.[6]

Complaint Counsel and Respondent have now filed a Joint Expedited Motion (1) to extend the stay of this proceeding through November 26, 2017; (2) to postpone the commencement of the evidentiary hearing until May 30, 2018; and (3) to adopt the schedule of pretrial proceedings attached to the Joint Expedited Motion.[7] While Complaint Counsel believe that Board implementation of the Governor's executive order does not "and will not exempt all of the Board's past or future actions from the antitrust laws,"[8] they nevertheless agree with Respondent "that the state action immunity defense may present significant issues for discovery and hearing in this case."[9] The parties further advise that the Board "is currently in the process of replacing and re-adopting a customary and reasonable fee rule;" has submitted this "Replacement Rule to the Louisiana Commissioner of Administration for approval, modification, or rejection;" and expects that "this review will be completed in time for the Replacement Rule to be published in the November 20, 2017 Louisiana Register," and that the Replacement Rule will be effective on that date.[10] The parties therefore argue that good

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5 *LREAB*, Order Granting In Part Motion To Stay Part 3 Proceedings at 3 (July 28, 2017).

6 As Commission Rule 4.3(a), 16 C.F.R. § 4.3(a), provides, the 90-calendar-day period began on the first business day after the Friday, July 28, 2017 date on which Judge Chappell issued his Order – that is, on Monday, July 31, 2017 – and will therefore end on Monday, October 30, 2017.

7 *LREAB,* Joint Expedited Motion To Extend the Stay of Part 3 Administrative Proceedings, Move the Evidentiary Hearing Date, and Adopt the Attached Schedule of Pretrial Proceedings (Oct. 16, 2017).

8 *Id*. at 2-3.

9 *Id*. at 3.

10 *Id*.

cause exists for the Commission to continue the stay of this proceeding until November 26, 2017. The parties also argue that good cause exists for the Commission to postpone the commencement of the evidentiary hearing from January 30, 2018 to May 30, 2018, in order to accommodate both the 90-day stay granted by Judge Chappell and the requested 30-day extension of that stay.

In light of the foregoing, we find that there is good cause to grant the first two requests embodied in the Joint Expedited Motion, while authorizing the Administrative Law Judge to determine the timetable for pretrial proceedings. Accordingly,

IT IS HEREBY ORDERED that this proceeding be, and it hereby is, stayed until November 26, 2017;

IT IS FURTHER ORDERED that the evidentiary hearing in this proceeding shall commence on May 30, 2018; and

IT IS FURTHER ORDERED that the Administrative Law Judge determine the timetable for pretrial proceedings before the commencement of the evidentiary hearing on May 30, 2018.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

ENDO INTERNATIONAL PLC

Docket No. C-4539. Order, October 27, 2017

Letter notifying Endo International plc of the Commission's decision to waive prior approval and public comment regarding modifications to the supply agreement.

LETTER WAIVING PRIOR APPROVAL AND COMMENT FOR MODIFICATIONS TO A SUPPLY AGREEMENT

Michael J. Sheerin, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP

Re: In the Matter of *Endo International plc*, Docket No. C-4539

Dear Mr. Sheerin:

This letter refers to an application for approval that Endo International plc filed on October 11, 2017, which requested Commission approval of a proposed amendment to the Supply Agreement, incorporated by reference into the Decision and Order entered into in this case.

After consideration of Endo's application and pursuant to the authority delegated to me under Rule 2.41(f)(5)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 2.41(f)(5)(ii), I hereby waive the requirements for Commission approval and the public comment period for the amendment to the Supply Agreement between Vintage Pharmaceuticals, LLC d/b/a Qualitest Pharmaceuticals and Rising Pharmaceuticals, Inc., described in Endo's application.

If you have further questions, please contact Ben Lorigo, the Compliance staff attorney assigned to this matter. Ben Lorigo can be reached at 202-326-3717 or slorigo@ftc.gov.

Interlocutory Orders, Etc.

IN THE MATTER OF

IMPAX LABORATORIES, INC.

Docket No. 9373. Order, October 27, 2017

Opinion and Order denying Complaint Counsel's Motion for Partial Summary Decision.

OPINION AND ORDER OF THE COMMISSION

By Acting Chairman Maureen K. Ohlhausen, for the Commission:

On January 19, 2017, the Commission issued an administrative complaint alleging that a litigation settlement agreement between Impax Laboratories, Inc. ("Impax") and Endo Pharmaceuticals, Inc. ("Endo") was an anticompetitive agreement in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Complaint alleges that Impax agreed to abandon a legal challenge of Endo patents and to delay launching its generic version of an Endo drug (Opana ER) in exchange for a large, unjustified "reverse payment" from Endo.

In its Answer to the Complaint,[1] Impax asserts an affirmative defense that the challenged conduct had substantial procompetitive justifications, benefited consumers, and avoided infringement of valid patents. Answer at 21. Impax further

1 This opinion uses the following abbreviations for citations to the record:
Comp.: Complaint
Answer: Answer of Respondent Impax Laboratories Inc. to the Federal Trade Commission's Administrative Complaint
CCB: Memorandum of Law in Support of Complaint Counsel's Motion for Partial Summary Decision
CCSUF: Complaint Counsel's Statement of Undisputed Facts
CCRRSMF: Complaint Counsel's Reply to Impax Laboratories Inc.'s "Statement of Material Facts That Remain in Dispute"
ROB: Respondent Impax Laboratories, Inc.'s Memorandum of Law in Opposition to Complaint Counsel's Motion for Partial Summary Decision
RSMF: Respondent Impax Laboratories, Inc.'s Statement of Material Facts that Remain in Dispute

asserts that the procompetitive justifications outweigh any alleged anticompetitive effects.[2]

Before us at this time is Complaint Counsel's Motion for Partial Summary Decision, which contends that certain justifications that Impax might assert in defense of its challenged agreement fail as a matter of law and cannot serve as defenses. CCB at 1-2.

Under Rule 3.24 of the Commission's Rules of Practice, a party may move for summary decision "upon all or any part of the issues being adjudicated." 16 C.F.R. §3.24(a)(1). We review motions for partial summary decision using the same legal standard as applies under Federal Rule of Civil Procedure 56 in federal courts. *See N. Carolina Bd. of Dental Exam'rs*, 151 F.T.C. 607, 610-11 (2011), *aff'd N. Carolina Bd. of Dental Exam'r v. FTC*, 717 F.3d 359 (4th Cir. 2013), *aff'd* 135 S. Ct. 1101 (2015). A party moving for summary decision must show that "there is no genuine dispute as to any material fact," and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* 16 C.F.R. § 3.24(a)(2) ("If the Commission . . . determines that there is no genuine issue as to any material fact regarding liability or relief, it shall issue a final decision and order.").

I. BACKGROUND FACTS

The background facts, as alleged in the Complaint and described in the parties' briefs, are largely undisputed. Consistent with the requirements of Commission Rule 3.24, Complaint Counsel submitted "a separate and concise statement of the

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2 Impax's Eighth Affirmative Defense reads:

> The alleged conduct had substantial pro-competitive justifications, benefited consumers and the public interest, and avoided potential infringement of valid patents. These pro-competitive justifications outweigh any alleged anticompetitive effects of the alleged conduct. There were no less restrictive alternatives that could have achieved these same pro-competitive outcomes.

Answer at 21.

material facts as to which the moving party contends there is no genuine issue for trial." 16 C.F.R. § 3.24(a)(1). Here, "Impax does not dispute most of the facts advanced in Complaint Counsel's Motion, [although] Impax does dispute material facts" that are relevant for other parts of the case. ROB at 4 n.3; *see also* RSMF at 1 n.1.

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 (or the "Hatch-Waxman Act") and the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, codified at 21 U.S.C. §§ 355(b) (2), 355(j) and 35 U.S.C. § 271(e), establishes procedures designed to facilitate competition from generic drugs while maintaining incentives for pharmaceutical companies to develop new drugs. Under the Hatch-Waxman scheme, the U.S. Food and Drug Administration ("FDA") requires a company seeking to market a new pharmaceutical product to identify any patents that it believes reasonably could be asserted against a generic company that makes, uses, or sells a generic version of the branded product. *See* 21 U.S.C. §§ 355(b)(1) and (c)(2); 21 C.F.R. §§ 314.53(b) and (c)(2). These patents are listed in an FDA publication, "Approved Drug Products with Therapeutic Equivalence Evaluations" (commonly known as the "Orange Book").

A company seeking to market a generic version of a branded drug may file an Abbreviated New Drug Application ("ANDA") with the FDA. 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. When the brand-name drug is covered by one or more patents listed in the Orange Book, a company seeking to market a generic version before the patents expire must make a "paragraph IV certification" in its ANDA certifying that the listed patents are invalid, unenforceable, and/or will not be infringed by the generic drug. 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, 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) expiration of a 30-month regulatory stay.

Opana ER is an extended-release opioid used to relieve pain. CCSUF ¶¶ 1, 3. Endo received FDA approval to market Opana ER in June 2006 and launched the product in July 2006. *Id*. ¶¶ 4, 5. In June 2007, Impax filed an ANDA seeking FDA approval to market a generic version of Opana ER. *Id*. ¶ 9.

[redacted] *Id*. ¶ 7. [redacted] *Id*. Impax then submitted a new ANDA with paragraph IV certifications that, according to the Complaint, asserted that Impax's generic version of Opana ER did not infringe the '933 or '456 patents. *Id*. ¶ 10; Compl. ¶ 38.

Endo sued Impax for infringement of the '933 and '456 patents, which triggered a 30-month stay on FDA approval of Impax's ANDA. CCSUF ¶ 15. Following that stay, Impax received the FDA's final approval in June 2010. *Id*. ¶ 19.

Trial in the infringement case began on June 3, 2010. *Id*. ¶ 17. On June 8, 2010, before the trial's outcome was known, Impax and Endo settled the patent infringement case and executed a Settlement and License Agreement (the "Settlement Agreement"). *Id*. ¶ 20.

[redacted] *Id*. ¶ 21. [redacted] *Id*. ¶ 22.[3] [redacted]

3 Impax and Endo have been litigating a dispute regarding the Settlement Agreement's provisions relating to future patents. Complaint Counsel assert that that dispute has "no significance for the legal issue presented by this motion" and therefore "assume that Impax's position in that dispute is correct" for purposes of the motion at hand. CCB at 4 n.1. For purposes of this Opinion and Order, we too will make that assumption. Complaint Counsel now state that Impax and Endo have settled their lawsuit but provide no details. CCRRSMF at 2 n.2.

[redacted][4] *Id*. ¶ 23. [redacted] *Id*. ¶ 24. Endo and Impax also entered a development and co-promotion agreement for a potential treatment for Parkinson's disease that Impax was developing. *Id*. ¶¶ 20, 25. According to the Complaint, the purpose and effect of the authorized generic arrangements and cash payments were "to induce Impax to abandon its patent challenge and agree not to compete with a generic version" of Endo's Opana ER "until January 2013." Comp. ¶¶ 74-75.

In July 2010, Endo filed a supplemental New Drug Application for a reformulated version of Opana ER, which the FDA approved in December 2011. CCSUF ¶ 29. In 2012, Endo ceased selling original Opana ER and began selling the reformulated Opana ER. *Id*. ¶ 30.

At the time Impax and Endo entered the Settlement Agreement, Endo had pending applications for additional patents relating to Opana ER. In November and December 2012, the U.S. Patent and Trademark Office ("USPTO") issued three patents to Endo, Nos. 8,309,060, 8,309,122, and 8,329,216. *Id*. ¶¶ 32-33. In December 2012, Endo began asserting these patents against drug manufacturers seeking to market generic versions of Opana ER. *Id*. ¶ 34. Endo did not assert these patents against Impax's generic version of original Opana ER. *Id*. In August 2015, the U.S. District Court for the Southern District of New York held that the '122 and '216 patents were not invalid and were infringed by generic versions of original Opana ER produced by defendants other than Impax and by generic versions of reformulated Opana ER, including Impax's. *See Endo Pharm. Inc. v. Amneal Pharm., LLC*, 2015 WL 9459823, at *2 (S.D.N.Y. Aug. 18, 2015), *amended in part*, 2016 WL 1732751 (S.D.N.Y. Apr. 29, 2016), *appeal reactivated*, Nos. 2015-2021 *et al*. (Fed. Cir. Aug. 4, 2016). The court issued an injunction prohibiting all defendants

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4 [redacted]

from selling their infringing products; consequently, all defendants except Impax are enjoined from selling generic versions of original Opana ER until the patents expire, and all defendants, including Impax, are enjoined from selling the reformulated version. *Id*. at *66. Complaint Counsel assert that the injunction expires in 2029. CCSUF ¶ 36. Impax suggests that the '122 and '216 patents expire in 2023. RSMF at 10. The U.S. Patent and Trademark Office issued two additional patents covering Opana ER in 2014; one patent was issued to Endo and the other to Mallinkcrodt, which has provided an exclusive field-of-use license to Endo. CCSUF ¶ 35.

II. PROCEDURAL HISTORY

To determine the nature of Impax's claim of procompetitive justifications, Complaint Counsel served an interrogatory asking Impax to "[i]dentify all procompetitive justifications and benefits to consumers and the public interest referenced in the Eighth Defense in Your Answer to the Complaint in this case, and explain the factual basis for Your answer to this Interrogatory, including all facts and documents You rely on . . . ." Compl. Counsel's Mot. to Compel Resp. to Interrog. Nos. 2 & 3 at 2 (June 1, 2017). In its response to the interrogatory, Impax stated that the interrogatory "involves an opinion or contention that relates to fact or the application of law to fact. Therefore, under Federal Trade Commission Rule of Practice § 3.35(b)(2), no answer is required until the close of discovery. Impax will supplement its response . . . in due course." *Id*. Ex. B (Resp't Impax Laboratories, Inc.'s Obj. and Resps. to Compl. Counsel's First Set of Interrogs. at 7).[5]

Complaint Counsel filed a motion to compel a response to the interrogatory with Chief Administrative Law Judge ("ALJ") D. Michael Chappell. *See* Compl. Counsel's Mot. to Compel Resp. to Interrog. Nos. 2 & 3 (June 1, 2017). Judge Chappell denied the motion. He explained that deferring an answer to contention

5 Rule 3.35(b)(2) states that an interrogatory that seeks "an opinion or contention that relates to fact or the application of law to fact . . . need not be answered until after designated discovery has been completed, but in no case later than 3 days before the final prehearing conference." 16 C.F.R. § 3.35(b)(2).

interrogatories until the close of discovery is the usual position established by Commission Rule 3.35(b)(2) and found that Complaint Counsel had not demonstrated appropriate circumstances to require the contention interrogatories be answered before the end of discovery. *See* Order Den. Compl. Counsel's Mot. to Compel Resp. to Interrog. Nos. 2 and 3 at 3-4 (June 12, 2017).

Consequently, Impax had not yet fully articulated or described its procompetitive justifications for the conduct alleged in the Complaint when Complaint Counsel filed the Motion for Partial Summary Decision.

III. COMPLAINT COUNSEL'S MOTION AND IMPAX'S RESPONSE

Complaint Counsel argue that certain justifications that Impax may identify should be rejected because they are inconsistent with the logic of the Supreme Court's decision in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013). Complaint Counsel contend that these justifications are not legally viable.

First, according to Complaint Counsel, *Actavis* precludes an argument that entry before patent expiration is procompetitive. CCB at 10. Complaint Counsel argue that *Actavis* recognized that the challenged patent may not be valid or infringed, so the proper benchmark is not a comparison to the full preclusive effect of the patent. *Id*. Complaint Counsel explain, "A reverse-payment settlement that allows the generic to enter the market before patent expiration [also] eliminates the risk of competition prior to the agreed-upon entry date." *Id*. Therefore, Complaint Counsel argue, "the Supreme Court necessarily rejected the proposition that a reverse-payment settlement could be rendered lawful because it allowed for entry prior to patent expiration." *Id*. at 11.

Second, Complaint Counsel contend that *Actavis* precludes Impax from claiming the elimination of patent and business uncertainty as a justification for a reverse-payment settlement. CCB at12. According to Complaint Counsel, while the Supreme Court recognized the business certainty benefits of patent settlements, it nonetheless concluded that those benefits "did not

justify the significant risk of substantial anticompetitive effects that reverse payments pose." *Id*.

Finally, Complaint Counsel claim that patent rulings that occur after the Settlement Agreement cannot justify the reverse payment because, under *Actavis*, the assessment of competitive effects focuses on circumstances at the time the agreement was entered, when the outcome of litigation was uncertain. CCB at 15. Here, Complaint Counsel contend that "the relevant harm to competition under *Actavis* is not that, absent the reverse payment, generic entry would necessarily have been earlier, but rather that the payment served to eliminate the *risk* (even if 'small') that competition would have been earlier." *Id*. at 17-18 (citing *Actavis*, 133 S. Ct. at 2236).

Impax responds that Complaint Counsel's motion seeks to upend traditional rule-of-reason analysis and, while ostensibly directed at procompetitive benefits, would effectively truncate Complaint Counsel's *prima facie* showing. It explains that, under the rule of reason, the plaintiff bears the initial burden of showing a substantially adverse effect on competition, and only if that burden is met must the defendant come forward with procompetitive justifications. ROB at 11. Impax argues that *Actavis* rejected Complaint Counsel's premise that any reverse payment necessarily creates antitrust concern and therefore requires justification by defendants. *Id*. (citing *Actavis*, 133 S. Ct. at 2237 (rejecting argument that reverse payment settlements are presumptively unlawful)). According to Impax, "'[t]he existence and degree of any anticompetitive consequence may . . . vary' based on a payment's characteristics and 'any other convincing justification.'" *Id*. at 11-12 (alteration in original) (quoting *Actavis*, 133 S. Ct. at 2237).

Courts look to "a challenged restraint's actual effects," Impax insists, "without limitations on the temporal scope of the evidence." *Id*. at 13 (citations omitted). "[H]ypothetical competitive effects" should not be elevated over "known competitive impact," *id*. at 19 (emphasis omitted); actual market effects are always relevant, *id*. at 2-3, 13-16; and "closing the courtroom door to actual competitive-effects evidence is" inappropriate, *id*. at 1. Impax also argues that the specific procompetitive effects challenged by Complaint Counsel –

including entry before patent expiration and patent-related defenses – have been recognized in cases, including *Actavis*. *Id*. at 24-27.

IV. ANALYSIS

Complaint Counsel's Motion for Partial Summary Decision asks the Commission to declare that three results of the settlement agreement – (i) authorizing Impax to enter prior to expiration of various existing and future Endo patents; (ii) providing Impax with certainty that it could launch its generic products free from the risk of infringing Endo's existing and future patents; and (iii) enabling Impax to continue selling its generic product despite a court ruling that two Endo patents obtained after the settlement were valid and infringed – are not cognizable as defenses to the conduct challenged in the Complaint. CCB at 1, 18. Complaint Counsel seek an order foreclosing Impax from making arguments to justify or otherwise defend the Settlement Agreement on those bases. *Id*. For two reasons, however, Complaint Counsel's motion is premature.

The first reason relates to the posture of this proceeding. As of the time that Complaint Counsel framed their motion (August 3, 2017) and the time that Impax filed its opposition (August 31, 2017), Impax had not specified its contentions regarding procompetitive benefits. Impax's Affirmative Defense 8 merely asserts that "[t]he alleged conduct had substantial pro-competitive justifications, benefited consumers and the public interest, and avoided potential infringement of valid patents." Although Complaint Counsel sought more details, the ALJ determined that Complaint Counsel had not shown need to accelerate the timing specified by Commission Rule 3.35(b)(2), which permits Impax to defer responding until after the close of discovery (but in no case later than three days before the final prehearing conference). *See* Order Den. Compl. Counsel's Mot. to Compel Resp. to Interrog. Nos. 2 and 3 at 3-4 (June 12, 2017).[6]

6 Most fact discovery was to close on August 11, 2017, depositions of experts were to conclude by October 2, 2017, and the final prehearing conference was scheduled for October 19, 2017. Second Revised Scheduling Order (June 19, 2017).

Consequently, the Motion for Summary Decision rests on characterizations of Impax's likely positions drawn by Complaint Counsel from statements made by Impax during the pre-complaint investigation or at the Initial Pretrial Conference. CCB at 6.[7] In opposing that Motion, Impax describes Complaint Counsel's characterizations as "strawmen" and reaffirms that it has not yet fully articulated its procompetitive justifications. ROB at 3. Consequently, Complaint Counsel's Motion asks us to prevent further argument on positions that Impax has not clearly adopted, without knowing whether those positions have been accurately portrayed or whether they are meant to be applied individually or in combination; intended to be treated as relevant or as dispositive; or asserted as presenting countervailing efficiencies or as reducing the magnitude of any anticompetitive effects. In light of this procedural posture, we are currently unwilling to render summary decision.

Our second reason for finding Complaint Counsel's Motion premature relates to the nature of its subject matter and the state of the relevant law. Complaint Counsel ask us to reject specific aspects of possible procompetitive benefits before the structure of the relevant rule-of-reason inquiry has been determined. Indeed, although the Motion ostensibly focuses on Impax's justifications, it rests substantially on Complaint Counsel's view of the "rule of reason principles" applicable to this proceeding. CCB at 9. We have reservations about attempting to specify a complete rule-of-reason framework at this stage of the proceeding. Some background is necessary here.

In *Actavis*, the Supreme Court, *inter alia*, made three important, but limited rulings relating to the nature of the antitrust liability inquiry. First, the Court held that reverse payment settlements are not to be judged under the so-called "scope of the patent" test, under which reverse payment arrangements automatically pass muster so long as their anticompetitive effects fall within the scope of the exclusionary potential of the patent.

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7 In contrast, when the Commission recently awarded partial summary decision in *1-800 Contacts*, Complaint Counsel directed their motion to the entirety of two specific affirmative defenses, the text of which defined their content. *See In re 1-800 Contacts*, *Inc.*, FTC Dkt. No. 9372, 2017 WL 511541, at *1-2 (Feb. 1, 2017).

133 S. Ct. at 2227, 2230-32. Consequently, a reverse payment settlement can sometimes violate antitrust law even if generic entry is allowed prior to the patent's expiration date, *id*. at 2227, or if the patent permits the branded firm to charge drug prices sufficient to recoup the reverse payments. *Id*. at 2230. The Court explained that the scope of the patent test erroneously assumes that the patent is valid and infringed and fails to give weight to procompetitive antitrust policies. *Id*. at 2230-32.

Second, the Court held that anticompetitive effects should not be presumed from the mere presence of a reverse payment. *Id*. at 2237. A quick-look review, the Court stated, is appropriate only when an observer with even a "rudimentary" knowledge of economics could conclude that the practice in question would have an anticompetitive effect, a criterion not satisfied by reverse payment settlements. *Id*.

Finally, the Court held that the analysis should proceed under the rule of reason. *Id*. The Court explained that it will "normally not [be] necessary to litigate patent validity," *id*. at 2236; *see also id*. at 2237; and it observed that justifications for reverse payments may include litigation costs saved through settlement, compensation attributable to other services rendered by the generic firm, or, potentially, other considerations. *Id*. at 2236. Overall, "the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." *Id*. at 2237. After noting that it was not requiring that plaintiffs demonstrate the virtues or vices of the patent system or account for every possible supporting fact or theory that might have minimal bearing on the possibility of anticompetitive consequences, the Supreme Court left it "to the lower courts" to determine how to structure the rule-of-reason antitrust litigation in the *Actavis* case. *Id*. at 2237-38.

Speaking at the most general level, two federal appellate courts have held that the "traditional" rule of reason is applicable in reverse payment cases. *King Drug Co. of Florence v. Smithkline Beecham Corp.*, 791 F.3d 388, 399 (3rd Cir. 2015); *see also In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538, 551 n.12 (1st Cir. 2016). Beyond this, the Third Circuit has provided a

generalized recitation of the elements of a rule of reason inquiry[8] and has repeated various rulings in *Actavis*.[9] Apart from generalities, however, the federal appellate courts have offered only scattered guidance. *See, e.g.*, *In re Lipitor Antitrust Litig.*, 868 F.3d 231, 256 (3rd Cir. 2017) ("[D]efendants have the burden of justifying [a] . . . large reverse payment"); *id*. at 263 ("[I]ntent is not an element of an antitrust claim"); *Loestrin*, 814 F.3d at 551 n.12 (noting that the size of the reverse payment is a strong indicator of market power and is central to the antitrust query).[10]

The most comprehensive appellate discussion has been provided by the California Supreme Court in a case involving the California antitrust statute, the Cartwright Act. *See In re Cipro Cases I & II*, 348 P.3d 845 (Cal. 2015).[11] The court reasoned that

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8 The Third Circuit explains that, under standard formulations, the plaintiff bears the initial burden of showing that the challenged agreements produced adverse anticompetitive effects within the relevant markets. *See King Drug*, 791 F.3d at 412. In a reverse payment case, the court elaborates, "the plaintiff must prove payment for delay, or, in other words, payment to prevent the risk of competition." *Id*. (citation omitted). If plaintiff makes the requisite showing, defendant then has the burden to show procompetitive justifications. *Id*. The plaintiff may rebut the defendant's justifications by demonstrating that "the restraint is not reasonably necessary to achieve the stated objective." *Id*. (quoting *United States v. Brown Univ.*, 5 F.3d 658, 669 (3rd Cir. 1993)).

9 *See, e.g., King Drug*, 791 F.3d at 412.

10 Some appellate discussions have provided guidance regarding the requirements applicable to a private plaintiff's showing that a reverse payment settlement caused injury. *See, e.g.*, *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class*, 868 F.3d 132, 164-70 (3rd Cir. 2017): *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 61-65 (1st Cir. 2016). The courts, however, have distinguished the private injury showing from the demonstration of liability under the rule-of-reason inquiry. *See Wellbutrin*, 868 F.3d at 170 n.64 (refraining from discussing the rule of reason other than observing that it is fact intensive and not easily applied at the summary judgment stage); *Nexium*, 842 F.3d at 59-60.

11 The California court viewed interpretations of federal law such as *Actavis* as "at most instructive, [but] not conclusive" with regard to application of the Cartwright Act. *Cipro*, 348 P.3d at 858 (internal quotation marks and citations omitted). Some federal district courts, however, have found the California court's *Cipro* analysis persuasive in the Sherman Act context. *See, e.g.*, *In re K-Dur Litig.*, 2016 WL 755623, at *13 (D. N.J. Feb. 25, 2016) (expressly adopting *Cipro*'s statement of the *prima facie* case and the respective burdens of plaintiff and defendant); *see also In re Aggrenox Antitrust Litig.*, 2015 WL

patents should be viewed probabilistically: thus, for a patent with a 50 percent chance of being upheld, the patent could be viewed as likely to continue to govern competition for half of its remaining life, on average. *Id*. at 864. A reverse payment settlement that delays generic entry only to that midpoint would replicate the expected level of competition, thereby reflecting the patent's strength; delay beyond that point would constitute anticompetitive harm.[12] "An agreement to exchange compensation for elimination of any portion of the period of competition that would have been expected had a patent been litigated[," therefore,] is a violation of the Cartwright Act." *Id*. at 865. The California court operationalized this analysis by postulating that a large reverse payment that cannot otherwise be explained is cause to believe that there has been payment for exclusion beyond the point that would have resulted, on average, from litigating the case to conclusion. *Id*. at 867.[13]

4459607, at *9 (D. Conn. July 21, 2015) (describing *Cipro* as "one of the most thorough and thoughtful discussions of *Actavis* yet issued by any court").

12 *Cipro*, 348 P.3d at 863-64; *see also id*. at 859; *King Drug*, 791 F.3d at 409 ("[W]e read *Actavis* to hold that antitrust law may prohibit settlements that are anticompetitive because, without justification, they delay competition for longer than the patent's strength would otherwise permit.").

13 *Cipro* summarized:

> To make out a prima facie case that a challenged agreement is an unlawful restraint of trade, a plaintiff must show the agreement contains both a limit on the generic challenger's entry into the market and compensation from the patentee to the challenger. The defendants bear the burden of coming forward with evidence of litigation costs or valuable collateral products or services that might explain the compensation; if the defendants do so, the plaintiff has the burden of demonstrating the compensation exceeds the reasonable value of these. If a prima facie case has been made out, the defendants may come forward with additional justifications to demonstrate the settlement agreement nevertheless is procompetitive. A plaintiff who can dispel these justifications has carried the burden of demonstrating the settlement agreement is an unreasonable restraint of trade under the Cartwright Act.

348 P.3d at 871.

Finally, "[v]arious district courts have struggled to fill the gaps [regarding the structure of the rule-of-reason inquiry] that *Actavis* left open, and not always with consistent results." *In re Aggrenox Antitrust Litig.*, 199 F. Supp. 3d 662, 669 (D. Conn. 2016).[14] These courts have not yet fully worked out their analyses. Suggestions by some courts, at the motion to dismiss stage, have yet to be applied. *See, e.g.*, *In re Aggrenox Antitrust Litig.*, 94 F. Supp. 3d 224, 245 (D. Conn. 2015). Others have offered insights expressly premised on specific fact patterns. *See, e.g.*, *In re Wellbutrin XL Antitrust Litig.*, 133 F. Supp. 3d 734 (E.D. Pa. 2015) (describing a framework for analyzing a reverse payment settlement that allowed the underlying patent litigation to continue), *aff'd,* 868 F.3d 132 (3rd Cir. 2017). Another court sent the case to a jury with questions that suggest only the outline of a framework. *See Nexium*, 842 F.3d at 49-50 (quoting the trial court's jury verdict form).[15]

Plainly, the Commission could articulate its own rule-of-reason framework for application in this case. That would require

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14 Previously, the *Aggrenox* court had sought interlocutory appellate guidance regarding the proof required to establish an antitrust violation and causation of antitrust injury. *See In re Aggrenox Antitrust Litig.*, 2015 WL 4459607, at *10 (D. Conn. July 21, 2015) (listing factors that, if proved by plaintiff, would establish "an antitrust violation *and* causation of antitrust injury" without separating the factors applicable to each issue). The court of appeals declined the invitation. *See In re Aggrenox Antitrust Litig.*, 2016 WL 4204478, at *1 n.1 (D. Conn. Aug. 9, 2016). The district court then, for a second time, certified an issue for interlocutory appeal, this time a ruling regarding the relevance of evidence pertaining to the substitutability of other drugs for the product at issue. *Aggrenox*, 199 F. Supp. 3d at 669. The court of appeals again declined to provide interlocutory review. *In re Aggrenox Antitrust Litig.*, Case 3.14-md-02516-SRU (2nd Cir. Jan. 9, 2017).

15 Previously, the trial court had sketched its view of the rule of reason in decisions concerned with motions to dismiss and motions for summary judgment. *See In re Nexium (Esomeprazole) Antitrust Litig.*, 42 F. Supp. 3d 231, 262-63, 294 (D. Mass. 2014) (summary judgment), *aff'd*, 842 F.3d 34; *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 387-93 (D. Mass. 2013) (motions to dismiss). In rejecting plaintiffs' appeal from an adverse jury verdict, the First Circuit based its analysis on the absence of antitrust injury and did not set out a rule-of-reason framework. *See Nexium*, 842 F.3d 34.

briefs that have not been filed[16] and, perhaps, argument that has not been heard, but that could be done. There are fundamental reasons, however, that dissuade us from pursuing that course. Without the facts before us, and an understanding of how the parties intend to marshal those facts, a formulation that unnecessarily establishes the law of the case risks straight-jacketing the proceeding in ways that impede effective inquiry and appropriate resolution.

Nonetheless, proceeding with caution, we can still address the essential issues raised by Complaint Counsel's Motion. We see that Motion as essentially raising two issues: (i) what is the role of evidence suggesting that the Settlement Agreement allowed entry of Impax's generic product prior to patent expirations?[17] and (ii) what is the role of evidence of post-Settlement-Agreement judicial rulings that patents issued after the settlement were valid and infringed by other generic products? Compl. Counsel's Mot. for Partial Summ. Decision at 1. Complaint Counsel ask us to declare that these considerations are not cognizable procompetitive benefits and seek an order prohibiting Impax from "justify[ing] or otherwise defend[ing] the alleged reverse-payment" on those bases. Compl. Counsel's Proposed Or. at 1.

As to entry prior to patent expiration, we agree with Complaint Counsel insofar as Impax might assert that the mere fact of entry prior to patent expiration is dispositive. In *Actavis*, the generic firm received the right to enter 65 months before patent expiration, but the Court, rejected the scope of the patent test and found that entry prior to expiration did not preclude the FTC's cause of action. *See* 133 S.Ct. at 2229.

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16 Complaint Counsel's Motion for Partial Summary Decision focuses directly on selected procompetitive defenses. Although portions of the briefs present positions regarding the nature of the relevant competitive harm, the framework for the rule of reason has not been comprehensively briefed.

17 Complaint Counsel suggest that Impax has asserted distinct claims of procompetitive benefit deriving from (i) the right to sell its generic product prior to patent expiration and (ii) the certainty that the generic products could be sold free from the risk of patent infringement liability. These benefits largely overlap, and we consequently treat them together.

We are not however, able to state at this time that entry prior to patent expiration is not a factor to be considered in assessing the competitive consequences of the challenged reverse payment agreement. Although *Actavis* holds that the risk that a large and unjustified reverse payment will delay entry is a sufficient basis for a valid cause of action, it does not rule upon the relevance of evidence or the cognizability of arguments that might relate to the likelihood or magnitude of such delay. If, for example, an analysis like that in *Cipro* were applied, entry prior to patent expiration might be found to enable generic competition on or prior to the entry date that would have resulted, on average, from litigating the patent suit to conclusion; under *Cipro*, such entry could have bearing on whether there was an anticompetitive effect. At a minimum, the *extent* to which a settlement allows entry prior to patent expiration affects the magnitude of any anticompetitive effect and may be relevant if balancing anticompetitive harms and procompetitive benefits becomes necessary. Consequently, we are not in a position at this time to bar all argument to justify or defend the alleged reverse payment in the Settlement Agreement on grounds that it permits generic entry before the expiration of Endo's patents, as Complaint Counsel request.

With regard to the contention that the Settlement Agreement enabled Impax to continue selling its generic product despite a court ruling that two subsequently issued patents were not invalid and were infringed by various generic products, we again agree with Complaint Counsel that these rulings are not dispositive.[18] Again, however, we are unable at this time to state that the rulings are irrelevant. For example, under *Cipro*, the centerpiece of analysis is "whether a settlement postpones market entry beyond the average point that would have been expected *at the time* in the absence of agreement," 348 P.3d at 870 (emphasis added) (citation omitted), understood as a reflection of the underlying

18 *See Cipro*, 348 P.3d at 870 (stating that "later evidence of validity will not automatically demonstrate an agreement was procompetitive"). We note, in this regard, that the referenced rulings do not even fully resolve issues of validity or infringement. The referenced infringement rulings do not expressly reach Impax's generic version of original Opana ER. *See* CCSUF at 34, 36. In any case, the validity/infringement rulings are still the subject of appeal. *See id*. at 36.

patent strength. *Id*. at 864. Although Complaint Counsel emphasize *Cipro*'s further explanation that "[a]greements must be assessed as of the time they are made," *id*. (citation omitted),[19] subsequent rulings of validity and infringement arguably might shed light on the expectations likely to have been held by the parties at the time of their settlement agreement. We are not willing to shut off all such argument at this time.

Moreover, this case involves factual circumstances not presented in *Actavis*. In particular, this case involves patents beyond those in litigation at the time of the Settlement Agreement, and a provision of that agreement allowed generic entry notwithstanding the potential that such patents might issue. Some courts have held that the context of the broader settlement agreement in which a reverse payment occurs is relevant in assessing its anticompetitive effects.[20] At this point, issues posed by the additional patents and by the post-Settlement-Agreement validity and infringement rulings remain open.

What is needed at this time is development of a record, ordering of that record under a proposed rule-of-reason framework, and, ultimately, briefing of disputed issues concerning the appropriateness of that framework and of its application to the facts presented. Lest anything we have said be misapprehended, we have not adopted the *Cipro* framework, or any other structure for the rule of reason. At this point, that structure remains an open issue, and complete resolution of the issues raised by Complaint Counsel's Motion must await development of that structure and a more definitive presentation of the context in which those issues arise. Other than as expressly stated above, we have not prescribed how this case must be presented. We expect that this proceeding ultimately will provide considerable guidance

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19 *See also Apotex Inc. v. Cephalon, Inc.,* 2017 WL 2473148, at *5 (E.D. Pa. June 8, 2017) (explaining that "the *Actavis* rule of reason analysis is focused on whether the settlements were reasonable at the time they were entered"); *Wellbutrin XL*, 133 F. Supp. 3d at 753 (evaluating the settlement's reasonableness "at the time it was entered into").

20 *See, e.g.*, *Wellbutrin XL*, 133 F. Supp. 3d at 753-54 (stating that "failing to evaluate the agreement as a whole would overlook context essential to determining any possible anticompetitive effects"); *Aggrenox*, 94 F. Supp. 3d at 243 (explaining that a settlement agreement should be viewed "holistically").

regarding the rule-of-reason analysis of reverse payment settlement agreements, but we will allow the proceeding to unfold without rigidly constraining its course.

Accordingly,

IT IS ORDERED THAT:

1. Complaint Counsel's Motion for Partial Summary Decision is **DENIED**; and

2. The hearing in this proceeding shall continue under a schedule specified by the Chief Administrative Law Judge, pursuant to the Commission's Rules of Practice for Adjudicative Proceedings.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

IMPAX LABORATORIES, INC.

Docket No. 9373. Order, October 27, 2017

Order specifying the statement of facts that appear without substantial controversy.

ORDER SPECIFYING FACTS WITHOUT SUBSTANTIAL CONTROVERSY

Pursuant to Section 3.24(a)(5), of the Commission's Rules of Practice, 16 C.F.R. § 3.24(a)(5), the Commission hereby specifies the following statement of facts that appear without substantial controversy. Accordingly,

IT IS ORDERED THAT the following facts shall be deemed established for purposes of this proceeding:

Opana ER & Endo Patents

1. Oxymorphone is a semi-synthetic opioid used to relieve pain.

2. The U.S. Food & Drug Administration ("FDA") first approved oxymorphone in 1960. Opana ER is an extended-release formulation of oxymorphone.

3. The FDA approved Opana ER (NDA No. 021610) in June 2006 "for the relief of moderate to severe pain in patients requiring continuous, around-the clock opioid treatment for an extended period of time."

4. Endo Pharmaceuticals Inc. ("Endo") announced commercial availability of Opana ER in July 2006. Endo offered Opana ER in seven dosage strengths (5, 7.5, 10, 15, 20, 30 and 40 mg).

5. [redacted]

[redacted] The '143 patent was set to expire in September 2008.

6. [redacted]

7. The '250, '933, and '456 patents all pertain to the controlled-release mechanism of the oxymorphone formulation.

Impax Application and Endo Lawsuit

8. Impax Laboratories, Inc. ("Impax") filed an Abbreviated New Drug Application ("ANDA") for a generic version of Opana ER (No. 79-087) in June 2007. [redacted] As of June 2007, the '143 patent was the only patent covering Opana ER listed in the Orange Book.

9. Following Endo's listing of the additional patents in the Orange Book in October 2007, Impax amended its ANDA to include Paragraph IV certifications for the '250, '933 and '456 patents. [redacted]

10. The FDA rescinded its original acceptance of Impax's ANDA for substantive review. Impax re-submitted its ANDA, which the FDA accepted on November 23, 2007.

11. Impax was the first company to file an ANDA with Paragraph IV certifications for the 5, 10, 20, 30, and 40 mg dosages of Opana ER. [redacted]

12. [redacted] meaning that, if the FDA ultimately granted such exclusivity, the FDA would not be able to approve another ANDA for a generic version of Opana ER in those dosages until 180 days after Impax began selling its product. Endo, however, as the holder of the approved NDA for Opana ER, would be able to market its own "authorized generic" version of Opana ER during Impax's exclusivity period.

13. On December 13, 2007, Impax sent Endo notice of its Paragraph IV certifications for the '250, '933, and '456 patents. [redacted]

14. Endo sued Impax on January 25, 2008, alleging that Impax's ANDA product infringed the '456 and '933 patents. Endo's lawsuit triggered a statutory 30-month stay, meaning that the FDA could not approve Impax's ANDA until the earlier of the expiration of thirty months or resolution of the patent dispute in Impax's favor. [redacted]

15. The FDA granted tentative approval to Impax's ANDA on May 14, 2010.

16. Trial began in Endo's patent infringement action against Impax on June 3, 2010.

17. Impax and Endo settled the patent dispute on June 8, 2010. At the time of settlement, the outcome of Endo's infringement suit was uncertain.

18. The FDA granted final approval to Impax's ANDA for generic Opana ER for the 5, 10, 20, and 40 mg dosages on June 14, 2010. The FDA granted final approval to Impax's ANDA for the 30 mg dosage on July 22, 2010.

The Impax-Endo Agreements

19. On June 8, 2010, Impax and Endo entered into the Settlement and License Agreement and the Development and Co-Promotion Agreement.

20. [redacted]

21. [redacted] At the time of settlement in June 2010, it was uncertain whether any additional patents would ultimately issue, or whether any patents that Endo might obtain in the future would cover Impax's ANDA product. At the time of the settlement, Endo had pending applications for patents relating to Opana ER.

22. [redacted]

[redacted]

24. Under the Development and Co-Promotion Agreement, Impax and Endo entered a deal concerning a potential treatment for Parkinson's disease using a combination of a levodopa- ester and carbidopa.

25. [redacted]

26. [redacted]

27. [redacted]

Reformulated Opana ER

28. In July 2010, Endo filed a supplemental New Drug Application (No. 201655) for a reformulated version of Opana ER ("reformulated Opana ER"). The FDA approved the application in December 2011.

29. In 2012, Endo ceased selling original Opana ER and began selling a "new formulation" of Opana ER (NDA No. 201655).

Post-Settlement Patents and Litigations

30. After entering the Settlement and License Agreement, Endo obtained additional patents and patent licenses that it has asserted cover both original and reformulated Opana ER.

31. The Patent and Trademark Office issued Patent Nos. 8,309,060 and 8,309,122 to Endo on November 13, 2012.

32. The Patent and Trademark Office issued Patent No. 8,329,216 to Endo on December 11, 2012.

33. In December 2012, Endo began asserting the '060, '122, and '216 patents against drug manufacturers seeking to market generic versions of Opana ER. At that time, Endo did not assert these patents against Impax's generic version of original Opana ER.

34. The Patent and Trademark Office issued U.S. Patent No. 8,808,737 to Endo on August 19, 2014. The Patent and Trademark Office issued U.S. Patent No. 8,871,779 on October 28, 2014. Endo acquired an exclusive field-of-use license to the '779 patent from Mallinkcrodt.

35. In August 2015, the U.S. District Court for the Southern District of New York held that the '122 and '216 patents were not invalid and were infringed by other companies' generic versions of original Opana ER and by generic versions of reformulated Opana ER, including Impax's. The court issued an injunction barring all defendants except Impax from selling their generic versions of original Opana ER prior to expiration of the '122 and '216 patents. *Endo Pharm. Inc. v. Amneal Pharm.*, LLC, 2015 WL 9459823, at *66 (S.D.N.Y. Aug. 18, 2015), *amended in part*, 2016 WL 1732751 (S.D.N.Y. Apr.29, 2016), *appeal reactivated*, Nos. 2015-2021 *et al*. (Fed. Cir. Aug. 4, 2016). The ruling is currently on appeal to the Federal Circuit.

36. In November 2015, the U.S. District Court for the District of Delaware held that the '737 patent was invalid. The ruling is currently on appeal to the Federal Circuit.

37. In October 2016, the U.S. District Court for the District of Delaware held that the '779 patent was not invalid and was infringed by a generic version of reformulated Opana ER. The ruling is currently on appeal to the Federal Circuit.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

SANFORD HEALTH, SANFORD BISMARCK, AND MID DAKOTA CLINIC, P.C.

Docket No. 9376. Order, November 3, 2017

Order granting in part respondent's Expedited Motion for a Two-Month Stay of Administrative Proceedings.

ORDER GRANTING 14-DAY CONTINUANCE

On October 6, 2017, Respondents Sanford Health, Sanford Bismarck, and Mid Dakota Clinic, P.C. moved to postpone commencement of the administrative hearing in this proceeding from November 28, 2017 to January 30, 2018, and to stay all pre-hearing deadlines for two months. *See* Expedited Motion for a Two-Month Stay of Administrative Proceedings ("Respondents' Motion"). On October 12, 2017, Complaint Counsel responded that Respondents have not shown good cause for the requested relief and consequently opposed Respondents' Motion.[1]

Respondents argue that a ruling in a parallel action brought by the Federal Trade Commission in federal district court – seeking a preliminary injunction barring Respondents from merging or acquiring each other's assets or other interests, pending final disposition of this administrative proceeding – will obviate the need for the administrative hearing. In particular, Respondents state that if, after all appeals in the injunction proceedings are exhausted, they are enjoined from consummating the acquisition, they will abandon the transaction. Respondents' Motion at 2-3, Exhibits A-B. Respondents further assert that, if the district court denies an injunction, they will move under Commission Rule 3.26 to withdraw the case from adjudication or to dismiss the administrative proceeding. Respondents' Motion at 4-5. Respondents argue that under either scenario, deferring

1 On October 13, 2017, Respondents moved for leave to file a reply to Complaint Counsel's opposition filing. That motion is **GRANTED**.

commencement of the administrative hearing is likely to avoid the expenditure of resources by Respondents, Complaint Counsel, and third parties on administrative litigation that may prove unnecessary. *Id*. at 2-4.

Commission Rule 3.41(f) provides, in relevant part, that a pending "collateral federal court action that relates to the administrative adjudication shall not stay the proceeding . . . [u]nless a court of competent jurisdiction, or the Commission for good cause, so directs." 16 C.F.R. § 3.41(f). The administrative hearing is scheduled to begin November 28, 2017. The proposed findings of fact for the preliminary injunction hearing are due to be filed on November 10, 2017, and a decision is expected sometime thereafter. Presently, it is not clear whether the two proceedings will in fact overlap.

As reflected in its Rules of Practice, the Commission has committed to moving forward as expeditiously as possible with administrative hearings on the merits. *See, e.g.*, 16 C.F.R. §§ 3.1, 3.11(b)(4), 3.41, 3.46, 3.51-3.52. A two-month delay of the long-scheduled administrative hearing would interfere with that objective in a manner not warranted by present circumstances. At the same time, the public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary. Under the circumstances presented, we find that a short continuance is justified. Deferring the start of trial by fourteen days – to December 12, 2017 – and extending remaining pre-hearing deadlines by the same fourteen-day interval – provide additional time for resolution of the district court action without materially delaying the Commission proceeding. We have granted similar, short continuances under comparable circumstances in the past. S*ee In re Advocate Health Care Network*, 2016 WL 2997850 (F.T.C. May 6, 2016) (granting continuance when "the district court hearing on the Commission's motion for preliminary injunction ha[d] yet to conclude"). Respondents and/or Complaint Counsel, of course, may seek extension of this continuance based on future circumstances. Accordingly,

IT IS HEREBY ORDERED that Respondents' Expedited Motion for a Two-Month Stay of Administrative Proceedings is **GRANTED IN PART**; and

IT IS FURTHER ORDERED that the evidentiary hearing in this proceeding shall commence on December 12, 2017, and that, unless modified by the Chief Administrative Law Judge, all related pre-hearing deadlines shall be extended by 14 days.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

1-800 CONTACTS, INC.

Docket No. 9372. Order, November 16, 2017

Order granting a Joint Motion to extend the deadlines for the parties to file their respective appellate briefs.

ORDER GRANTING JOINT MOTION TO EXTEND DEADLINES FOR FILING APPEAL, ANSWERING, AND REPLY BRIEFS

On November 6, 2017, Complaint Counsel and Respondent in this matter filed a Joint Motion to extend the deadlines for the parties to file their respective appellate briefs. Under the Joint Motion's proposed schedule, Respondent would file its Appeal Brief on or before December 6, 2017; Complaint Counsel would file its Answering Brief on or before January 24, 2018; and Respondent would file its Reply Brief on or before February 9, 2018. The parties request these extensions "in order to prevent cancellation of holiday travel plans and to ensure that [they] have sufficient time to provide helpful, yet thorough, briefs in this case." This small delay in the schedule will accommodate counsels' schedules and provide a modicum of additional time for the preparation of briefs.

In light of the foregoing and pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), we find there is good cause to grant the parties' joint request to extend the deadlines for the filing of their respective appeals briefs. Accordingly,

IT IS HEREBY ORDERED THAT Respondent must file its Appeal Brief on or before December 6, 2017, and if Respondent files its 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);

IT IS FURTHER ORDERED THAT Complaint Counsel must file its Answering Brief on or before January 24, 2018; and

IT IS FURTHER ORDERED THAT Respondent must file its Reply Brief on or before February 9, 2018.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

IMPAX LABORATORIES, INC.

Docket No. 9373. Order, November 17, 2017

Order specifying the statement of facts that appear without substantial controversy. This order corrects and supersedes the Commission's Order of October 27, 2017.

ORDER SPECIFYING FACTS WITHOUT SUBSTANTIAL CONTROVERSY (CORRECTED)

Pursuant to Section 3.24(a)(5), of the Commission's Rules of Practice, 16 C.F.R. § 3.24(a)(5), the Commission hereby specifies the following statement of facts that appear without substantial controversy. This order corrects and supersedes the Commission's Order of October 27, 2017.

Accordingly,

IT IS ORDERED THAT the following facts shall be deemed established for purposes of this proceeding:

Opana ER & Endo Patents

1. Oxymorphone is a semi-synthetic opioid used to relieve pain.

2. The U.S. Food & Drug Administration ("FDA") first approved oxymorphone in 1960.

3. Opana ER is an extended-release formulation of oxymorphone.

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36. In August 2015, the U.S. District Court for the Southern District of New York held that the ’122 and ’216 patents were not invalid and were infringed by other companies’ generic versions of original Opana ER and by generic versions of reformulated Opana ER, including Impax’s. The court issued an injunction barring all defendants except Impax from selling their generic versions of original Opana ER prior to expiration of the ’122 and ’216 patents. *Endo Pharm. Inc. v. Amneal Pharm.*, LLC, 2015 WL 9459823, at *66 (S.D.N.Y. Aug. 18, 2015), *amended in part*, 2016 WL 1732751 (S.D.N.Y. Apr.29, 2016), *appeal reactivated*, Nos. 2015-2021 *et al*. (Fed. Cir. Aug. 4, 2016). The ruling is currently on appeal to the Federal Circuit.

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By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

SANFORD HEALTH, SANFORD BISMARCK, AND MID DAKOTA CLINIC, P.C.

Docket No. 9376. Order, November 21, 2017

Order granting Complaint Counsel's and Respondents' joint motion to postpone commencement of the administrative hearing in this proceeding.

ORDER GRANTING FURTHER CONTINUANCE OF ADMINISTRATIVE PROCEEDINGS

On November 14, 2017, Complaint Counsel and Respondents Sanford Health, Sanford Bismarck, and Mid Dakota Clinic, P.C. jointly moved to postpone commencement of the administrative hearing in this proceeding from December 12, 2017 to January 17, 2018, and to stay all pre-hearing deadlines by corresponding periods. *See* Joint Expedited Motion for Further Continuance of Administrative Proceedings ("Joint Motion").

The parties argue that "absent an extension of the continuance, the parties – and, importantly, third parties – will be required to devote significant resources to meeting various interim deadlines between now and December 12, 2017 (the current commencement date for the administrative hearing), including extensive document and data review." Joint Motion at 3. The parties also argue that "many non-party (and Respondents') witnesses who may be called to testify live are practicing physicians, and a brief stay will provide sufficient time for them to reschedule patient care and/or secure alternative coverage." Joint Motion at 3. Further, Respondents reiterate that if, after all appeals in the injunction proceedings are exhausted they are enjoined from consummating the acquisition, they will abandon the transaction. Joint Motion at 4.

The preliminary injunction hearing and post-hearing filings have concluded in the pending district court action. *Id.* at 2. The parties do not know when the district court will issue its decision regarding a preliminary injunction, but Judge Senechal stated at

the conclusion of the hearing that she had a goal to provide a decision within a few weeks. *Id.* The administrative hearing before Judge Chappell is currently scheduled to begin December 12, 2017.

Commission Rule 3.41(f) provides, in relevant part, that a pending "collateral federal court action that relates to the administrative adjudication shall not stay the proceeding . . . [u]nless a court of competent jurisdiction, or the Commission . . . so directs." 16 C.F.R. § 3.41(f). This reflects the Commission's commitment to move forward as expeditiously as possible with administrative hearings on the merits. *See, e.g.*, 16 C.F.R. §§ 3.1, 3.11(b)(4), 3.41, 3.46, 3.51-3.52.

Yet, as we explained in our Order of November 3, 2017, the public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary. Consequently, we previously granted a short continuance of fourteen days – to December 12, 2017 – to provide additional time for resolution of the district court action without materially delaying the Commission proceeding. Under the present circumstances, where the district court has concluded its hearing and has stated a goal to provide an opinion shortly, we again conclude that a limited continuance to allow time for resolution of the judicial proceedings is warranted. Accordingly,

IT IS HEREBY ORDERED that the Joint Expedited Motion for Further Continuance of Administrative Proceedings is **GRANTED**; and

IT IS FURTHER ORDERED that the evidentiary hearing in this proceeding shall commence on January 17, 2018, and that, unless modified by the Chief Administrative Law Judge, all related pre-hearing deadlines shall be extended by 36 days.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HIKMA PHARMACEUTICALS PLC

Docket No. C-4568. Order, December 6, 2017

Letter notifying Hikma Pharmaceuticals plc of the Commission's decision to waive prior approval and public comment regarding modifications to the Supply Agreement and Asset Purchase Agreement.

LETTER WAIVING PRIOR APPROVAL AND COMMENT FOR MODIFICATIONS TO AGREEMENTS

Maria Raptis, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP

Re: In the Matter of *Hikma Pharmaceuticals plc,*
Docket No. C-4568

Dear Ms. Raptis:

This letter refers to an application for approval that Hikma Pharmaceuticals plc ("Hikma") filed on October 23, 2017, which requested Commission approval of a proposed amendment to the Supply Agreement (Prednisone) and Asset Purchase Agreement, incorporated by reference into the Decision and Order entered into in this case.[1]

After consideration of Hikma's application and pursuant to the authority delegated to me under Rule 2.41(f)(5)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 2.41(f)(5)(ii), I hereby waive the requirements for Commission approval and the public comment period for the amendment to the Supply Agreement and Asset Purchase Agreement described in Hikma's application.

If you have further questions, please contact David von Nirschl, the Compliance staff attorney assigned to this matter.

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1 Order ¶¶ I.RR., II.A., and VI.

David von Nirschl can be reached at 202-326-3213 or dnirschl@ftc.gov.

Interlocutory Orders, Etc.

IN THE MATTER OF

FRESENIUS MEDICAL CARE AG & CO. KGAA

Docket No. C-4348. Order, December 15, 2017

Letter Order approving respondent's application to establish a dialysis clinic

LETTER ORDER APPROVING APPLICATION

Mr. Brian F. Burke, Esq.
Baker & McKenzie LLP

Re: *Fresenius Medical Care AG & CO. KGaA,*
Docket No. C-4348

Dear Mr. Burke,

Pursuant to Rule 2.41(f) of the Commission's Rules of Practice, the Commission has determined to approve the Application of Fresenius Medical Care AG & CO. KGaA ("Fresenius") (October 4, 2017) to establish a dialysis clinic at 5311 Clyde Park Avenue, SW, Wyoming, Michigan, a location that was previously divested to DSI by Fresenius as a *de novo* dialysis clinic pursuant to the Commission Order in the above matter. The property was never developed into a dialysis clinic and has been vacant for over five years. In according its approval to Fresenius's Application, the Commission has relied upon the information submitted by Fresenius, and the Commission has assumed that information to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

SANFORD HEALTH, SANFORD BISMARCK, AND MID DAKOTA CLINIC, P.C.

Docket No. 9376. Order, December 21, 2017

Order granting Respondents' motion to postpone commencement of the administrative hearing in this proceeding pending appeal of the district court's order for Preliminary Injunction.

ORDER GRANTING FURTHER CONTINUANCE OF ADMINISTRATIVE PROCEEDINGS

On December 14, 2017, Respondents Sanford Health, Sanford Bismarck, and Mid Dakota Clinic, P.C. filed an Unopposed Expedited Motion for Further Continuance of Administrative Proceedings Pending Appeal of Order Granting Motion for Preliminary Injunction. Respondents ask the Commission to continue commencement of the administrative hearing until 21 days after resolution of a pending appeal.

On December 13, 2017, the United States District Court for the District of North Dakota, Western Division, granted the motion for a preliminary injunction filed by the Federal Trade Commission and the North Dakota Attorney General to enjoin Sanford's proposed acquisition of Mid Dakota Clinic. On December 15, 2017, Respondents filed their notice of appeal of the preliminary injunction to the Eighth Circuit Court of Appeals. Respondents explain that under the Rules and practices of the Eighth Circuit, briefing for Respondents' appeal will be complete by March 14, 2018.

Similar to earlier requests for a continuance of the administrative proceedings, Respondents argue that absent an extension of the continuance, the Administrative Law Judge and parties, including third parties and witnesses, will be required to devote significant resources to meet various interim deadlines between now and the administrative hearing, which is currently scheduled to begin on January 17, 2018. Respondents repeat that

if, after all appeals of the preliminary injunction are exhausted, they are enjoined from consummating the acquisition, they will abandon the proposed transaction. They explain that in such circumstance, the administrative hearing before the Administrative Law Judge would not be necessary.

As we explained in our earlier Orders granting continuances in this matter, the public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary. Under the present circumstances, where the District Court has issued a preliminary injunction to enjoin the transaction and that Order has already been appealed to the United States Court of Appeals, we again conclude that a limited continuance to allow time for resolution of the judicial proceedings is warranted.

Accordingly, consistent with our prior decisions to stay administrative proceedings in *In the Matter of Advocate Health Care Network*, Docket No. 9369, Order Granting Continuance, (June 28, 2016) and *In the Matter of The Penn State Hershey Medical Center*, Docket No. 9368, Commission Order Granting Continuance (June 10, 2016),

IT IS HEREBY ORDERED that the evidentiary hearing shall commence 21 days after the United States Court of Appeals for the Eighth Circuit renders its judgment on Respondents' appeal, and that all pre-hearing deadlines shall be extended until after the Court of Appeals renders its judgment, as determined by the Administrative Law Judge.

By the Commission.

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