

# FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS  
JANUARY 1, 2018, TO JUNE 30, 2018

PUBLISHED BY THE COMMISSION

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Robert F. Swenson, Editor

**MEMBERS OF THE FEDERAL TRADE COMMISSION  
DURING THE PERIOD  
JANUARY 1, 2018 TO JUNE 30, 2018**

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Took oath of office May 1, 2018

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Took oath of office April 4, 2012.

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

NOAH JOSHUA PHILLIPS, *Commissioner*  
Took oath of office May 2, 2018

ROHIT CHOPRA, *Commissioner*  
Took oath of office May 2, 2018

REBECCA KELLY SLAUGHTER, *Commissioner*  
Took oath of office May 2, 2018

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



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# FEDERAL TRADE COMMISSION DECISIONS

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FINDINGS, OPINIONS, AND ORDERS  
JANUARY 1, 2018, TO JUNE 30, 2018

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IN THE MATTER OF

**COWBOY AG LLC**

**D/B/A**

**COWBOY TOYOTA AND COWBOY SCION**

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

*Docket No. C-4639; File No. 172 3009  
Complaint, January 4, 2018 – Decision, January 4, 2018*

This consent order addresses Cowboy AG LLC's Spanish-language advertising that only provided disclosures in fine-print English. The complaint alleges that respondent violated Section 5(a) of the Federal Trade Commission Act by representing in its Spanish-language advertisements that: (1) consumers could purchase new 2016 automobiles with no down payments, (2) that advertised low monthly payments were available to those who financed automobile purchases, (3) that advertised interest rates, monthly payments, and other terms were available to consumers with bad credit, and (4) that certain new 2016 model year Toyotas were available for purchase in 2017. The complaint further alleges that respondent's credit sale advertisements violated the Truth in Lending Act and Regulation Z by failing to disclose or to disclose clearly and conspicuously required terms. The consent order prohibits the respondent from misrepresenting the costs of financing the purchase or the leasing of automobiles or any qualifications or restrictions on advertised merchandise.

### *Participants*

For the *Commission*: *M. Hasan Aijaz* and *James R. Golder*.

For the *Respondent*: *Derek Rollins*, *Shackelford*, *Bowen*, *McKinley & Norton*.

## Complaint

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Cowboy AG LLC, a Texas limited liability company, doing business as Cowboy Toyota and Cowboy Scion, (Respondent) has violated provisions of the Federal Trade Commission Act (FTC Act); the Truth in Lending Act (TILA) and its implementing Regulation Z; and the Consumer Leasing Act (CLA) and its implementing Regulation M; and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Cowboy AG LLC, doing business as Cowboy Toyota and Cowboy Scion, is a Texas limited liability company with its principal office or place of business at 9325 East R.L. Thornton Freeway, Dallas, Texas 75228.

2. The acts or practices of Respondent alleged in this Complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

3. Since at least October 2016, Respondent has disseminated or caused to be disseminated advertisements to the public promoting credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms “advertisement,” “credit sale,” “closed-end credit,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

4. Since at least October 2016, Respondent has disseminated or caused to be disseminated advertisements to the public promoting consumer leases for automobiles, as the terms “advertisement” and “consumer lease” are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

5. Respondent placed full-page newspaper advertisements in *Al Día*, a regional Dallas, Texas area Spanish-language newspaper published by the *Dallas Morning News*. *Al Día* is a free subscription newspaper that is delivered twice weekly on Wednesdays and Saturdays. *Al Día* makes current editions available on its *aldiadallas.com* website. Exhibits A and B are representative examples of Respondent’s full-page Spanish-

## Complaint

language *Al Día* ads from October and November 2016. The full-page *Al Día* ads measured approximately 22” high by 12” wide.

6. Respondent ran frequent Spanish-language advertisements in *Al Día*, including during its “Mes de la Herencia Hispana!” (Hispanic Heritage Month!) sales event and its “Acción de Gracias” (Thanksgiving) sales event. *See* Exhibits A and B, respectively. Although Respondent’s ads evolved, since at least October 2016, the full-page Spanish-language newspaper ads contained substantially similar statements, offers, depictions, and fine print disclaimers.

7. In numerous instances, since at least October 2016 until at least July 2017, Respondent’s advertisements in *Al Día* prominently touted the availability of various deals to consumers with bad credit, with no down payment, 0% interest rates for 60- or 72-month periods, low monthly payments amounts, and other favorable terms. In numerous instances, however, Respondent’s advertisements included buried fine print disclaimers, including a lengthy fine print disclaimer written only in English, that contradicted its advertisements’ more prominent claims.

**Representative Advertisement for “Mes de la Herencia Hispana!” (Hispanic Heritage Month!) Event**

8. The top section of Respondent’s full-page October 2016 Hispanic Heritage Month *Al Día* advertisements, excerpted from Exhibit A, touted that Respondent’s deals were available to individuals with bad credit without requiring a down payment, a Social Security number, or a driver’s license. For example, Respondent made the following representations: “Sin Engache,” “Con Buen o Mal Credito,” “Sin Seguro Social,” “Sin Licencia de conducir,” “Financiamos,” and “Aceptamos Tax ID.” These representations translate to English as follows: “Without Down Payment,” “With Good or Bad Credit,” “Without Social Security,” “Without Driver’s License,” “We Finance,” and “We Accept Tax ID”:

## Complaint

6C - AL DÍA EDICIÓN DE FIN DE SEMANA 9/10/2016 www.aldiadallas.com

**COWBOYTOYOTA.COM**

**Cowboy Toyota celebra:**  
MES DE LA HERENCIA  
**HISPANA!**






Te esperamos para ayudarte a comprar tu carro!

**Con La mejores ofertas del Metroplex!**

Sin Engache

Con Buen o Mal Credito

Sin Seguro Social

Sin Licencia de conducir

Financiamos

Aceptamos Tax ID

Exhibit B is an example of a substantially similar Thanksgiving ad that ran in *Al Día* in November 2016. In December 2016, Respondent altered its advertisements and moved language concerning financing to individuals with good or bad credit without requiring a down payment, a Social Security number, or a driver's license to a prominent border area surrounding the featured new Toyota vehicles.

9. In the second section of Respondent's full-page 2016 Hispanic Heritage Month *Al Día* advertisements, Respondent announced offers for new 2016 Toyota Tundras, Camrys, and Corollas. Respondent touted the availability of 0% interest rates over 60- or 72-month periods and low monthly payment amounts, suggesting that consumers could obtain all of these terms when financing to purchase these automobiles:

<p><b>NUEVO 2016 TOYOTA TUNDRA</b> 0% DE INTERESES POR 60 MESES CCA 2 Años de Mantenimiento Incluidos</p>  <p style="color: red; font-weight: bold; font-size: 1.2em;">\$379/MES</p> <p><small>Solo \$999 de Enganche</small></p>	<p><b>NUEVO 2016 TOYOTA TACOMAS DISPONIBLES</b> 2 Años de Mantenimiento Incluidos</p>  <p style="color: orange; font-weight: bold; font-size: 1.2em;">BAJAS PRECIOS</p> <p><small>Solo \$999 de Enganche</small></p>
<p><b>NUEVO 2016 TOYOTA CAMRY</b> 0% DE INTERESES POR 72 MESES CCA 2 Años de Mantenimiento Incluidos</p>  <p style="color: green; font-weight: bold; font-size: 1.2em;">\$199/MES</p> <p><small>Solo \$1,999 de Enganche</small></p>	<p><b>NUEVO 2016 TOYOTA COROLLA</b> 0% DE INTERESES POR 72 MESES CCA 2 Años de Mantenimiento Incluidos</p>  <p style="color: green; font-weight: bold; font-size: 1.2em;">\$179/MES</p> <p><small>Solo \$999 de Enganche</small></p>

Complaint

This ad section was excerpted from Exhibit A, Respondent’s Hispanic Heritage Month ad in *Al Día* in October 2016.

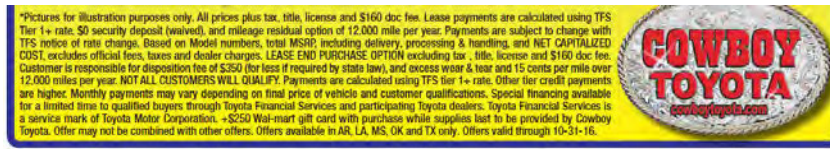
This section of the advertisement translates to English as follows:

<p><b>NEW 2016 TOYOTA TUNDRA</b>                  0% INTEREST FOR 60 MONTHS CCA                  2 Years Maintenance Included                  \$250 Gift Card with your purchase!  <b>\$379/MONTH*</b>                  Only \$999 down payment</p>	<p><b>NEW 2016 TOYOTA TACOMAS AVAILABLE</b>                  2 Years Maintenance Included                  \$250 Gift Card with your purchase!  <b>LOW PRICES</b></p>
<p><b>NEW 2016 TOYOTA CAMRY</b>                  0% INTEREST FOR 72 MONTHS CCA                  2 Years Maintenance Included                  \$250 Gift Card with your purchase!  <b>\$199/MONTH*</b>                  Only \$1,999 down payment</p>	<p><b>NEW 2016 TOYOTA COROLLA</b>                  0% INTEREST FOR 72 MONTHS CCA                  2 Years Maintenance Included                  \$250 Gift Card with your purchase!  <b>\$179/MONTH*</b>                  Only \$999 down payment</p>

10. In Paragraph 8 above, Respondent prominently stated that there were no down payments (“Sin Engache”) in large print on the top of its full-page newspaper ads. The section of the advertisement reproduced in Paragraph 9 contains fine print disclaimers revealing that the featured vehicles require down payments of either \$999 or \$1,999, thus contradicting the advertisement’s prominent statements that no down payments were required.

11. Additionally, in the advertisement section excerpted in Paragraph 9 above, Respondent placed asterisks next to the monthly payment amounts. These asterisks appear to refer to a lengthy disclaimer buried in fine print at the bottom of the ad. Although the more prominent representations in Paragraphs 8 and 9 appeared in Spanish, this fine print disclaimer was written only in English. As shown in Exhibit A, the disclaimer stated the following:

## Complaint



As reproduced in larger font, the disclaimer states:

\*Pictures for illustration purposes only. All prices plus tax, title, license and \$160 doc fee. Lease payments are calculated using TFS Tier 1+ rate, \$0 security deposit (waived), and mileage residual option of 12,000 mile per year. Payments are subject to change with TFS notice of rate change. Based on Model numbers, total MSRP, including delivery, processing & handling, and NET CAPITALIZED COST, excludes official fees, taxes and dealer charges. LEASE END PURCHASE OPTION excluding tax, title, license and \$160 doc fee. Customer is responsible for disposition fee of \$350 (for less if required by state law), and excess wear & tear and 15 cents per mile over 12,000 miles per year. NOT ALL CUSTOMERS WILL QUALIFY. Payments are calculated using TFS tier 1+ rate. Other tier credit payments are higher. Monthly payments may vary depending on final price of vehicle and customer qualifications. Special financing available for a limited time to qualified buyers through Toyota Financial Services and participating Toyota dealers. Toyota Financial Services is a service mark of Toyota Motor Corporation. +\$250 Wal-mart gift card with purchase while supplies last to be provided by Cowboy Toyota. Offer may not be combined with other offers. Offers available in AR, LA, MS, OK and TX only. Offers valid through 10-31-16.

Virtually identical English disclaimers appeared in each of Respondent's ads through at least August 2017.

12. The buried fine print disclaimer in Paragraph 11 reveals that Respondent was including a leasing term with its financing offers shown in Paragraph 9 above. Specifically, the low monthly payment amounts prominently touted in Respondent's advertisements were only available to consumers who lease the advertised motor vehicles, and not to consumers who finance to purchase the motor vehicles. The ads included other finance terms such as "0% INTEREST."

## Complaint

13. Additionally, the buried fine print disclaimer in Paragraph 11 contradicts Respondent's more prominent representations, in Paragraph 8 above, that its offers were available to consumers with bad credit. Specifically, the disclaimer reveals that the advertised offer terms were only available to consumers eligible for the "TFS Tier 1+ rates." TFS Tier 1+ rates are available only to consumers with very good or excellent credit, such as those with Auto FICO scores of 720 or higher. Further, even if Spanish-speaking consumers were able to notice and read this fine print English statement, a reasonable consumer would be unlikely to understand the term "TFS Tier 1+ rates."

14. Respondent also advertised new 2016 Toyota Tundras, Tacomas, Camrys, and Corollas for sale in its January and early February 2017 *Al Día* advertisements. However, despite these representations, during this time period Respondent did not have any 2016 Toyota Tundras, Tacomas, Camrys, or Corollas available for sale.

15. Respondent's advertisements contained TILA triggering terms, such as "0% INTEREST FOR 60 MONTHS," but did not disclose, or did not disclose clearly and conspicuously, certain required TILA information, such as:

- a. The amount or percentage of down payment required;
- b. The terms of repayment, reflecting the repayment obligations over the full term of the loan, including any balloon payment; or
- c. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

16. Similarly, Respondent's advertisements contained CLA triggering terms, such as the low advertised monthly payment amounts, but did not disclose, or did not disclose clearly and conspicuously, certain required CLA information, such as:

- a. Whether the transaction advertised is a lease;

## Complaint

- b. The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation;
- c. Whether or not a security deposit is required;
- d. The number, amount, and timing of scheduled payments; or
- e. With respect to a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property, that an extra charge may be imposed at the end of the lease term.

**VIOLATION OF THE FEDERAL TRADE COMMISSION  
ACT****Count I****Misrepresentations Regarding Offers**

17. Through the means described in Paragraphs 5 through 16, Respondent has represented, directly or indirectly, expressly or by implication, the following regarding the vehicles it advertised for sale or lease:

- a. No down payment was required;
- b. The advertised low monthly payments were available to those who financed automobile purchases;
- c. The advertised interest rates, monthly payments, and other terms were available to consumers with bad credit; and
- d. New 2016 model year Toyota Tundras, Tacomas, Camrys, and Corollas were available for purchase at the time of the ads in 2017.

18. In fact, in numerous instances:

- a. A down payment was required;



Complaint

- b. The advertised low monthly payments were available only for automobile leases;
- c. The advertised interest rates, monthly payments, and other terms were available only to consumers with very good to excellent credit; and
- d. New 2016 model year Toyota Tundras, Tacomas, Camrys, and Corollas were not available for purchase at the time of the ads in 2017.

19. Therefore, the representations set forth in Paragraph 17 were false or misleading.

20. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**VIOLATION OF THE TRUTH IN LENDING ACT AND  
REGULATION Z**

21. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, as amended, advertisements promoting closed-end credit in consumer credit transactions are required to make certain disclosures ("TILA additional terms") if they state any of several terms, such as the monthly payment ("TILA triggering terms").

22. To the extent that Respondent's automobile sales advertisements promote closed-end credit, such as those described in Paragraphs 5 through 16, Respondent is subject to the requirements of the TILA and Regulation Z.

**Count II**

**Failure to Disclose or to Disclose Clearly and Conspicuously  
Required Credit Information**

23. Respondent's automobile sales advertisements promoting closed-end credit, such as those described in Paragraphs 5 through 16, included TILA triggering terms, but failed to disclose, or to disclose clearly and conspicuously, additional terms required by

## Complaint

the TILA and Regulation Z, including one or more of the following:

- a. The amount or percentage of the down payment;
- b. The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment; and
- c. The “annual percentage rate,” using that term, and, if the rate may be increased after consummation, that fact.

24. Therefore, the practices set forth in Paragraph 23 of this Complaint violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

**VIOLATION OF THE CONSUMER LEASING ACT AND  
REGULATION M**

25. Under Section 184 of the CLA and Section 213.7 of Regulation M, advertisements promoting consumer leases are required to make certain disclosures (“additional terms”) if they state any of the several terms, such as the amount of any payment (“CLA triggering terms”). 15 U.S.C. § 1667c; 12 C.F.R. § 213.7.

26. To the extent that Respondent’s automobile advertisements promote consumer leases, such as those described in Paragraph 5 through 16, Respondent is subject to the requirements of the CLA and Regulation M.

**Count III**

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

27. Respondent’s automobile advertisements promoting consumer leases, such as those described in Paragraphs 5 through 16, included CLA triggering terms, but failed to disclose or to disclose clearly and conspicuously additional terms required by

## Complaint

the CLA and Regulation M, including one or more of the following:

- a. That the transaction advertised is a lease;
- b. The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation;
- c. Whether a security deposit is required;
- d. The number, amount, and timing of scheduled payments; and
- e. With respect to a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property, that an extra charge may be imposed at the end of the lease term.

28. Therefore, the practices set forth in Paragraph 27 of this Complaint violated Section 184 of the CLA, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

**THEREFORE**, the Federal Trade Commission, this fourth day of January, 2018, has issued this complaint against Respondent.

By the Commission.

Complaint

Exhibit A

6C - AL DÍA EDICIÓN DE FIN DE SEMANA 9/10/2016 www.aidadallas.com

**COWBOYTOYOTA.COM**

**Cowboy Toyota celebra:**  
**MES DE LA HERENCIA**  
**HISPANA!**






Te esperamos para ayudarte a comprar tu carro!

**Con La mejores ofertas del Metroplex!**

Sin Engache

Con Buen o Mal Credito

Sin Seguro Social

Sin Licencia de conducir

Financiamos

Aceptamos Tax ID

**NUEVO 2016 TOYOTA TUNDRA**  
0% DE INTERESES POR 60 MESES CCA  
2 Años de Mantenimiento Incluidos



Tarjeta de Regalo de \$250 con su Compra!

**\$379/MES\***

Solo \$999 de Enganche

**NUEVO 2016 TOYOTA TACOMAS DISPONIBLES**  
2 Años de Mantenimiento Incluidos



Tarjeta de Regalo de \$250 con su Compra!

**BAJAS PRECIOS**

**NUEVO 2016 TOYOTA CAMRY**  
0% DE INTERESES POR 72 MESES CCA  
2 Años de Mantenimiento Incluidos



Tarjeta de Regalo de \$250 con su Compra!

**\$199/MES\***

Solo \$1,299 de Enganche

**NUEVO 2016 TOYOTA COROLLA**  
0% DE INTERESES POR 72 MESES CCA  
2 Años de Mantenimiento Incluidos



Tarjeta de Regalo de \$250 con su Compra!

**\$179/MES\***

Solo \$999 de Enganche

**Nuestros Carros Autos Usados - Mejores Precios del Metroplex!**

 <b>\$7,985</b> 1 Owner, 190k, Mid 100k #19511024	 <b>\$9,790</b> 1 Owner, Clean, Mid 100k #175444	 <b>\$12,985</b> Full 100k, Mid 100k, Double 100k #1800734	 <b>\$13,304</b> 1 Owner, Roof Rack, Fog, Home Ready #7415504	 <b>\$14,885</b> 1 Owner, Low Miles, Mid 100k #1627004	 <b>\$15,985</b> 1 Owner, Look, For Home, Mid 100k #154455
 <b>\$16,985</b> 1 Owner, Rainy, Fog, Clean #7271154	 <b>\$18,968</b> 1 Owner, 500k, Mid 150k #1584564	 <b>\$22,985</b> 1 Owner, Rainy, Fog, Mid 100k #154442	 <b>\$23,444</b> 1 Owner, 21k, Mid, Mid 100k #153473	 <b>\$23,985</b> 1 Owner, 50k Miles, Looking For Home #1628204	 <b>\$24,495</b> 1 Owner, Looking For Home, Low Miles #154454
 <b>\$25,983</b> 1 Owner, Low Mile, Back Home, Ready #1611491	 <b>\$26,985</b> 1 Owner, 50k Miles, Mid 150k #1507414	 <b>\$27,799</b> Low Miles, Lin Bar, Roof Rack #1540249	 <b>\$30,921</b> 1 Owner, Low Miles, Just In the Today #1515444	 <b>\$30,985</b> Looking For New Home, Clean #1617004	 <b>\$30,977</b> Running Board, Roof Rack, Mid 100k #154459

**9525 E. R.L. THORNTON FRWY. DALLAS, TX 75228**      **866-521-1870**

\*Pictures for illustration purposes only. All prices plus tax, title, license and \$160 doc fee. Lease payments are calculated using TFS Tier 1a rate, \$0 security deposit (waived), and 12,000 mile per year. Payments are subject to change with TFS notice of rate change. Based on Model numbers, total MSRP, including delivery, processing & handling, and NET COST (ALREADY COST), excludes official fees, taxes and dealer charges. LEASE END PURCHASE OPTION (excluding tax, title, license and \$160 doc fee. Customers responsible for disposition fee of \$350 (for less if required by state law), and excess wear & tear and 15 cents per mile over 12,000 miles per year. NOT ALL CUSTOMERS WILL QUALIFY. Payments are calculated using TFS Tier 1a rate. Other tier credit payments are higher. Monthly payments may vary depending on final price of vehicle and customer qualifications. Special financing available for a limited time to qualified buyers through Toyota Financial Services and participating Toyota dealers. Toyota Financial Services is a service mark of Toyota Motor Corporation. \$250 100-mart gift card with purchase while supplies last to be provided by Cowboy Toyota. Offer may not be combined with other offers. Offers available in AR, LA, MS, OK and TX only. Offers valid through 10-31-16.





Complaint

Exhibit B

6C - ALDÍA EDICIÓN DE FIN DE SEMANA 6/11/2016 www.aldiadallas.com

**COWBOYTOYOTA.COM**











**COWBOY TOYOTA TE REGALA:** \*Tarjeta de \$250 de regalo con su compra! A comer pavo y ahorrar con Cowboy Toyota 866-521-1870

"Cena" de Accion de Gracias para toda tu familia\*

Sin Engache

Con Buen o Mal Credito

Sin Seguro Social

Sin Licencia de conducir

Financiamos

Aceptamos Tax ID

**NUEVO 2016 TOYOTA TUNDRA**  
0% DE INTERESES POR 60 MESES CCA  
2 Años de Mantenimiento Incluidos



**\$379/MES\***

Solo \$959 de Enganche

**NUEVO 2016 TOYOTA TACOMAS DISPONIBLES**  
2 Años de Mantenimiento Incluidos



**BAJAS PRECIOS**

**NUEVO 2016 TOYOTA CAMRY**  
0% DE INTERESES POR 72 MESES CCA  
2 Años de Mantenimiento Incluidos



**\$199/MES\***

Solo \$1,999 de Enganche

**NUEVO 2016 TOYOTA COROLLA**  
0% DE INTERESES POR 72 MESES CCA  
2 Años de Mantenimiento Incluidos



**\$179/MES\***

Solo \$999 de Enganche

**Nuestros Carros Autos Usados - Mejores Precios del Metroplex!**

 <b>\$11,499</b> <small>2012 Ford Fusion SE Trendo con radio, Airbag, Control de Velocidad, Rayos X de Ver. #1000024</small>	 <b>\$11,876</b> <small>2009 Hyundai Tucson SE 1.8 Gas, Black, 18" Alloy Wheel. #1379424</small>	 <b>\$13,304</b> <small>2007 Toyota Highlander Doble, Park, 4x4, 18" Alloy Wheel &amp; Cca. #7419536</small>	 <b>\$14,985</b> <small>2014 Ford Escape SE 1.8 Gas, Esp. 18" Alloy, Ray. Que. Ver. #1627004</small>	 <b>\$16,499</b> <small>2009 GMC Yukon XL XL, 4x4, 18" Alloy Wheel. #1671144</small>	 <b>\$18,968</b> <small>2013 Chevy Camaro 2LS 1.8 Gas, Sportivo, Ray. Que. Ver. #1090264</small>
 <b>\$19,995</b> <small>2007 Mercedes Benz CLS V8, Auto, 4x4, 18" Alloy Wheel. #1335504</small>	 <b>\$23,444</b> <small>2016 Dodge Charger SXT 1.8 Gas, 21" K/M 18" Alloy, Ray. Que. Ver. #1514713</small>	 <b>\$23,985</b> <small>2014 BMW 328i 1.8 Gas, 20" Alloy, 18" Alloy Wheel, 18" Alloy Wheel. #1000004</small>	 <b>\$24,250</b> <small>2014 Toyota Tacoma PreRunner 1.8 Gas, 18" Alloy Wheel, 18" Alloy Wheel, 18" Alloy Wheel. #1487136</small>	 <b>\$24,499</b> <small>2016 RAM 1500 SLT 1.8 Gas, 18" Alloy Wheel, 18" Alloy Wheel. #1514713</small>	 <b>\$26,897</b> <small>2014 Toyota Tacoma PreRunner 1.8 Gas, 18" Alloy Wheel, 18" Alloy Wheel. #1514713</small>
 <b>\$27,799</b> <small>2009 Cadillac Escalade 1.8 Gas, 18" Alloy Wheel, 18" Alloy Wheel. #1000004</small>	 <b>\$27,888</b> <small>2015 Toyota Tundra SR 1.8 Gas, 18" Alloy Wheel, 18" Alloy Wheel. #1000004</small>	 <b>\$28,971</b> <small>2015 Chevy Tahoe 1.8 Gas, 18" Alloy Wheel, 18" Alloy Wheel. #1000004</small>	 <b>\$29,777</b> <small>2013 Toyota Tundra 1.8 Gas, 18" Alloy Wheel, 18" Alloy Wheel. #1000004</small>	 <b>\$29,985</b> <small>2014 Chevy Silverado 1500 1.8 Gas, 18" Alloy Wheel, 18" Alloy Wheel. #1000004</small>	 <b>\$29,977</b> <small>2016 GMC Yukon 1.8 Gas, 18" Alloy Wheel, 18" Alloy Wheel. #1000004</small>

9525 E. R.L. THORNTON FRWY. DALLAS, TX 75228 866-521-1870

\*Picture for illustration purposes only. All prices plus tax, title, license and \$160 doc fee. Lease payments are calculated using TFS Tier 14 rate. \$3.99 security deposit (refund) and mileage residual option of 12,000 miles per year. Payments are subject to change with TFS. Notice of rate change. Based on Model numbers, total MSRP, including delivery, processing & handling, and NET CAPITALIZED COST, excludes official fees, taxes and dealer charges. LEASE END PURCHASE OPTION excluding tax, title, license and \$160 doc fee. Gas taxes are not possible for disposal fees of \$350. Fuel fees are required by state law, and excess wear \$3 per year and .15 cents per mile over 12,000 miles per year. NOT ALL CUSTOMERS WILL QUALIFY. Payments are calculated using TFS Tier 14 rate. Other tier credit payments are higher. Monthly payments may vary depending on retail price of vehicle and customer qualifications. Special financing available for a limited time to qualified buyers through Toyota Financial Services and participating Toyota dealers. Toyota Financial Services is a service mark of Toyota Motor Corporation. +\$250. Max. net gift card with purchase. White supplies, not to be provided by Cowboy Toyota. Offer may not be combined with other offers. Offers available in AR, LA, MS, OK and TX only. Offers valid through 11-30-16.



## Decision and Order

**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 violations of the Federal Trade Commission Act (“FTC Act”); the Truth in Lending Act (“TILA”) and its implementing Regulation Z; and the Consumer Leasing Act (“CLA”) and its implementing Regulation M.

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 FTC Act; the TILA and its implementing Regulation Z; and the CLA and its implementing Regulation M; 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. Respondent Cowboy AG LLC, is a Texas limited liability company, also doing business as Cowboy Toyota and Cowboy Scion, with its principal office or place of business at 9325 East R.L. Thornton Freeway, Dallas, Texas 75228.

## Decision and Order

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

**ORDER****Definitions**

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

- A. “Advertisement” shall mean a commercial message in any medium that directly or indirectly, expressly or by implication, promotes a consumer transaction.
- 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 made visually or audibly.
  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.

## Decision and Order

5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.
  6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices.
  7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.
- C. “Consumer credit” shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes, as set forth in Section 226.2(a)(12) of Regulation Z, 12 C.F.R. § 226.2(a)(12), as amended.
- D. “Consumer lease” shall mean a contract in the form of a bailment or lease for the use of personal property by a natural person primarily for personal, family, or household purposes, for a period exceeding four months and for a total contractual obligation not exceeding the applicable threshold amount, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, as set forth in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.
- E. “Lease inception” shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.
- F. “Material” shall mean likely to affect a person’s choice of, or conduct regarding, goods or services.
- G. “Motor vehicle” shall mean:
1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;



## Decision and Order

2. Recreational boats and marine equipment;
  3. Motorcycles;
  4. Motor homes, recreational vehicle trailers, and slide-in campers; and
  5. Other vehicles that are titled and sold through dealers.
- H. “Respondent” means Cowboy AG LLC, also doing business as Cowboy Toyota and Cowboy Scion, and its successors and assigns.

**I.**

**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 advertising, promotion, offering for sale, or sale of motor vehicles, must not make any representation, expressly or by implication, that:

- A. Misrepresents the cost of:
1. Purchasing a motor vehicle with financing, including but not limited to the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or
  2. Leasing a motor vehicle, including but not limited to the total amount due at lease inception, amount down, down payment, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments.

## Decision and Order

- B. Misrepresents any qualification or restriction on the consumer's ability to obtain represented financing or leasing terms, including but not limited to any qualification or restriction based on a consumer's credit score or credit history.
- C. Represents any financing or leasing term, unless the representation is non-misleading, and the advertisement clearly and conspicuously discloses all qualifications or restrictions on the consumer's ability to obtain the represented financing or leasing term, including but not limited to any qualifications or restrictions that Respondent's lender, lessor, or any other entity may impose based on a consumer's credit score or credit history. *Provided, further,* that, if a majority of consumers likely will not be able to meet a stated credit score or credit history qualification or restriction, the advertisement must clearly and conspicuously disclose that fact.
- D. Misrepresents the number of vehicles, makes, or models that are available for purchase or lease.
- E. Misrepresents any other material fact about the price, sale, financing, or leasing of any motor vehicle.

**II.**

**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 any advertisement for any extension of consumer credit, shall not in any manner:

- A. State the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:

## Decision and Order

1. The amount or percentage of the down payment;
  2. The terms of repayment; and
  3. The annual percentage rate, using the term “annual percentage rate” or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed; or
- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term; or
- C. Fail to comply in any respect with Regulation Z, 12 C.F.R. Part 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667.

**III.**

**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 any advertisement for any consumer lease, shall not in any manner:

- A. State the amount of any payment or that any or no initial payment is required prior to or at consummation or by delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously:
1. That the transaction advertised is a lease;
  2. The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation;
  3. The number, amounts, and timing of scheduled payments;

## Decision and Order

4. Whether or not a security deposit is required; and
  5. That an extra charge may be imposed at the end of the lease term where the consumer's liability (if any) is based on the difference between the residual value of the leased property and its realized value at the end of the lease term; or
- B. Fail to comply in any respect with Regulation M, 12 C.F.R. Part 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.

**IV.**

**IT IS FURTHER ORDERED** that Respondent 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 15 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.
- C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

## Decision and Order

**V.**

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

- A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (1) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (2) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (3) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales; (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 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. For 15 years after the issuance date of this Order, 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.

## Decision and Order

- 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 Cowboy AG LLC, Docket No. C-4639.*

**VI.**

**IT IS FURTHER ORDERED** that Respondent must create certain records for 15 years after the issuance date of the Order, and retain each such record for 5 years. Specifically, Respondent, for any business that 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;
- 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 written consumer complaints concerning the subject matter of the Order, whether received directly or indirectly, such as through a third party, and any response;

## Decision and Order

- D. A copy of each unique advertisement or other marketing material making a representation subject to this Order;
- E. All materials that were relied upon in disseminating the representation;
- F. All evidence in its possession or control that contradicts, qualifies, or calls into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations;
- G. For 5 years from the date received, copies of all subpoenas and other communications with law enforcement, if such communication relates to Respondent's compliance with this Order;
- H. For 5 years from the date created or received, all records, whether prepared by or on behalf of Respondent, that tend to show any lack of compliance by Respondent with this Order; and
- I. All records necessary to demonstrate full compliance with each Provision of this Order, including all submissions to the Commission.

**VII.**

**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

## Decision and Order

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.

**VIII.**

**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 January 4, 2038, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Provision in this Order that terminates in less than 20 years; and
- B. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

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

By the Commission.



## Analysis to Aid Public Comment

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

The Federal Trade Commission (FTC) has accepted, subject to final approval, an agreement containing a consent order from Cowboy AG LLC, doing business as Cowboy Toyota and Cowboy Scion. The proposed consent 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 FTC will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

The respondent is a motor vehicle dealer that engaged in substantial Spanish-language advertising, but only provided disclosures in fine-print English. According to the FTC complaint, respondent advertised that consumers could purchase or lease advertised vehicles at certain favorable terms prominently stated in its advertisements. The complaint alleges that respondent violated Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), because it misrepresented in its Spanish-language advertisements that (1) consumers could purchase new 2016 automobiles with no down payments, (2) that advertised low monthly payments were available to those who financed automobile purchases, (3) that advertised interest rates, monthly payments, and other terms were available to consumers with bad credit, and (4) that certain new 2016 model year Toyotas were available for purchase in 2017. This information would be material to consumers in deciding whether to visit respondent's dealership and whether to purchase or lease an automobile from respondent.

The complaint also alleges that respondent's credit sale advertisements violated the Truth in Lending Act (TILA) and Regulation Z by failing to disclose or to disclose clearly and conspicuously required terms. Specifically, respondent's advertisements prominently stated the amount of the finance charge and the number of payments or period of repayment for certain vehicles—all triggering terms under the TILA—but failed to disclose, or unclearly and inconspicuously disclosed at the bottom of the ad in much smaller type, the required information

## Analysis to Aid Public Comment

set forth by the TILA. Finally, the complaint alleges that respondent's leasing advertisements violated the Consumer Leasing Act (CLA) and Regulation M by failing to disclose or to disclose clearly and conspicuously required terms. Specifically, respondent's advertisements prominently stated the monthly payment amounts for certain vehicles—a triggering term under the CLA—but failed to disclose, or unclearly and inconspicuously disclosed at the bottom of the ad in much smaller type, the required information set forth by the CLA.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future.

- Definition B. of the order defines “clearly and conspicuously” to mean that required disclosures must be difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers, including that disclosures must appear in the same language as the representation requiring the disclosure is made (*e.g.* Spanish advertisement → Spanish disclosure).
- Part I.A.1. provides that respondent shall not misrepresent the cost of financing the purchase of an automobile, including by misrepresenting the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment.
- Part I.A.2. provides that respondent shall not misrepresent the cost of leasing an automobile, including by misrepresenting the total amount due at lease inception, the down payment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments.
- Part I.B. provides that respondent shall not misrepresent any qualification or restriction on the consumer's ability to obtain the represented financing or leasing terms, including any qualification or restriction based on the consumer's credit score or credit history.

## Analysis to Aid Public Comment

- Part I.C. provides that respondent shall not represent any financing or leasing term, unless the representation is non-misleading, and the advertisement clearly and conspicuously discloses all qualifications or restrictions on the consumer's ability to obtain the represented financing or leasing term, including any qualifications or restrictions that respondent's lender, lessor, or any other entity may impose based on a consumer's credit score or credit history. Additionally, if a majority of consumers likely will not be able to meet a credit score qualification or restriction stated in the advertisement, respondent must clearly and conspicuously disclose that fact.
- Part I.D. provides that respondent shall not misrepresent the number of vehicles, makes, or models that are available for purchase or lease.
- Part I.E. provides that respondent shall not misrepresent any other material fact about the price, sale, financing, or leasing of any automobile.
- Part II of the order addresses the TILA and Regulation Z allegations by prohibiting credit sale advertisements that:
  - A. State the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:
    - The amount or percentage of the down payment;
    - The terms of repayment; and
    - The annual percentage rate, using the term "annual percentage rate" or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed; or

## Analysis to Aid Public Comment

- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term; or
  - C. Fail to comply in any respect with Regulation Z, 12 C.F.R. Part 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667f.
- Part III of the order addresses the CLA and Regulation M allegations by prohibiting lease advertisements that:
    - A. State the amount of any payment or that any or no initial payment is required at lease inception, without disclosing clearly and conspicuously the following terms:
      - that the transaction advertised is a lease;
      - the total amount due prior to or at consummation or by delivery, if delivery occurs after consummation;
      - the number, amounts, and timing of scheduled payments;
      - whether or not a security deposit is required; and
      - that an extra charge may be imposed at the end of the lease term where the consumer’s liability (if any) is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.
    - B. Fail to comply in any respect with Regulation M, 12 C.F.R. Part 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.
  - Part IV requires respondent to provide copies of the order to certain personnel and to obtain acknowledgments of receipt.

Analysis to Aid Public Comment

- Part V requires respondent to file compliance reports with the Commission, including notices regarding changes in corporate structure that might affect compliance obligations under the order. Part VI requires respondent to create certain records for 15 years and to retain them for 5 years. Part VII provides the Commission certain mechanisms to monitor respondent's compliance with the order. Part VIII is a provision that "sunsets" the order after 20 years, with certain exceptions.

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

Complaint

IN THE MATTER OF

**ALIMENTATION COUCHE-TARD INC.  
AND  
CROSSAMERICA PARTNERS LP**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-4631; File No. 171 0207  
Complaint, November 21, 2017 – Decision, January 5, 2018*

This consent order addresses the \$130 million acquisition by Alimentation Couche-Tard Inc. (“ACT”) and CrossAmerica Partners LP (“CAPL”) of certain assets of Jet-Pep, 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 for the retail sale of gasoline and diesel in three local markets in Alabama. The consent order requires ACT and CAPL must divest to a Commission-approved buyer (or buyers) certain Jet-Pep retail fuel outlets and related assets in three local markets in Alabama.

*Participants*

For the *Commission*: Ashley Masters, Christina Shackelford, and Kara Todd.

For the *Respondents*: Brian Byrne and David I. Gelfand, Cleary Gottlieb Steen & Hamilton LLP.

**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Alimentation Couche-Tard Inc. and CrossAmerica Partners LP have entered into agreements to acquire certain assets of Jet-Pep, Inc., that such acquisitions, 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

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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. Circle K Stores, Inc. (“Circle K”) is a wholly owned subsidiary of ACT.

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.

**CAPL**

4. Respondent CrossAmerica Partners LP (“CAPL”) is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 515 Hamilton Street, Suite 200 Allentown, Pennsylvania, 18101. Circle K indirectly owns all of the membership interests in CrossAmerica GP LLC, CAPL’s general partner.

5. Respondent CAPL 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 CAPL 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

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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 two Asset Purchase Agreements dated August 4, 2017, Circle K proposes to acquire 18 retail fuel outlets in addition to a fuel terminal and associated trucking assets. Pursuant to a third Asset Purchase Agreement dated August 4, 2017, CAPL proposes to acquire 102 Jet-Pep retail fuel outlets. All three Asset Purchase Agreements are collectively referred to as the “Acquisition.” As a result of the Acquisition, ACT will acquire ownership or operation of all Jet-Pep retail fuel outlets.

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

**III. THE RELEVANT MARKETS**

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 three local markets within: Brewton, Alabama; Monroeville, Alabama; and Valley, Alabama.

11. The relevant geographic markets for retail gasoline and retail diesel are highly localized, ranging up to a few miles, depending on local circumstances. Each relevant market is distinct and fact-dependent, reflecting 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.



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**IV. MARKET STRUCTURE**

12. The Acquisition, if consummated, would result in a highly concentrated market in each of the three local markets. The Acquisition, if consummated, would reduce the number of competitively constraining independent market participants to no more than three in each local market.

**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. Barriers to entry 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.

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16. The Asset Purchase Agreements entered into by Jet-Pep and Respondents ACT and CAPL constitute 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-first day of November, 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 Respondents Alimentation Couche-Tard Inc., through its wholly-owned subsidiary, Circle K Stores Inc., and CrossAmerica Partners LP (collectively “Respondents”) of certain assets of Jet-Pep, Inc., 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

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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 Alimentation Couche-Tard Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 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 CrossAmerica Partners LP is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 515 Hamilton Street, Suite 200 Allentown, Pennsylvania 18101.
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, which are

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incorporated herein by reference and made a part hereof, 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 ACT (including Circle K Stores Inc. and CrossAmerica Partners LP), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “CAPL” means CrossAmerica Partners LP, its partners, directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by CAPL, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “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 and the general partner of CAPL.
- D. “Jet-Pep” means Jet-Pep, Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 9841 Highway 278, Holly Pond, Alabama 35083.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquirer” means any Person that acquires any of the Retail Fuel Assets pursuant to the Decision and Order.
- G. “Acquisition” means the proposed acquisitions described in (i) the Asset Purchase Agreement

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between CrossAmerica Partners LP, Jet-Pep, Inc. and other signatories thereto, dated August 4, 2017; (ii) the Asset Purchase Agreement between Circle K Stores Inc., Jet-Pep, Inc., and other signatories thereto, dated August 4, 2017; and (iii) the Terminal Purchase Agreement between Circle K Stores, Inc., Bama Terminaling and Trading, LLC, Clean Fuels, Inc., C.S.E. Properties, LLC, and Robert G. Norris, dated August 4, 2017.

- H. “Acquisition Date” means the date the Acquisition is consummated.
  
- I. “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 Retail Fuel Assets, 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

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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 an Acquirer to operate the Retail Fuel Outlet Business(es) in a manner consistent with the purposes of the Decision and Order.

- J. “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 Retail Fuel Assets or the conduct of the Retail Fuel Outlet Business(es). 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 Retail Fuel Assets 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 the Orders; (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) the disclosure of which is consented to by an Acquirer; (e) is necessary to be exchanged in the course of consummating the Acquisition or transactions pursuant to the Divestiture Agreement; (f) is disclosed in complying with the Orders; (g) 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.

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- K. “Consent” means any approval, consent, ratification, waiver, or other authorization.
- L. “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.
- M. “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.
- N. “Divestiture Agreement” means any agreement between Respondents (or between a Divestiture Trustee) and an Acquirer to divest the Retail Fuel Assets and any ancillary agreements relating to the divestiture of the relevant assets (such as for the provision of Transition Services) that has been approved by the Commission pursuant to the Decision and Order, including all amendments, exhibits, agreements, and schedules thereto.
- O. “Divestiture Date” means the date on which Respondents (or the Divestiture Trustee) close on a transaction to divest the Retail Fuel Assets.
- P. “Divestiture Trustee” means the Person appointed by the Commission pursuant to Paragraph VI. of the Decision and Order.

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- Q. “Fuel Products” means refined petroleum gasoline and diesel products.
- R. “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.
- S. “Governmental Permit(s)” means all Consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any Governmental Entity(ies) necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to an Acquirer and for such Acquirer to operate any aspect of a Retail Fuel Outlet Business.
- T. “Inventories” means all inventories of every kind and nature for retail sale associated with the Retail Fuel Assets, including: (1) all Fuel Products, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public; 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.
- U. “Monitor” means any Person appointed by the Commission to serve as a Monitor pursuant to Paragraph IV. of this Order to Maintain Assets.
- V. “Orders” means the Decision and Order in this matter and this Order to Maintain Assets.
- W. “Person” means any individual, or any partnership, joint venture, firm, corporation, limited liability company, limited liability partnership, joint stock company, association, trust, unincorporated organization, or other business entity.



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- X. “Products” means any Fuel Products or merchandise products relating to the Retail Fuel Outlet Business(es).
- Y. “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 name “Circle K” and “Jet-Pep.”
- Z. “Retail Fuel Assets” means the assets defined in Paragraph I.CC. of the Decision and Order.
- AA. “Retail Fuel Employee” means any full-time, part-time, or contract individual employed by Jet-Pep as of August 4, 2017, or by Respondents at the time of the divestiture required by Paragraph II of this Order and whose job responsibilities primarily relate or related to the Retail Fuel Outlet Business.
- BB. “Retail Fuel Outlet Business” means all business activities conducted by Jet-Pep prior to the Acquisition Date at or relating to each of Jet-Pep’s locations identified in Appendix A of this Order, including but not limited to: (1) the retail sale, promotion, marketing, and provision of Fuel Products, 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 location identified in Appendix A of this Order.

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- CC. “Transition Services” means technical services, personnel, assistance, training, the supply of Products, and other logistical, administrative, and other transitional support as required by an Acquirer and approved by the Commission to facilitate the transfer of the Retail Fuel Assets from the Respondents to an 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.
- DD. “Transition Services Agreement(s)” means any agreements that receive the prior approval of the Commission between Respondents and an 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 Retail Fuel Assets to the Acquirer and to operate the Retail Fuel Outlet Businesses in a manner consistent with the purposes of the Orders.

**II.**

**IT IS FURTHER ORDERED** that from the date Respondents execute the Consent Agreement until the Divestiture Date:

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Retail Fuel Assets, and shall not cause the wasting or deterioration of any of the Retail Fuel Assets. Respondents shall not cause the Retail Fuel Assets to be operated in a manner inconsistent with applicable laws, nor shall

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they sell, transfer, encumber, or otherwise impair the viability, marketability, or competitiveness of the Retail Fuel Assets.

- B. Respondents shall conduct or cause the business of the Retail Fuel Assets 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 Retail Fuel Assets in the regular and ordinary course of business, in accordance with past practice.
- C. Respondents shall not terminate the operation of any of the Retail Fuel Assets, and shall continue to maintain the Inventory of each of the Retail Fuel Assets 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 Retail Fuel Assets, 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 Retail Fuel Assets. Among other actions as may be necessary to comply with these obligations, Respondents shall, without limitation:
  - 1. Maintain all operations at each of the Retail Fuel Assets 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 Retail Fuel Assets; when vacancies occur, replace the employees in the regular and ordinary course of business, in accordance with past practice; and not

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transfer any employees from any of the Retail Fuel Assets;

3. Provide each employee of the Retail Fuel Assets 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 Retail Fuel Assets;
4. Not transfer Inventory from any Retail Fuel Asset, 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 Retail Fuel Assets, in each case in a manner in accordance with past practice;
6. Maintain the Books and Records of each of the Retail Fuel Assets;
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 Retail Fuel Asset to another location, or that indicates a Retail Fuel Asset will close;
8. Not conduct any “going out of business,” “close-out,” “liquidation,” or similar sales or promotions at or relating to any Retail Fuel Asset;
9. Continue existing pricing or advertising practices, including marketing programs and policies, merchandising programs and policies, and price zones for or applicable to any of the Retail Fuel Assets, other than changes or modifications in the regular and ordinary course of business, in

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accordance with past practices and business strategy;

10. Provide each of the Retail Fuel Assets 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 Retail Fuel Assets;
11. Continue, at least at their scheduled pace, any additional expenditures for each of the Retail Fuel Assets 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 Retail Fuel Assets;
13. Make available for use by each of the Retail Fuel Assets 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 Retail Fuel Assets;
14. Provide support services to each of the Retail Fuel Assets at least at the level as were being provided to such Retail Fuel Assets 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 Retail Fuel Asset;

*Provided, however,* that it shall not be a violation of Paragraph II.D. if Respondents take actions that have

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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 Retail Fuel Assets and consistent with the purposes of the Orders.

- E. The purpose of this Order to Maintain Assets is to: (1) maintain and preserve the Retail Fuel Assets 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 Retail Fuel Assets,

- 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:
  2. Comply with the requirements of the Orders;
  3. Perform their obligations to the Acquirer under the terms of any Divestiture Agreement, including providing Transition Services pursuant to a Transition Services Agreement; or

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4. Comply with financial reporting requirements, defend legal claims, or as otherwise required by applicable law; and
  5. 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).
- 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 Divestiture 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

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agreement in writing to maintain the confidentiality of such Confidential Business Information; and

2. Monitor the implementation and enforce the terms of 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 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, the Commission may appoint Anthony P. Bartys to serve as Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Divestiture Agreement, including any Transition Services Agreement approved by the Commission.
- B. Respondent shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:
  1. The Monitor shall have the power and authority to monitor Respondents' compliance with the



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obligations set forth in the Orders, and shall act in a fiduciary capacity for the benefit of the Commission;

2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with the Orders or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to the Orders;
3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct; and
5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the

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Monitor from providing any information to the Commission.

- C. The Monitor shall report in writing to the Commission (i) every thirty (30) days after this Order to Maintain Assets is issued and (ii) at any other time as requested by the staff of the Commission, concerning Respondent's compliance with this Order to Maintain Assets and the Decision and Order.
- D. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- E. The Monitor's power and duties shall terminate when this Order to Maintain Assets terminates at which time the Monitor's power and duties shall continue pursuant to the Decision and Order, or at such other time as directed by the Commission.
- F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:
  - 1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within five (5) days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
  - 2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Monitor,

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enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order to Maintain Assets on the same terms and conditions as provided in Paragraph V.

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

**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:

## Order to Maintain Assets

- A. Any proposed dissolution of the Respondents;
- B. Any proposed acquisition, merger, or consolidation of the 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 Orders.

**VII.**

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

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order to Maintain Assets, which copying services shall be provided by the Respondents at its expense; and
- B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

**VIII.**

**IT IS FURTHER ORDERED** that this Order to Maintain Assets shall terminate:

- 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;

## Order to Maintain Assets

- B. The day after Respondents complete the divestiture required by Paragraph II.A. of the Decision and Order; *provided, however,* that if at the time such divestiture has been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate the day after the Decision and Order becomes final; or
- C. The day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

**Appendix A**  
**Retail Fuel and Convenience Store Properties To Be Divested**

State	Area	Property Name & Address
Alabama	Brewton	Jet-Pep 13 13288 Highway 113 Brewton, Alabama 36426
Alabama	Monroeville	Jet-Pep 65 3781 S. Alabama Avenue Monroeville, Alabama 36460
Alabama	Valley	Jet-Pep 63 608 Fob James Drive Valley, Alabama 36854

Decision and Order

**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., through its wholly-owned subsidiary, Circle K Stores Inc., and Respondent CrossAmerica Partners LP (collectively “Respondents”) of certain assets of Jet-Pep, Inc. 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 and served 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 enters the following Decision and Order (“Order”):

## Decision and Order

1. Respondent Alimentation Couche-Tard Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 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 CrossAmerica Partners LP is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 515 Hamilton Street, Suite 200 Allentown, Pennsylvania 18101.
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 HEREBY 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 ACT (including Circle K Stores Inc. and CrossAmerica Partners LP), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “CAPL” means CrossAmerica Partners LP, its partners, directors, officers, employees, agents,

## Decision and Order

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

- C. “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 and controls the general partner of CAPL.
- D. “Jet-Pep” means Jet-Pep, Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 9841 Highway 278, Holly Pond, Alabama 35083.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquirer” means any Person that acquires any of the Retail Fuel Assets pursuant to this Order.
- G. “Acquisition” means the proposed acquisitions described in (i) the Asset Purchase Agreement between CrossAmerica Partners LP, Jet-Pep, Inc. and other signatories thereto, dated August 4, 2017; (ii) the Asset Purchase Agreement between Circle K Stores Inc., Jet-Pep, Inc., and other signatories thereto, dated August 4, 2017; and (iii) the Terminal Purchase Agreement between Circle K Stores, Inc., Bama Terminating and Trading, LLC, Clean Fuels, Inc., C.S.E. Properties, LLC, and Robert G. Norris, dated August 4, 2017.
- H. “Acquisition Date” means the date the Acquisition is consummated.



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- I. “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 Retail Fuel Assets, 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 an Acquirer to operate the Retail Fuel Outlet Business(es) in a manner consistent with the purposes of this Order.
- J. “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

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with the Retail Fuel Assets or the conduct of the Retail Fuel Outlet Business(es). 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 Retail Fuel Assets 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) the disclosure of which is consented to by an Acquirer; (e) is necessary to be exchanged in the course of consummating the Acquisition or transactions pursuant to the Divestiture Agreement; (f) is disclosed in complying with the Order; (g) 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.
- K. “Consent” means any approval, consent, ratification, waiver, or other authorization.
- L. “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.
- M. “Cost” means costs not to exceed the actual cost of labor, goods and material, travel, third party vendors,

## Decision and Order

and other expenditures that are directly incurred by Respondents to provide and fulfill any Transition Services; *provided, however*, that with respect to the transitional supply of Fuel Products, Fuel Products Cost shall be calculated net of any rebates, RIN sharing, or other discounts or allowances and shall not include any mark-up, profit, overhead, minimum volume penalties, or other upward adjustments by Respondents. With respect to the transitional supply of Fuel Products, Respondents shall charge, separately for gasoline and diesel, no more than the daily OPIS reported Birmingham, Alabama, terminal “Low Rack” price plus a common carrier fee to transport the fuel from the Jet-Pep terminal at 2529 and 2605 28th Street SW and 2430 Nabors Road, Birmingham, Alabama 35211 to the respective Retail Fuel Outlet Business.

- N. “Divestiture Agreement” means any agreement between Respondents (or between a Divestiture Trustee) and an Acquirer to divest the Retail Fuel Assets and any ancillary agreements relating to the divestiture of the relevant assets (such as for the provision of Transition Services) that has been approved by the Commission pursuant to this Order, including all amendments, exhibits, agreements, and schedules thereto.
- O. “Divestiture Date” means the date on which Respondents (or the Divestiture Trustee) close on a transaction to divest the Retail Fuel Assets.
- P. “Divestiture Trustee” means the Person appointed by the Commission pursuant to Paragraph VI. of this Order.
- Q. “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 Outlet Business associated with the Retail Fuel Assets at each of the locations specified in Appendix A to this Order , including, but

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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 the Retail Fuel Outlet Business associated with the Retail Fuel Assets at each of the locations specified in Appendix A to this Order, 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.

- R. “Fuel Products” means refined petroleum gasoline and diesel products.
- S. “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.
- T. “Governmental Permit(s)” means all Consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any Governmental Entity(ies) necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to an Acquirer and for such Acquirer to operate any aspect of a Retail Fuel Outlet Business.

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- U. “Inventories” means all inventories of every kind and nature for retail sale associated with the Retail Fuel Assets, including: (1) all Fuel Products, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public; 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.
- V. “Monitor” means any Person appointed by the Commission to serve as a Monitor pursuant to Paragraph V. of this Order or Paragraph IV. of the Order to Maintain Assets.
- W. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.
- X. “Person” means any individual, or any partnership, joint venture, firm, corporation, limited liability company, limited liability partnership, joint stock company, association, trust, unincorporated organization, or other business entity.
- Y. “Prior Notice Outlet” means any existing retail fuel facility (including any successors) identified in Non-Public Appendix B.
- Z. “Products” means any Fuel Products or merchandise products relating to the Retail Fuel Outlet Business(es).
- AA. “Proposed Acquirer” means any proposed acquirer of any of the Retail Fuel Assets that Respondents or the Divestiture Trustee intend to submit or have submitted to the Commission for its approval under this Order.
- BB. “Respondents’ Brands” means all of Respondents’ trademarks, trade dress, logos, service marks, trade

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names, brand names, and all associated intellectual property rights, including rights to the name “Circle K,” “Kangaroo Express,” and “Jet-Pep.”

- CC. “Retail Fuel Assets” means all of Respondents’ right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, relating to, used in, or reserved for use in, the Retail Fuel Outlet Business, 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, including any Equipment removed from any location of the Retail Fuel Outlet Business since the date of the announcement of the Acquisition and not replaced;
  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 therefor or renewals thereof, to the extent transferable;
  6. All intangible rights and property, including intellectual property, owned or licensed (as licensor or licensee) by Respondents (to the extent

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transferable or licensable), going concern value, goodwill, and telephone and telecopy listings; and

7. Books and Records; *provided, however*, that in cases in which Books and Records included in the Retail Fuel Assets contain information: (a) that relates both to the Retail Fuel Assets 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 Retail Fuel Assets, 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;

*Provided, however*, that the Retail Fuel Assets need not include the Retained Assets.

- DD. “Retail Fuel Employee” means any full-time, part-time, or contract individual employed by Jet-Pep as of August 4, 2017, or by Respondents at the time of the divestiture required by Paragraph II of this Order and whose job responsibilities primarily relate or related to the Retail Fuel Outlet Business.
- EE. “Retail Fuel Location” means: (1) any facility engaged in the retail sale, promotion, marketing, and provision of Fuel Products and other fuels, automotive services, and related services; and (2) any property site where construction of a retail facility to be engaged in the retail sale, promotion, marketing, and provision of Fuel Products and other fuels, automotive services, and related services is planned or underway.

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- FF. “Retail Fuel Outlet Business” means all business activities conducted by Jet-Pep prior to the Acquisition Date at or relating to each of Jet-Pep’s locations identified in Appendix A of this Order, including but not limited to: (1) the retail sale, promotion, marketing, and provision of Fuel Products, 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 location identified in Appendix A of this Order.
- GG. “Retained Assets” means:
1. Respondents’ Brands, except with respect to any purchased Inventories (including private label inventory);
  2. Tangible assets that are not located at any site of the Retail Fuel Outlet Business (unless included in the Retail Fuel Assets pursuant to Paragraph I.CC.2.); and
  3. Intellectual property; *provided, however*, that the Retained Assets shall not include software that cannot readily be purchased or licensed from sources other than Respondents or that has been materially modified (other than through user preference settings).
- HH. “Third Party(ies)” means any Person other than the Respondents or an Acquirer.



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- II. “Transition Services” means technical services, personnel, assistance, training, the supply of Products, and other logistical, administrative, and other transitional support as required by an Acquirer and approved by the Commission to facilitate the transfer of the Retail Fuel Assets from the Respondents to an 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.
- JJ. “Transition Services Agreement(s)” means any agreements that receive the prior approval of the Commission between Respondents and an 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 Retail Fuel Assets to the Acquirer and to operate the Retail Fuel Outlet Businesses in a manner consistent with the purposes of this Order.

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

- A. No later than 120 days from the date this Order is issued, Respondents shall divest the Retail Fuel Assets, absolutely and in good faith, at no minimum price, as an on-going business, to an Acquirer or Acquirers that receive the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

## Decision and Order

- B. No later than the Divestiture Date of the Retail Fuel Assets, Respondents shall obtain, at their sole expense, all Consents from Third Parties and all Governmental Permits that are necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to the Acquirer and for the Acquirer to operate any aspect of a Retail Fuel Outlet Business;

*Provided, however, that:*

1. Respondents may satisfy the requirement to obtain all Consents from Third Party(ies) by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant Third Party(ies) that are acceptable to the Commission, or has otherwise obtained all necessary consents and waivers; and
2. With respect to any Governmental Permits relating to the Retail Fuel Assets that are not transferable, allow the Acquirer to operate the Retail Fuel Assets 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.

- C. Respondents shall:

1. At the option of the Acquirer, and pursuant to a Transition Services Agreement and in a manner that receives the prior approval of the Commission, provide Transition Services to the Acquirer for a period of twelve (12) months from the Divestiture Date;
2. Provide the Transition Services at a price not to exceed Cost and of a quality and quantity sufficient for the Acquirer to operate the Retail Fuel Outlet Business(es) in substantially the same manner as

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Jet-Pep prior to the Acquisition Date (including the ability to develop new services and products and increase sales of current services and products);

*Provided, however,* that Respondents shall give priority to the Acquirer's requirements for Transition Services over Respondents' own requirements and take all actions that are reasonably necessary to ensure uninterrupted Transition Services;

*Provided further* that (i) Acquirer may terminate any Transition Services at any time upon commercially reasonable notice to the Respondents and without cost or penalty to the Acquirer and (ii) at Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of any Transition Services needed to achieve the purposes of this Order, so long as the total duration of any Transition Services does not exceed eighteen (18) months (including the initial twelve (12) month term); and

*Provided further* that Respondents shall not seek to limit the damages (such as indirect, special, and consequential damages) that Acquirer would be entitled to receive in the event of Respondents' breach of any agreement relating to Transition Services.

- D. 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 Retail Fuel Assets 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).
- E. The purpose of the divestiture of the Retail Fuel Assets is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of

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competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. Respondents shall cooperate and assist with an Acquirer's due diligence investigation of the Retail Fuel Assets and Retail Fuel Outlet Business, including but not limited to access to any and all personnel, properties, contracts, authorizations, documents, and information customarily provided as part of a due diligence process.
- B. Respondents shall:
  - 1. No later than twenty (20) days before the Divestiture Date (i) identify each Retail Fuel Employee, (ii) allow a Proposed Acquirer to inspect the personnel files and other documentation of each Retail Fuel Employee, to the extent permissible under applicable laws; and (iii) allow a Proposed Acquirer an opportunity to meet with any Retail Fuel Employee outside the presence or hearing of Respondents, and to make an offer of employment;
  - 2. Remove any contractual impediments that may deter any Retail Fuel Employee from accepting employment with an Acquirer, including, any non-compete or confidentiality provision of an employment contract;
  - 3. Vest all current and accrued benefits under Respondents' retirement plans as of the date of transition of employment with an Acquirer for any Retail Fuel Employee who accepts an offer of employment from an Acquirer; and provide each Retail Fuel Employee with a financial incentive as

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necessary to accept an offer of employment with an Acquirer; and

4. Not offer any incentive to any Retail Fuel Employee to decline employment with an Acquirer or otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Retail Fuel Employee by an Acquirer.
- C. For a period of one (1) year after Divestiture Date, Respondents shall not solicit or induce any Retail Fuel Employee who has accepted an offer of employment with an Acquirer to terminate such employment; *provided, however*, that Respondents may (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the Retail Fuel Employees; (ii) hire Retail Fuel Employees if employment has been terminated by an Acquirer or who apply for employment with Respondents, so long as such Retail Fuel Employees were not solicited by Respondents in violation of this paragraph; or (iii) hire any Retail Fuel Employees if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that Retail Fuel Employee, or where such an offer has been made and the Retail Fuel Employee has declined the offer.

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

- A. Respondents shall (i) not disclose (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Business Information received or maintained by Respondents relating to the Retail Fuel Assets, Retail Fuel Outlet Business, and the post-divestiture Retail Fuel Outlet Business; *provided, however*, that Respondents may disclose or use such Confidential Business Information in the course of:

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1. Performing their obligations or as permitted under this Order, the Order to Maintain Assets, or the Divestiture Agreement; or
  2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Retail Fuel Assets, Retail Fuel Outlet Business or the post-divestiture Retail Fuel Outlet Business, or as required by law.
- B. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A. of this Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.
- C. Respondents shall enforce the terms of this Paragraph IV. as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph IV., including implementation of access and data controls, training of employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

## V.

**IT IS FURTHER ORDERED** that:

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint Anthony P. Bartys to serve as Monitor to assure that Respondents expeditiously comply with all of their obligations and

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perform all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Divestiture Agreement, including any Transition Services Agreement approved by the Commission.

- B. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:
1. The Monitor shall have the power and authority to monitor Respondents' compliance with the obligations set forth in this Order and the Order to Maintain Assets, and shall act in a fiduciary capacity for the benefit of the Commission;
  2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with this Order and the Order to Maintain Assets or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order and the Order to Maintain Assets;
  3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants

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as are reasonably necessary to carry out the Monitor's duties and responsibilities;

4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct; and
  5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.
- C. The Monitor shall report in writing to the Commission (i) every thirty (30) days after this Order is issued, (ii) no later than ten (10) days after Respondents have completed their obligations as required by Paragraph II. of this Order ("Final Report"), and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order and/or the Order to Maintain Assets.
- D. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- E. The Monitor's power and duties shall terminate ten (10) business days after the Monitor has completed his



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final report pursuant to Paragraph V.C.(ii) of this Order, or at such other time as directed by the Commission.

- F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:
1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within five (5) days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
  2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order on the same terms and conditions as provided in this Paragraph V.
- G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

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

- A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the Retail Fuel Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor.
- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.
- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be

## Decision and Order

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

- D. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Retail Fuel Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order;
  2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, 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;

## Decision and Order

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph VI. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;
4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however,* that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval;

## Decision and Order

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph VI.E.6., the term "Divestiture Trustee" shall include all Persons

## Decision and Order

retained by the Divestiture Trustee pursuant to Paragraph VI.E.5. of this Order;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order;
  8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and
  9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- F. The Commission may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.
- H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

## Decision and Order

**VII.****IT IS FURTHERED 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 Prior Notice Outlet.
- B. With respect to the notification:
1. The prior notification required by this Paragraph VII. 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.

## Decision and Order

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

**VIII.****IT IS FURTHERED ORDERED** that:

- A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and Respondents shall comply with all terms of the agreement. Any failure by Respondents to comply with the terms of a Divestiture Agreement shall constitute a violation of this Order. The Divestiture Agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order. In the event of a conflict between the terms of this Order and a Divestiture Agreement, or any ambiguity in the language used in a Divestiture Agreement, the terms of this Order shall govern to resolve such conflict or ambiguity.
- B. Respondents shall not modify, replace, or extend the terms of the Divestiture Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

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

- A. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which its intends to comply, is complying, and has complied with this Order:



## Decision and Order

1. Thirty (30) days from the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraph II. of this Order; and
  2. No later than one (1) year after the date this Order is issued and annually thereafter until this Order terminates, and at such other times as the Commission or its staff may request.
- B. With respect to the divestiture required by Paragraph II.A. of this Order, Respondents shall include in their compliance reports (i) the status of the divestiture and transfer of any of the Retail Fuel Assets; (ii) a description of all substantive contacts with a proposed acquirer; and (iii) as applicable, a statement that the divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondents have completed such divestiture and the date the divestiture was accomplished.

**X.**

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

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

**XI.**

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and

## Decision and Order

upon five (5) days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and
- B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

**XII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on January 5, 2028.

By the Commission.

## Decision and Order

**Appendix A****Retail Fuel and Convenience Store Properties To Be Divested**

<b>State</b>	<b>Area</b>	<b>Property Name &amp; Address</b>
Alabama	Brewton	Jet-Pep 13 13288 Highway 113 Brewton, Alabama 36426
Alabama	Monroeville	Jet-Pep 65 3781 S. Alabama Avenue Monroeville, Alabama 36460
Alabama	Valley	Jet-Pep 63 608 Fob James Drive Valley, Alabama 36854

**Non-Public Appendix B****Prior Notice Outlets**

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

## Analysis to Aid Public Comment

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

The Federal Trade Commission (“Commission”) has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Alimentation Couche-Tard Inc. (“ACT”) and CrossAmerica Partners LP (“CAPL”) (collectively, the “Respondents”). The Consent Agreement is designed to remedy the anticompetitive effects that likely would result from the proposed acquisition of Jet-Pep, Inc. (“Jet-Pep”) assets.

Under the terms of the proposed Consent Agreement, ACT and CAPL must divest to a Commission-approved buyer (or buyers) certain Jet-Pep retail fuel outlets and related assets in three local markets in Alabama. ACT must complete the divestiture no later than 120 days after the closing of ACT’s acquisition of Jet-Pep. 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 until a 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 is the parent of wholly owned subsidiary, Circle K Stores Inc. (“Circle K”). ACT’s current U.S. network consists of approximately 7,200 stores located in 42 states, making ACT the

### Analysis to Aid Public Comment

second-largest retail fuel chain in the country. ACT convenience store locations operate primarily under the Circle K and Kangaroo Express banners, while its retail fuel outlets provide a variety of company unbranded and third-party branded fuels. ACT owns 158 retail fuel outlets in Alabama.

Respondent CAPL, a publicly traded master limited partnership headquartered in Allentown, Pennsylvania, markets fuel at wholesale, and owns and operates convenience stores and retail fuel outlets. ACT, via Circle K, acquired CST Brands, Inc. (“CST”) in June 2017, which gave Circle K operational control and management of CAPL. CAPL supplies fuel to nearly 1,200 sites across 29 states, but it does not operate in Alabama.

### **III. The Proposed Acquisition**

Through three separate agreements (collectively “the Acquisition”), ACT will acquire ownership or operation of 120 Jet-Pep retail fuel outlets with attached convenience stores. Circle K intends to acquire 18 retail fuel outlets and Jet-Pep’s terminal and related assets. CAPL will acquire the remaining 102 Jet-Pep retail fuel outlets. The Acquisition is not reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (“HSR Act”). The Acquisition would extend ACT’s position as one of the largest operators of retail fuel outlets in the United States.

The proposed Complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition for the retail sale of gasoline and diesel in three local markets in Alabama. The proposed Complaint further alleges that Acquisition agreements constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

### **IV. The Complaint**

As alleged in the proposed Complaint, the relevant product markets in which to analyze the Acquisition are the retail sale of gasoline and the retail sale of diesel. The retail sale of gasoline

## Analysis to Aid Public Comment

and the retail sale of diesel constitute separate relevant markets because the two are not interchangeable. 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 proposed Complaint alleges the relevant geographic markets in which to assess the competitive effects of the Acquisition are three local areas in Brewton, Monroeville, and Valley, Alabama. 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. Retail fuel markets are highly localized and can range in size up to a few miles.

According to the proposed Complaint, the Acquisition would reduce the number of independent market participants in each market to three or fewer. The Acquisition would thereby substantially lessen competition in these local markets by increasing the likelihood that ACT will unilaterally exercise market power and by increasing the likelihood of successful coordination among the remaining firms. Absent relief, the Acquisition would likely result in higher prices in each of the three local markets.

The proposed Complaint alleges that entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Barriers to entry 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 Consent Agreement**

The proposed Consent Agreement would remedy the Acquisition's likely anticompetitive effects by requiring ACT to divest certain Jet-Pep retail fuel outlets and related assets in three local markets.

## Analysis to Aid Public Comment

The proposed Consent Agreement requires that the divestiture occur no later than 120 days after ACT consummates the Acquisition. This Agreement protects the Commission's ability to obtain complete and effective relief in light of the non-reportable nature of the Acquisition and the small number of outlets to be divested. Further, based on Commission staff's investigation, the Commission believes that ACT can identify an acceptable buyer (or buyers) within 120 days.

The proposed Consent Agreement further requires ACT to maintain the economic viability, marketability, and competitiveness of each divestiture asset until the Commission approves a buyer (or buyers) and the divestiture is complete. For up to twelve months following the divestiture, ACT must make available transitional services, as needed, to assist the buyer of each divestiture asset.

In addition to requiring outlet divestitures, the proposed Consent Agreement also requires ACT to provide the Commission notice before acquiring designated outlets in the three local areas for ten years. The prior notice provision is necessary because acquisitions of the designated outlets likely raise competitive concerns and may fall below the HSR Act premerger notification thresholds.

The proposed Consent Agreement contains additional provisions designed to ensure the effectiveness of the proposed relief. For example, Respondents have agreed to an Order to Maintain Assets that will issue 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 Respondents' complete divestiture of the outlet. During this period, and until such time as the buyer (or buyers) no longer requires transitional assistance, the Order to 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.

*Analysis to Aid Public Comment*

The purpose of this analysis is to facilitate public comment on the proposed Consent agreement, and 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

**VICTORY MEDIA, INC.**  
**D/B/A**  
**G.I. JOBS AND MILITARY FRIENDLY**

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

*Docket No. C-4640; File No. 162 3210*  
*Complaint, January 11, 2018 – Decision, January 11, 2018*

This consent order addresses Victory Media, Inc.’s operation of the search tool School Matchmaker at gjobs.com to help service members find educational institutions in their fields of interest. The complaint alleges that the respondent made claims that its Matchmaker tool searched schools that met respondent’s “military friendly” criteria. The complaint further alleges that the respondent, in certain of its articles, emails, and social media posts, misrepresented that its endorsements were independent and not paid advertising, and failed to adequately disclose that the content recommended schools that paid the respondent specifically to be promoted therein. The consent order prohibits the respondent from making any misrepresentations regarding the scope of any search tool, including whether the tool only searches “military friendly” schools, material connections between it and any schools, and that paid commercial advertising is independent content.

*Participants*

For the *Commission: Stephanie Cox and Nikhil Singhvi.*

For the *Respondent: Spencer Elg, Ilunga Kalala, William MacLeod, and Sharon Schiavetti, Kelley Drye & Warren LLP.*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Victory Media, Inc., d/b/a Jobs and also d/b/a Military Friendly, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Victory Media, Inc. (“Victory Media”), also doing business as G.I. Jobs, also doing business as Military Friendly, is a Pennsylvania corporation with its principal place of

## Complaint

business at 420 Rouser Road, Suite 101, Moon Township, PA 15108.

2. Victory Media offers nationally recognized media brands, survey and ratings programs, reporting services and training.

3. Respondent creates and prepares advertising, marketing, and promotional content for educational institutions. Respondent disseminates this content to consumers through a variety of mediums, including the magazines *G.I. Jobs* (published monthly), the *Guide to Military Friendly Schools* (published annually), and *Military Spouse* (published monthly). According to Victory Media's website, "Since 2001, G.I. Jobs® has been the premier brand and resource in military recruitment, offering articles, tips and online tools to help military transitioners and veterans explore different employment, education and entrepreneurship opportunities. We give specific, 'how-to advice' on everything from choosing a college to writing a resume to interviewing to industry and career highlights."

4. These magazines typically contain articles on topics related to employment and education, as well as features on specific post-secondary schools and advertisements for educational institutions. Respondent places these magazines on military bases, in military hospitals, and in centers where the military's Transitional Assistance Programs ("TAP") are being held. TAP is a mandatory program that all service members who are separating from the military must attend. Respondent's monthly magazines have a combined print circulation of over 145,000.

5. Respondent also owns and operates several websites directed at military consumers, including [militaryfriendly.com](http://militaryfriendly.com), [militaryspouse.com](http://militaryspouse.com), and [gijobs.com](http://gijobs.com). As part of its education outreach, Respondent often posts articles, lists, and other information on educational topics and about educational institutions on these websites. Respondent also maintains active profiles on social media platforms, including Facebook, Twitter, LinkedIn, and YouTube, on which it posts information about educational topics and educational institutions.

### Complaint

6. Respondent has described itself as an advisor to military consumers. For example, on the G.I. Jobs Facebook page, <https://www.facebook.com/pg/GIJobsMagazine/about/>, Respondent describes itself as “the number one choice of service members for advice on career and education opportunities,” explaining that “new veterans look to us for advice and tools to help them find the right jobs, education, and vocational training during and after leaving the military.”

7. 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.

### **The Matchmaker Search Tool**

8. Respondent’s School Matchmaker tool (“Matchmaker”) has been a search function on Respondent’s [gijobs.com](http://gijobs.com) website that consumers could use to search for post-secondary schools based on name, location, or subject area of study.

9. Respondent has represented to military consumers that the Matchmaker searches through schools that are “military friendly” – a designation Respondent created based on publicly available data and a voluntary survey it sends to schools with questions related to the educational needs and interests of military students. For example, the following advertisement for the Matchmaker tool appeared in Respondent’s G.I. Jobs magazine, representing that the tool searches “military friendly” schools.

## Complaint

**MAXIMIZE YOUR  
GI BILL MONEY  
WITH THE  
#1  
COLLEGE TOOL  
FOR VETERANS**

It's a big decision ... and an important one. We understand. With so much to consider, where do you even begin your search for the perfect school? The answer is simple: with the **G.I. Jobs School Matchmaker!**

With a few simple clicks you can quickly search hundreds of Military Friendly® Schools that have the exact degree you're looking for, provide the most credit hours for your military service and give you the highest BAH!

It's never been easier to find the perfect school that meets your post-military needs, exceeds your expectations and makes your transition from service member to student that much easier.

**GI JOBS**  
SCHOOL MATCHMAKER

Visit the G.I. Jobs School Matchmaker today and take the guesswork out of finding the perfect school:

**GIJOBS.COM/SCHOOLS**

10. Similarly, Respondent has represented:

- “To help ease your stress, we publish an annual Military Friendly Schools list that’s augmented by the digital School Matchmaker tool at GIJobs.com.” (*G.I. Jobs*, February 2016)

## Complaint

- “School Matchmaker. Find the best Military Friendly Schools.” (*G.I. Jobs*, May 2016)
- “Check out our new School Matchmaker – tell us what you’re looking for in post- military education and we’ll match you with a Military Friendly School that exceeds your expectations.” ([www.gijobs.com](http://www.gijobs.com))
- “For a full list of military friendly schools, check out the G.I. Jobs School Matchmaker.” ([www.militaryspouse.com](http://www.militaryspouse.com))

11. Beginning in mid-2015, Respondent has included schools as possible search results for its Matchmaker tool only if the schools paid Respondent to be included, and regardless of whether Respondent has designated them as “military friendly” under Respondent’s criteria. Indeed, schools that Respondent’s internal documents state did not receive a high enough score on Respondent’s survey to be designated as “military friendly” have been included in the Matchmaker search if they paid to be included.

**Articles, Emails, And Posts Promoting Paying Schools**

12. Respondent has endorsed individual schools in certain articles, emails, and social media posts it creates discussing educational opportunities. Unbeknownst to consumers, in many cases, these schools have paid Respondent to be endorsed in those specific materials.

13. For example, Respondent has annually created and posted an article designated as “Hot Degrees” on its website [gijobs.com](http://gijobs.com). These articles list college degrees or certifications that Respondent asserts are in high demand. For each listed degree or certification, the articles then list, under the heading, “Find Your School,” schools that offer the degree or certification and that specifically paid to be promoted in such articles.

14. Respondent has created and included a list identifying specific schools Respondent recommended to be considered in an article on its website [gijobs.com](http://gijobs.com) in May 2016 entitled “2016 Hot

## Complaint

Jobs, Cool Degrees.” The following is a screenshot of a portion of one page of the article:



Unbeknownst to consumers, the schools listed in this article are only those that have paid Respondent to be featured in such articles.

15. Indeed, Respondent’s sales documents solicit schools to pay for advertising in the Hot Degrees articles. The following is a screenshot of one such document:

16. The document shows that Respondent specifically places “Advertisers” under the “Find Your School” heading at the end of these articles. The document also encourages schools to purchase this promotion by saying, “Make sure you don’t miss the opportunity to advertise your programs in this issue.”

Complaint

**Second Annual AMERICA'S HOT DEGREES FOR VETERANS**

**BE A PART OF OUR SECOND ANNUAL LIST OF AMERICA'S TOP DEGREES FOR VETERANS**

Derived from data submitted for the annual Military Friendly® Employment list, the May 2015 issue of G.I. Jobs® will showcase the second annual list of America's hottest degrees for veterans. Hot Degrees are areas of study that map to in-demand jobs for veterans. All of these educational paths can lead to one of the 2015 Top 20 Hot Jobs for Veterans®.

Our special May issue will include descriptions of our top fields of study, plus schools that offer degrees in these fields.

As a school seeking high-caliber students, you know the value student veterans can bring to your classrooms. Make sure you don't miss the opportunity to advertise your programs in this issue.

• **Deadline for space is Friday, 3/29**  
 • **Deadline for artwork is Tuesday, 3/24**  
 • **See advertising rates below**

When you book your ad, be sure to let us know for which fields of study you are recruiting.

**FIELDS OF STUDY**

• **TOP DEGREES ON WINGS:** Business Admin/Finance, Construction Management, Engineering, HealthCare, Information Technology, Operations & Logistics

• **FIRST TRACE TWO YEARS OR LESS:** Law, Corrections, Information Technology, Business

• **COL:** Health Care, Information Technology, Military Trainer

**G.I. JOBS' RATES**

SIZE	GUARANTEED POSITIONS	1 TO 2,426	3 TO 5,426	6 TO 11,426	12,426
Full Page 4c					
Two Third 4c					
Half Page 4c					
Third Page 4c					
Third Page 8c					

**Business Administration/Finance**

Getting a bachelor's degree in business administration or finance will give you many options for transferring your education. Depending on your major, you may be able to transfer into a variety of careers. These degrees can give you the skills you need to succeed in a variety of careers. You may also be able to transfer into a variety of careers. You may also be able to transfer into a variety of careers.

**SELECTED HOT JOBS:**

- Business Administration
- Financial Services Advisor
- Operations Manager
- Construction Project Manager
- Customer Service Manager/Rep
- Quality Assurance
- Junior Executive Trainee
- Account Manager

**TECHNICIAN**

Technician training is a technical career field that is in high demand. These are plenty of jobs that will be in demand in the future. You may have heard that you need to be a military veteran to get into this field. This is not true. You can get into this field if you are a military veteran or a civilian. You can also get into this field if you are a military veteran or a civilian.

**SELECTED HOT JOBS:**

- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician

17. Respondent also has created and distributed information to military consumers via regular emails (a service described internally as “Incoming Email”) and on its social media accounts, and Respondent has included in this information lists of specific schools Respondent endorsed. For example, the following is an excerpt of an email that Respondent sent to military and veteran consumers in August 2016:

**G.I. JOBS**  
YOUR BACK TO CIVILIAN SUCCESS

Hey, G.I. Jobs team here

After talking among ourselves we realized that, while you're looking for a job or looking to go back to school, you need up-to-date information on the best jobs and schools available.

We've got what you need to know, right here:

**Schools:**

- Borough of Manhattan Community College**
  - Borough of Manhattan Community College is a vibrant, pluralistic learning community, offering more than 40 academic programs, committed to the intellectual and personal growth of students. -> [Click Here](#)



## Complaint

Unbeknownst to consumers, all schools listed in this email have paid Respondent to be featured.

18. Since at least May 2016, all schools promoted in “Incoming Email” have paid to be included. Beginning in August 2016, the following disclaimer, which consumers could reach only by scrolling down through several screens, has appeared at the bottom of such emails in smaller, dense print:

## Disclaimer

Our email communication may contain advertising and sponsorships from time to time. Advertisers and sponsors are responsible for ensuring that material submitted for inclusion in our email is accurate and complies with applicable laws. We are not responsible for the illegality or any error, inaccuracy or problem in the advertiser's or sponsor's materials.

THE INCLUSION OF THIRD PARTY ADVERTISEMENTS DOES NOT CONSTITUTE AN ENDORSEMENT, GUARANTEE, WARRANTY, OR RECOMMENDATION BY VICTORY MEDIA, INC. BRANDS AND WE MAKE NO REPRESENTATIONS OR WARRANTIES ABOUT ANY INSTITUTION, EMPLOYER, PRODUCT OR SERVICE CONTAINED THEREIN.

**You should always perform proper due diligence when making important decisions.**

The disclaimer does not disclose clearly and prominently to consumers that the specific schools promoted in the email have, in fact, paid Respondent for that promotion.

19. Respondent's sales documents solicit schools to pay to be included as endorsed schools in these emails Respondent sends to consumers. The following is an excerpt of one such document:





## Complaint

**Count I Misrepresentations About Matchmaker**

20. Through the means described in Paragraphs 8 through 11, Respondent has represented, directly or indirectly, expressly or by implication, that the School Matchmaker tool searches schools Respondent has designated as “military friendly” to find the right educational choice for the consumer.

21. In fact, in numerous instances in which Respondent has made the representations set forth in Paragraph 20 of this Complaint, it included schools that the Respondent had not designated as military friendly, and only included schools that paid to be included. Therefore, the representations set forth in Paragraph 20 are false or misleading.

**Count II****Misrepresentations About Independence Of Endorsements**

22. Through the means described in Paragraphs 12 through 19, Respondent has represented, directly or indirectly, expressly or by implication, that specific endorsements in content it prepared promoting post-secondary schools were independent sources of information regarding those schools and not paid advertising.

23. In fact, in many instances, the specific endorsements described in Paragraph 22 were not independent sources of information and were paid advertising. Therefore, the representation set forth in Paragraph 22 of this complaint is false or misleading.

**Count III****Deceptive Failure To Disclose Material Connections**

24. Through the means described in Paragraphs 12 through 19, Respondent has represented, directly or indirectly, expressly or by implication, that it recommends specific post-secondary schools for consumers in specific articles, social media posts, and emails it prepared.

25. In many instances in which Respondent has made the representation set forth in Paragraph 24 of this Complaint,

## Decision and Order

Respondent has failed to disclose or disclose adequately that many of the specific post-secondary schools paid Respondent to be recommended. This fact would be material to consumers in evaluating Respondent's claims concerning these schools as well as in considering whether to consult additional sources of information about these and other schools.

26. Respondent's failure to disclose or disclose adequately the material information described in Paragraph 25, in light of the representation made in Paragraph 24, is a deceptive act or practice.

**THEREFORE**, the Federal Trade Commission this eleventh day of January, 2018, has issued this Complaint against Respondent.

By the Commission.

**DECISION**

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

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) a statement by Respondent that Respondent neither admits nor denies any of the allegations in the draft Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, they admit the

## Decision and Order

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 Victory Media, Inc. is a Pennsylvania corporation, also doing business as G.I. Jobs, also doing business as Military Friendly, with its principal office or place of business at 420 Rouser Road, Building 3, Suite 101, Moon Township, Pennsylvania 15108.
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. Unless otherwise specified, "Respondent" shall mean Victory Media, Inc., a corporation, also doing business as G.I. Jobs, and also doing business as Military Friendly, its successors and assigns (including but not limited to Neptune Holdings, Inc. and M2V, Inc.), and its officers, agents, representatives, and employees.

## Decision and Order

- 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 (“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.

## Decision and Order

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.
- C. “Close proximity” means that the disclosure is very near the triggering endorsement or representation. In an interactive electronic medium (such as a mobile app or other computer program), a visual disclosure that cannot be viewed at the same time and in the same viewable area as the triggering endorsement or representation, on the technology used by ordinary consumers, is not in close proximity. A disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering endorsement or representation. A disclosure made on a different printed page than the triggering endorsement or representation is not in close proximity.
- D. “Material Connection” means any relationship that materially affects the weight or credibility of any endorsement and that would not be reasonably expected by consumers.
- E. “Post-Secondary School[s]” means an academic, vocational, technical, home study, business, professional, or other school, college, or university, or other organization or person, offering educational credentials or offering instruction or educational services (primarily to persons who have completed or terminated their secondary education or who are beyond the age of compulsory school attendance) for attainment of educational, professional, or vocational objectives.

## Decision and Order

**Provisions****I. Prohibited Misleading Representations Regarding Paid Promotional Content**

**IT IS ORDERED** that Respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with paid promotional content regarding post-secondary schools, must not make, or assist others in making, any misrepresentation, expressly or by implication:

- A. Regarding the scope of the search conducted by any search tool, including, but not limited to whether any such tool searches only through schools Respondent or others have designated as military friendly;
- B. Regarding any material connection between Respondent and any school; or
- C. That paid commercial advertising is independent content.

**II. Required Disclosure Regarding Paid Endorsements**

**IT IS FURTHER ORDERED** that Respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with an endorsement of any post-secondary school that Respondent makes, or a third-party endorsement of any post-secondary school that Respondent prepares, must disclose, clearly and conspicuously, and in close proximity to that representation, all material connections between Respondent or the other endorser and the school. *Provided that*, for the purposes of this Provision, an “endorsement” means “any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the school, even if the views expressed by that party are identical to those of the school.”

## Decision and Order

**III. Acknowledgments of the Order**

**IT IS FURTHER ORDERED** that Respondent obtains acknowledgments of receipt of this Order:

- A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.
- B. For 5 years after the issuance date of this Order, Respondent, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in paid promotion of Post-Secondary Schools; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.
- C. From each individual or entity to which Respondent delivered a copy of this Order, 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 Respondent make timely submissions to the Commission:

- A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names;

## Decision and Order

- (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes 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.
- B. For ten years after the issuance date of this Order, 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 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



## Decision and Order

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 Victory Media, Inc.

**V. Recordkeeping**

**IT IS FURTHER ORDERED** that Respondent must create certain records for 10 years after the issuance date of the Order, and retain each such record for 5 years. Specifically, Respondent must create and retain the following records:

- A. accounting records showing the revenues from all goods or services sold, 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. records of all consumer complaints concerning the subject matter 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; and
- E. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

## Decision and Order

**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 January 11, 2038, 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:

## Analysis to Aid Public Comment

- A. Any Provision in this Order that terminates in less than 20 years; and
- B. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

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

By the Commission.

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Victory Media, Inc. The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the FTC will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final agreement’s proposed order.

The respondent publishes print and online magazines and guides for servicemembers transitioning from military service to the civilian workforce. The respondent does business under the names G.I. Jobs and Military Friendly. Its websites include [gijobs.com](http://gijobs.com), [militaryfriendly.com](http://militaryfriendly.com), and [militaryspouse.com](http://militaryspouse.com).

## Analysis to Aid Public Comment

Victory Media also maintains active social media accounts, including on Twitter, Facebook, YouTube, and LinkedIn, under handles such as “Military Friendly” or “G.I. Jobs” that attract military consumers.

The respondent operates a search tool, School Matchmaker, at [gijobs.com](http://gijobs.com) to help servicemembers find educational institutions in their fields of interest. The proposed complaint in this matter alleges that the respondent made claims that its Matchmaker tool searched schools that met respondent’s “military friendly” criteria. In fact, the tool searches only schools that pay to be included, whether respondent has designated them as “military friendly” or not. Thus, several schools not designated by the respondent as “military friendly” are included in the Matchmaker search results. The proposed complaint alleges that the respondent’s misrepresentations regarding the scope of the Matchmaker search tool constitute a deceptive act or practice under Section 5 of the FTC Act.

Additionally, the FTC complaint alleges that the respondent, in certain of its articles, emails, and social media posts, misrepresented that its endorsements were independent and not paid advertising, and failed to adequately disclose that the content recommended schools that paid the respondent specifically to be promoted therein. The proposed complaint alleges that those misrepresentations and undisclosed paid recommendations constitute deceptive acts or practices under Section 5 of the FTC Act.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future.

Part I prohibits the respondent from making any misrepresentations regarding the scope of any search tool, including whether the tool only searches “military friendly” schools. Part I further prohibits the respondent from making any misrepresentations about material connections between it and any schools, and from making any misrepresentations that paid commercial advertising is independent content.

*Analysis to Aid Public Comment*

Part II requires the respondent, when endorsing schools (or preparing third-party endorsements of schools), to clearly and conspicuously disclose, in close proximity to the endorsement, any payments or other material connections between the respondent or the other endorser and the school. This disclosure requirement applies where consumers are likely to believe that such endorsements reflect the beliefs of the respondent or other endorser (and not the schools themselves).

Parts III through VII of the proposed order are reporting and compliance provisions. Part III is an order distribution provision. Part IV requires the respondent to submit a compliance report one year after the issuance of the order, and to notify the Commission of corporate changes that may affect compliance obligations. Part V requires the respondent to create, for 10 years, accounting, personnel, complaint, and advertising records, and to maintain each of those records for 5 years. Part VI requires the respondent to submit additional compliance reports within 10 business days of a written request by the Commission, and to permit voluntary interviews with persons affiliated with the respondent. Part VII “sunsets” the order after twenty years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order’s terms.

Complaint

IN THE MATTER OF

**BECTON, DICKINSON AND COMPANY**  
**AND**  
**C. R. BARD, 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-4637 File No. 171 0140*  
*Complaint, December 22, 2017 – Decision, January 19, 2018*

This consent order addresses the \$24 billion acquisition by Becton, Dickinson and Company (“BD”) of certain assets of C. R. Bard, Inc. The complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the U.S. markets for tunneled home drainage catheter systems and soft tissue core needle biopsy devices. The consent order requires the respondents to divest all rights and assets related to Bard’s tunneled home drainage catheter business and BD’s soft tissue core needle biopsy device business to Merit Medical Systems, Inc.

*Participants*

For the *Commission*: *Kenneth A. Libby*.

For the *Respondents*: *Michael Sheerin, Lindsey Strang, and Steve Sunshine, Skadden; Nelson Fitts, Wachtell*.

**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 Becton, Dickinson and Company (“BD”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the issued and outstanding shares of Respondent C. R. Bard, Inc. (“Bard”) by means of a merger, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45, and it appearing to the Commission that

Complaint

a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

**I. RESPONDENTS**

1. Respondent BD is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its headquarters located at 1 Becton Drive, Franklin Lakes, New Jersey, 07417.

2. Respondent Bard is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its headquarters located at 730 Central Avenue, Murray Hill, New Jersey 07974.

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

**II. THE PROPOSED ACQUISITION**

4. Pursuant to an Agreement and Plan of Merger, dated as of April 23, 2017, BD and Lambda Corp., a wholly-owned subsidiary of BD, proposed to acquire the issued and outstanding shares of Bard by means of a merger in exchange for cash and stock valued at approximately \$24 billion (the “Acquisition”). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

**III. THE RELEVANT MARKETS**

5. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the development, manufacture, marketing, distribution, and sale of tunneled home drainage catheter systems and soft tissue core needle biopsy devices.

## Complaint

- a. Tunneled home drainage catheter systems treat recurrent fluid buildup in the lungs or the abdomen of patients suffering from certain diseases, such as cancer. These systems drain fluid from the lungs (pleural drainage) or abdomen (peritoneal drainage) through a tunneled, indwelling catheter connected to a disposable receptacle. Once a medical doctor places the indwelling catheter into a patient, fluid drainage can take place in a patient's home or in a hospice setting.
- b. Soft tissue core needle biopsy devices are used by medical clinicians, typically interventional radiologists or oncologists, to remove small samples of tissue from soft tissue organs for examination and diagnosis. Soft tissue core needle biopsy devices do not include, and are distinguished from, vacuum-assisted biopsy devices which are used only for breast biopsies and employ a vacuum to remove larger tissue samples.

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

#### **IV. STRUCTURE OF THE MARKET**

7. Respondents BD and Bard are the two largest manufacturers of tunneled home drainage catheter systems in the United States. BD and Bard have the number one and number two market share positions, respectively. Post-merger, the Respondents would have a combined market share of approximately 98% in the United States. Two other firms comprise the small balance of the relevant market. The Acquisition would substantially increase concentration in the already highly concentrated U.S. market for tunneled home drainage catheter systems.

8. Respondents BD and Bard are the two largest manufacturers of soft tissue core needle biopsy devices in the United States. Bard and BD have the number one and number two market share positions, respectively. Post-merger, the



### Complaint

Respondents would have a combined market share of approximately 60% or greater in the United States. Other firms in this market have considerably smaller shares than the Respondents combined. The Acquisition would substantially increase concentration in the already highly concentrated U.S. market for soft tissue core needle biopsy devices.

## **V. EFFECTS OF THE ACQUISITION**

9. The Acquisition, if consummated, may substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45, by eliminating actual, direct, and substantial competition between BD and Bard in the markets for tunneled home drainage catheter systems and soft tissue core needle biopsy devices. The Acquisition, if consummated, would increase the likelihood that (1) a combined BD and Bard would be able to unilaterally exercise market power, (2) customers would be forced to pay higher prices, and (3) customers would experience lower levels of innovation for each relevant product.

## **VI. ENTRY CONDITIONS**

10. 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 be costly and not take place in a timely manner because of the time required for product development, U.S. Food and Drug Administration approval, establishment of a sales and marketing infrastructure, and market adoption. No entry is likely to occur that would deter or counteract the competitive harm likely to result from the Acquisition.

## **VII. VIOLATIONS CHARGED**

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

## Order to Maintain Assets

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

**WHEREFORE, THE PREMISES CONSIDERED**, the Federal Trade Commission on this twenty-second day of December 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 Becton, Dickinson and Company (“BD”) of Respondent C. R. Bard, Inc. (“Bard”), collectively (“Respondents”), and Respondents having been furnished thereafter with a copy of a draft of the Complaint (“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 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

## Order to Maintain Assets

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 BD is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 1 Becton Drive, Franklin Lakes, NJ 07417.
2. Respondent Bard is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 730 Central Avenue, Murray Hill, NJ 07974.
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. “BD” means Becton, Dickinson and Company; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Becton, Dickinson and Company ,

## Order to Maintain Assets

and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, BD shall include Bard.

- B. “Bard” means C. R. Bard, Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Bard, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Respondent(s)” means BD and Bard, 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(s)” means the following, individually and collectively:
  - 1. the Tunneled Home Drainage Catheter System Products; and
  - 2. the Soft Tissue Core Needle Biopsy Products.
- G. “Divestiture Product Assets” means the following, individually and collectively:
  - 1. the Tunneled Home Drainage Catheter System Assets To Be Divested; and

## Order to Maintain Assets

2. the Soft Tissue Core Needle Biopsy Assets To Be Divested.
- H. “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.
- I. “Manufacturing Technology” means the following, individually and collectively:
1. the Tunneled Home Drainage Catheter System Manufacturing Technology; and
  2. the Soft Tissue Core Needle Biopsy Manufacturing Technology.
- J. “Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.
- K. “Transition Period” means, for each Divestiture Product, the period beginning on the date this Order to Maintain Assets is issued and ending on the earlier of the following dates: (i) the date on which the 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).
- L. “Orders” means the Decision and Order and this Order to Maintain Assets.

## 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; 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:

## Order to Maintain Assets

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);
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

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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) substantially 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. no later than the earlier of ten (10) days after a request from the Proposed Acquirer or ten (10) days before the Closing Date if requested by a Proposed Acquirer, provide to the Proposed Acquirer a list of all Employees and, in compliance with and to the extent permitted by all Laws, and an opportunity to inspect the personnel files and other documentation relating to such Employees. The list of Employees that Respondents shall provide shall include the following information for each Employee, as requested by the Proposed Acquirer, and to the extent permitted by Law:
    - a. name, job title or position, date of hire by the relevant Respondent, and effective service date;
    - b. specific description of the employee's responsibilities and primary work location;
    - c. the base salary or current wages;



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- d. most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, current target or guaranteed annual bonus or commission opportunities and target long term incentive opportunities, if applicable;
  - e. employment and leave status (i.e., active or on leave or disability); full-time or part-time; reason for leave and expected date of return from leave, in each case, if applicable; accrued and unused vacation, sick leave, and personal time off days;
  - f. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly-situated employees; and
  - g. at the Proposed Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Employee.
2. no later than ten (10) days before the Closing Date, allow the Proposed Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of Respondents with any Employee, and to make offers of employment to any one or more of the Employees;
  3. not interfere, directly or indirectly, with the hiring or employing of any Employee by the Proposed Acquirer, not offer any incentive to any Employee to decline employment with the Proposed Acquirer, not make any counter-offer to any Employee who has an outstanding offer of employment from the Proposed Acquirer or who has accepted an offer of employment from the Proposed Acquirer, and not otherwise interfere

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with the recruitment or employment of an Employee by the Proposed Acquirer;

4. remove any impediments within the control of Respondents that may deter any Employee from accepting employment with the Proposed Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of the Employee(s) to accept employment with the Proposed Acquirer;
5. not, for a period of one (1) year from the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any Employee who has accepted an offer of employment with the Acquirer to terminate his or her employment with the Acquirer; provided, however, that Respondents may:
  - a. advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, as long as this is not targeted specifically at Employees; or
  - b. hire Employees who apply for employment with Respondents, as long as such Employees were not solicited by Respondents in violation of this Paragraph II.D.

*provided, however,* that this Paragraph II.D. shall not prohibit Respondents from making offers of employment to or employing any Employee after the Closing Date where: (i) the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that Employee; (ii) the Acquirer has terminated the employment of the Employee; or (iii) where the Employee's employment with the Acquirer ended

## Order to Maintain Assets

for any reason more than ninety (90) days prior to Respondents' solicitation of the Employee.

6. until the Closing Date, provide all 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).
- E. During the Transition Period, with respect to each Divestiture Product that is marketed or sold 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;

## Order to Maintain Assets

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) 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 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:

## Order to Maintain Assets

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), *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.
- G. Not later than thirty (30) days from the earlier of (i) the Closing Date or (ii) the date this Order to Maintain

## Order to Maintain Assets

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 through their full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for the Divestiture Product Businesses; and to prevent the destruction, removal, wasting, deterioration, or

## Order to Maintain Assets

impairment of any of the Divestiture Product Assets except for ordinary wear and tear.

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

- A. Mazars LLP 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 the Decision and Order and the Order to Maintain Assets (collectively “Orders”), and the Remedial Agreements, pursuant to the agreement executed by the Monitor and Respondents and 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

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Manufacturing Technology, Divestiture  
Product IP and Divestiture Product IP License;  
or

- b. the date on which the relevant Acquirer commences the marketing, distribution, and sale of such Divestiture Product(s);

*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.

- B. 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.
- C. 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.
- D. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages,



## Order to Maintain Assets

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.

- E. 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 information 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.
- F. 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.
- G. 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.
- H. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the

## Order to Maintain Assets

Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.

- I. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- J. 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.
- K. 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 thirty (30) days thereafter until Respondents have fully complied with this Order to Maintain Assets, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Orders. 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;

## 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 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

## Order to Maintain Assets

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; *provided, however,* that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate three (3) business days after the Decision and Order becomes final;
- C. the day after the Manufacturing Technology related to each Divestiture Product has been provided to the Acquirer 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

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Becton, Dickinson and Company (“BD”) of Respondent C. R. Bard, Inc. (“Bard”), collectively (“Respondents”), and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, 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 Becton, Dickinson and Company is a corporation organized, existing and doing business

## Decision and Order

under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 1 Becton Drive, Franklin Lakes, NJ 07417.

2. Respondent C. R. Bard, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 730 Central Avenue, Murray Hill, NJ 07974.
3. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

**ORDER****I.**

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

- A. “BD” means Becton, Dickinson and Company, its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by BD, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. After the Acquisition, BD will include Bard.
- B. “Bard” means C. R. Bard, Inc., its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Bard, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.
- C. “Respondent(s)” means BD and Bard, individually and collectively.
- D. “Commission” means the Federal Trade Commission.

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- E. “Acquirer” means the following:
1. Merit; or
  2. Any other Person that receives the prior approval of the Commission to acquire the Assets To Be Divested.

*Provided, however,* that if Merit is not approved by the Commission as the Acquirer, the Soft Tissue Core Needle Biopsy Assets To Be Divested and the Tunneled Home Drainage Catheter System Assets To Be Divested may, in the Commission’s sole discretion, be divested to two different Acquirers that receive the prior approval of the Commission.

- F. “Acquisition” means BD’s acquisition of Bard through a series of transactions as contemplated by and pursuant to the Agreement and Plan of Merger dated April 23, 2017, among BD, Bard, and Lambda Corp. that was submitted by the Respondents to the Commission.

- G. “Acquisition Date” means the date on which the Acquisition is consummated.

- H. “Actual Cost” means the actual cost incurred to provide the relevant goods or services, including the cost of direct labor and direct material used and allocation of overhead that is consistent with past custom and practice.

*Provided, however,* in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order; and (ii) an agreement becomes a Remedial Agreement for the Assets to be Divested, “Actual Cost” means such cost as is provided in such Remedial Agreement.

- I. “Agency(ies)” means any government regulatory authority or authorities in the world responsible for

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granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of the Tunneled Home Drainage Catheter System Products and Soft Tissue Core Needle Biopsy Products, as the case may be. 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 with the FDA pursuant to 21 C.F.R. Parts 800 to 898, including all premarket notifications (Section 510(k) submissions) and premarket approvals (“PMA”), and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the holder and the FDA related thereto.
- K. “Assets To Be Divested” means the Tunneled Home Drainage Catheter System Assets To Be Divested and the Soft Tissue Core Needle Biopsy Assets To Be Divested.
- L. “Business” means the research, Development, manufacture, commercialization, distribution, marketing, promotion, importation, exportation, advertisement, and/or sale of a Product.
- M. “Business Records” means all books, records, files, databases, printouts, and all other documents of any kind, whether stored or maintained in hard copy paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, including, without limitation: customer files, customer lists, customer purchasing histories, supplier and vendor files, vendor lists, correspondence, advertising and marketing materials, marketing analyses, sales materials, price lists, cost information, employee lists and contracts,



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salary and benefits information, personnel files, financial and accounting records and documents, financial statements, financial plans and forecasts, operating plans, studies, reports, regulatory materials, Applications, Agency filings and submissions, Agency correspondence, operating guides, technical information, manuals, policies and procedures, service and warranty records, maintenance logs, equipment logs, registrations, and permits.

- N. “cGMP” means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.
- O. “Clinical Trial(s)” means a controlled study in humans of the safety or efficacy of a product, and includes, without limitation, such clinical trials as are designed to satisfy the requirements of an Agency in connection with any product and any other human study used in research and Development of a product.
- P. “Closing Date” means the date Respondents (or a Divestiture Trustee) consummate a transaction to divest any of the Assets To Be Divested to an Acquirer pursuant to this Order.
- Q. “Confidential Business Information” means competitively sensitive, proprietary, and all information owned by, or in the possession or control of, any Respondent that is not in the public domain and to the extent that it is directly related to the conduct of the Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business. The term “Confidential Business Information” excludes the following:
1. Information relating to any Respondent’s general business strategies or practices that does not discuss with particularity the Tunneled Home

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Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business;

2. Information that is contained in documents, records or books of any Respondent that are provided to an Acquirer by a Respondent that is unrelated to either the Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business or that is exclusively related to the Retained Business;
3. Information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws;
4. Information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality and non-disclosure agreement with respect to such information by Respondents;
5. Information that is required by Law to be disclosed;
6. Information that does not directly relate to the Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business; and
7. Information that Respondents demonstrate to the satisfaction of the Commission, in the Commission's sole discretion:
  - a. Is necessary to be included in Respondents' mandatory regulatory filings, *provided, however,* that Respondents shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;

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- b. Is information the disclosure of which is consented to by the Acquirer;
  - c. Is necessary to be exchanged in the course of consummating the Acquisition or the transaction under the Remedial Agreement; or
  - d. Is disclosed in complying with this Order.
- R. “Contract Manufacturing Agreement(s)” means any agreement(s) that receives the prior approval of the Commission between the Respondents and the Acquirer to provide, at the option of the Acquirer, sufficient quantities of Soft Tissue Core Needle Biopsy Products and Tunneled Home Drainage Catheter System Products for a period of time sufficient to allow the Acquirer to obtain all of the relevant Product Approvals necessary to manufacture the Soft Tissue Core Needle Biopsy Products and Tunneled Home Drainage Catheter System Products in commercial quantities, and in a manner consistent with cGMP, independently of Respondents.
- S. “Development” means all preclinical and clinical medical device development activities, including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a product, product approval and registration, and regulatory affairs related to the foregoing. “Develop” means to engage in Development.
- T. “Divestiture Product IP” means (a) all patents, copyrights, trade secrets or other intellectual property rights owned by Respondents as of the Closing Date

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(other than trademarks or trade dress), that are used in or would otherwise be infringed by the Soft Tissue Core Needle Biopsy Business as of the Closing Date but that are not included in the Soft Tissue Core Needle Biopsy Assets To Be Divested; and (b) all patents, copyrights, trade secrets or other intellectual property rights owned by Respondents as of the Closing Date (other than trademarks or trade dress), that are used in or would otherwise be infringed by the Tunneled Home Drainage Catheter System Business as of the Closing Date but that are not included in the Tunneled Home Drainage Catheter System Assets To Be Divested.

- U. “Divestiture Product IP License” means a royalty-free, fully paid-up, perpetual, irrevocable, worldwide, non-exclusive license to the Acquirer under any Divestiture Product IP to operate the Soft Tissue Core Needle Biopsy Business, including the research, Development, manufacture, distribution, marketing or sale of Soft Tissue Core Needle Biopsy Products anywhere in the world, and the Tunneled Home Drainage Catheter System Business, including the research, Development, manufacture, distribution, marketing or sale of Tunneled Home Drainage Catheter System Products anywhere in the world.
- V. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.
- W. Employee(s)” means:
  1. If Merit is approved by the Commission to be the Acquirer, the employees identified in the Merit Agreement; or
  2. If the Acquirer(s) is not Merit, any individual employed on a full-time, part-time, or contract basis as of, and at any time after, April 23, 2017,

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the date of the announcement of the Acquisition, by:

- a. BD, where such employee's job responsibilities relate or related primarily to the Soft Tissue Core Needle Biopsy Business; and
  - b. Bard, where such employee's job responsibilities relate or related primarily to the Tunneled Home Drainage Catheter System Business.
- X. "Exclusive Supplier Contract" means any contract for the supply of finished goods of, inputs to, or instrumentation for, the Tunneled Home Drainage Catheter System Products or the Soft Tissue Core Needle Biopsy Products where under the terms of the contract with Respondents, the Acquirer would be prevented from entering into a contract for the supply of such finished goods, inputs, or instrumentation with such Supplier.
- Y. "Government Entity" means any Federal, state, local or non-U.S. government, or any court, legislature, Agency, or government commission, or any judicial or regulatory authority of any government.
- Z. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- AA. "Merit" means Merit Medical Systems, Inc., a corporation organized under the laws of the state of Utah with its principal place of business at 1600 West Merit Parkway, South Jordan, Utah 64095.
- BB. "Merit Agreement" means the "Asset Purchase Agreement" by and between BD and Merit, dated as of November 15, 2017, and all amendments, exhibits, attachments, agreements and schedules, in each case thereto or contemplated thereby, related to the Assets

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To Be Divested, that have been approved by the Commission to accomplish the requirements of this Order. The Merit Agreement is attached to this Order as Non-Public Appendix A.

- CC. “Monitor” means any monitor appointed pursuant to Paragraph III of this Order.
- DD. “Order Date” means the date on which the final Decision and Order in this matter is issued by the Commission.
- EE. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention, applications for certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Closing Date, and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, substitutions, reexaminations, restorations, and/or patent term extensions thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto.
- FF. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.
- GG. “Product(s)” means any medical device or system regulated by the FDA as a Class II (Special Controls) or Class III (PMA) medical device pursuant to 21 C.F.R. Parts 800 to 898, *i.e.*, an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component part, or accessory, which is:

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1. recognized in the official National Foundry, 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.
- HH. “Product Approval(s)” means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage, or transport of a Product, and includes, without limitation, all approvals, registrations, licenses, or authorizations granted in connection with any Application related to that Product.
- II. “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 Merit.
- JJ. “Remedial Agreement(s)” means the following:
1. The Merit Agreement;
  2. Any agreement between a Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer that has received the prior approval of the

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Commission) to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested, that have been approved by the Commission to accomplish the requirements of this Order.

KK. “Retained Business” means:

1. All right, title and interest in and to the names “BD” and “Bard,” together with all variations thereof and all trademarks and trade dress containing, incorporating or associated with any of the foregoing, and any trademark and trade dress other than what is included in the Tunneled Home Drainage Catheter System Assets To Be Divested or the Soft Tissue Core Needle Biopsy Assets To Be Divested;
2. Any of the assets, tangible or intangible, businesses or goodwill that relate to the Retained Products or that are not related to the Assets to be Divested; and
3. Cash and cash equivalents; tax assets; stock in any entity; corporate and tax records of any entity; insurance policies; benefit plans; and accounts receivable arising prior to the Closing Date.

LL. “Retained Products” means any Product researched, Developed, manufactured, marketed, sold or distributed by Respondents other than the Tunneled Home Drainage Catheter System Products and the Soft Tissue Core Needle Biopsy Products.

MM. “Soft Tissue Core Needle Biopsy Assets To Be Divested” means all of the rights, titles and interest in, to and under the following, in each case exclusively or predominantly related to the Soft Tissue Core Needle Biopsy Business, including any improvements as of the Closing Date, and all such products under



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Development as of the Closing Date, including the right to Develop, manufacture and use with a view to its marketing and sale including, but not limited to:

1. Finished product inventory;
2. Advertising, marketing and promotional materials for the Soft Tissue Core Needle Biopsy Products;
3. Copies of all design history files, technical files, drawings, product specifications, manufacturing process descriptions, validation documentation, packaging specifications, quality control standards and regulatory records for the Soft Tissue Core Needle Biopsy Products;
4. Demonstration models, prototypes, samples, instruments, and supporting equipment that are used for training purposes and copies of all training materials that are used for training in the proper use of the Soft Tissue Core Needle Biopsy Products;
5. Copies of all testing and clinical performance reports, market research reports and other marketing related information and materials for the Soft Tissue Core Needle Biopsy Products;
6. Copies of all Soft Tissue Core Needle Biopsy Products Manufacturing Technology;
7. All equipment and machinery (including all molds) and the spare parts held by BD as of the Closing Date for use in such equipment and machinery;
8. Copies of all Soft Tissue Core Needle Biopsy Scientific and Regulatory Material;
9. Soft Tissue Core Needle Biopsy Intellectual Property;

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10. A list of existing and past customers for the Soft Tissue Core Needle Biopsy Products;
11. Copies of customer credit and other records for the Soft Tissue Core Needle Biopsy Products;
12. Copies of all books, ledgers and other business records for the Soft Tissue Core Needle Biopsy Products;
13. Copies of clinical, regulatory, and customer sales databases for the Soft Tissue Core Needle Biopsy Products; and
14. All licenses, permits and authorizations related to the Soft Tissue Core Needle Biopsy Products, to the extent transferrable, and all dossiers to the current and/or pending authorizations held or sought for the Soft Tissue Core Needle Biopsy Products.

*provided, however,* that “Soft Tissue Core Needle Biopsy Business” does not include the Retained Business; and

*provided further, however,* that with respect to documents or other materials included in the Soft Tissue Core Needle Biopsy Business that contain information (a) that relates both to Soft Tissue Core Needle Biopsy Products and to other products of Respondents or (b) for which Respondents have a legal obligation to retain the original copies, Respondents shall be required to provide only copies or, at their option, relevant excerpts of such documents and materials, but Respondents shall provide the Acquirer access to the originals of such documents as necessary, it being a purpose of this provision to ensure that Respondents not be required to divest themselves completely of records or information that relate to products other than Soft Tissue Core Needle Biopsy Products.

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- NN. “Soft Tissue Core Needle Biopsy Business” means the Business conducted by BD as of immediately prior to the Acquisition Date, and as maintained by Respondents up to the Closing Date, with respect to the Soft Tissue Core Needle Biopsy Products.
- OO. “Soft Tissue Core Needle Biopsy Intellectual Property” means all of the following to the extent owned by BD and used exclusively or predominantly in the research, Development, manufacture, marketing, distribution, or sale of Soft Tissue Core Needle Biopsy Products:
1. Patents and patent applications in each case filed, or in existence, on or before the Closing Date, and any renewal, derivation, divisions, reissues, continuations, continuations in-part, modifications, or extensions thereof; and
  2. Trademarks, trade dress, copyrights, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; in each case, other than patents or patent applications (which are addressed in Item 1, above).
- PP. “Soft Tissue Core Needle Biopsy Manufacturing Technology” means all tangible technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable or otherwise), in each case to the extent related exclusively or predominantly to the manufacture of Soft Tissue Core Needle Biopsy Products for sale, 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,

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annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Product Approval(s) conformance, and labeling and all other information related to the manufacturing process, and supplier lists.

- QQ. “Soft Tissue Core Needle Biopsy Products” means BD’s soft tissue core needle biopsy devices as of immediately prior to the Acquisition Date, including but not limited to all Products marketed or sold under the following Trademarks: Achieve™, Pink Achieve™, Temno™, Original Temno™, Temno Evolution™, Adjustable Coaxial Temno™ and Tru-Cut™, and all such Products under Development, including but not limited to Sontina.
- RR. “Soft Tissue Core Needle Biopsy Scientific and Regulatory Material” means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information, to the extent each of the foregoing are related to the research, Development, manufacture, marketing, distribution, or sale of Soft Tissue Core Needle Biopsy Products.
- SS. “Supplier” means any Third Party provider of finished goods of, inputs to, or instrumentation for, the Tunneled Home Drainage Catheter System Products or the Soft Tissue Core Needle Biopsy Products.
- TT. “Transition Services” means technical services, personnel, assistance, training, and other logistical, administrative and transitional support as required by the Acquirer and approved by the Commission to facilitate the transfer of the Assets To Be Divested from the Respondents to the Acquirer, including, but not limited to, services, training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, information technology and systems, maintenance and

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repair of facilities and equipment, manufacturing, purchasing, quality control, R&D support, technology transfer, regulatory compliance, sales and marketing, customer service, and supply chain management and customer transfer logistics.

- UU. “Transition Services Agreement(s)” means any agreement(s) that receives the prior approval of the Commission between the Respondents and the Acquirer to provide, at the option of the Acquirer, Transition Services (or training for the Acquirer to provide services for itself) necessary to transfer the Assets To Be Divested to the Acquirer in a manner consistent with the purposes of this Order.
- VV. “Third Party(ies)” means any non-governmental Person other than the Respondents, or the Acquirer.
- WW. “Tunneled Home Drainage Catheter System Assets To Be Divested” means all of the rights, titles and interest in, to and under the following, in each case exclusively or predominantly related to the Tunneled Home Drainage Catheter System Business, including any improvements as of the Closing Date, and all such products under Development as of the Closing Date, including the right to Develop, manufacture and use with a view to its marketing and sale including, but not limited to:
1. Finished product inventory;
  2. Instrumentation inventory for the Tunneled Home Drainage Catheter System Products;
  3. Advertising, marketing and promotional materials for the Tunneled Home Drainage Catheter System Products;
  4. Copies of all design history files, technical files, drawings, product specifications, manufacturing process descriptions, validation documentation,

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packaging specifications, quality control standards and regulatory records for the Tunneled Home Drainage Catheter System Products;

5. Demonstration models, prototypes, samples, instruments, and supporting equipment that are used for training purposes and copies of all training materials that are used for training in the proper use of the Tunneled Home Drainage Catheter System Products;
6. Copies of all testing and clinical performance reports, market research reports and other marketing related information and materials for the Tunneled Home Drainage Catheter System Products;
7. Copies of all Tunneled Home Drainage Catheter System Products Manufacturing Technology;
8. All equipment and machinery (including all molds) and the spare parts held by Bard at the Closing Date for use in such equipment and machinery;
9. Copies of all Tunneled Home Drainage Catheter System Scientific and Regulatory Material;
10. Tunneled Home Drainage Catheter System Intellectual Property;
11. A list of existing and past customers for the Tunneled Home Drainage Catheter System Products;
12. Copies of customer credit and other records for the Tunneled Home Drainage Catheter System Products;
13. Copies of all books, ledgers and other business records for the Tunneled Home Drainage Catheter System Products;

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14. Copies of clinical, regulatory, and customer sales databases for the Tunneled Home Drainage Catheter System Products; and
15. All licenses, permits and authorizations related to the Tunneled Home Drainage Catheter System Products, to the extent transferrable, and all dossiers to the current and/or pending authorizations held or sought for the Tunneled Home Drainage Catheter System Products.

*provided, however,* that “Tunneled Home Drainage Catheter System Business” does not include the Retained Business; and

*provided further, however,* that with respect to documents or other materials included in the Tunneled Home Drainage Catheter System Business that contain information (a) that relates both to Tunneled Home Drainage Catheter System Products and to other products of Respondents or (b) for which Respondents have a legal obligation to retain the original copies, Respondents shall be required to provide only copies or, at their option, relevant excerpts of such documents and materials, but Respondents shall provide the Acquirer access to the originals of such documents as necessary, it being a purpose of this provision to ensure that Respondents not be required to divest themselves completely of records or information that relate to products other than Tunneled Home Drainage Catheter System Products.

- XX. “Tunneled Home Drainage Catheter System Business” means the Business conducted by Bard as of immediately prior to the Acquisition Date, and as maintained by Respondents up to the Closing Date, with respect to the Tunneled Home Drainage Catheter System Products.
- YY. “Tunneled Home Drainage Catheter System Intellectual Property” means all of the following to the

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extent owned by Bard and used exclusively or predominantly in the research, Development, manufacture, marketing, distribution, or sale of Tunneled Home Drainage Catheter Products:

1. Patents and patent applications in each case filed, or in existence, on or before the Closing Date, and any renewal, derivation, divisions, reissues, continuations, continuations in-part, modifications, or extensions thereof; and
  2. Trademarks, trade dress, copyrights, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; in each case, other than patents or patent applications (which are addressed in Item 1, above).
- ZZ. “Tunneled Home Drainage Catheter System Manufacturing Technology” means all tangible technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable or otherwise), in each case to the extent exclusively or predominantly related to the manufacture of Tunneled Home Drainage Catheter System Products for sale, 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 Product Approval(s) conformance, and labeling and all other information related to the manufacturing process, and supplier lists.
- AAA. “Tunneled Home Drainage Catheter System Products” means Bard’s tunneled home drainage catheter



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systems used to reduce symptoms associated with malignant pleural effusion or malignant ascites as of immediately prior to the Acquisition Date, including but not limited to all Products marketed or sold under the trademark Aspira, and all such Products under Development.

- BBB. “Tunneled Home Drainage Catheter System Scientific and Regulatory Material” means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information, to the extent each of the foregoing are exclusively or predominantly related to the research, Development, manufacture, marketing, distribution, or sale of Tunneled Home Drainage Catheter System Products.

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

- A. Not later than the earlier of: (a) February 14, 2018, or (b) three (3) days after Respondents receive all regulatory approvals necessary for the divestiture of the Assets To Be Divested, Respondents shall divest the Assets To Be Divested and grant the Divestiture Product IP License, absolutely and in good faith, to Merit pursuant to, and in accordance with, the Merit Agreement(s) (which agreement(s) shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of the Acquirer or to reduce any obligations of Respondents under such agreement(s)), and each such agreement, if it becomes a Remedial Agreement, is incorporated by reference into this Order and made a part hereof;

*provided, however,* that if Respondents have divested the Assets To Be Divested to Merit prior to the Order Date, and if, at the time the Commission determines to

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make this Order final and effective, the Commission notifies Respondents that Merit is not an acceptable purchaser of the Assets To Be Divested, then Respondents shall immediately rescind the transaction with Merit, in whole or in part, as directed by the Commission, and shall divest the Assets To Be Divested within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

*provided further, however,* that if Respondents have divested the Assets To Be Divested to Merit prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Assets To Be Divested to Merit (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order;

*provided further, however,* that subject to the approval of the Commission, Respondents may obtain a royalty-free, fully paid-up, perpetual, irrevocable, worldwide, non-exclusive license from the Acquirer to the Tunneled Home Drainage Catheter System Intellectual Property and the Soft Tissue Core Needle Biopsy Intellectual Property for use in the research, Development, manufacture, distribution, marketing or sale of Retained Products, anywhere in the world, to the extent and only to the extent that the Tunneled Home Drainage Catheter System Intellectual Property or the Soft Tissue Core Needle Biopsy Intellectual Property was used in or would otherwise be infringed by the Retained Products as of the Closing Date.

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- B. Prior to the Closing Date, Respondents shall, at their sole expense, obtain all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the Assets To Be Divested to the Acquirer(s), and to permit the Acquirer(s) to continue to operate the Businesses related to the Assets To Be Divested in a manner that will achieve the purposes of this Order; *provided, however*, that the Respondents may satisfy this requirement by certifying that the Acquirer(s) has executed agreements or entered into equivalent arrangements directly with the relevant Third Party(ies).
- C. Respondents shall, at the option of the Acquirer, and subject to the prior approval of the Commission, provide Transition Services to the Acquirer pursuant to a Transition Services Agreement for a period of thirty (30) months from the Closing Date; *provided, however*, that such Agreement shall provide that (1) the Acquirer may terminate the Agreement at any time, without cost or penalty to the Acquirer, upon commercially reasonable notice to Respondents; and (2) at the Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of a Transition Services Agreement as provided in this Paragraph. The Transition Services provided pursuant to a Transition Services Agreement shall be at no greater than Respondents' Actual Costs for such personnel, technical support, assistance, training, and other services as are necessary to transfer the Assets To Be Divested to the Acquirer and enable the Acquirer to operate the Assets To Be Divested in a manner consistent with the purposes of this Order.
- D. Respondents shall, at the option of the Acquirer, and subject to the prior approval of the Commission, enter into a Contract Manufacturing Agreement to supply the Acquirer with the Soft Tissue Core Needle Biopsy Products and the Tunneled Home Drainage Catheter System Products for a period of two (2) years from the Closing Date; *provided, however*, that such Agreement

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shall provide that the Acquirer may terminate the Agreement at any time, without cost or penalty to the Acquirer, upon commercially reasonable notice to Respondents. The Soft Tissue Core Needle Biopsy Products and the Tunneled Home Drainage Catheter System Products supplied by Respondents to the Acquirer pursuant to such Contract Manufacturing Agreement shall be at no greater than Respondents' Actual Costs.

- E. Respondents shall:
1. submit to the Acquirer, at Respondents' expense, all Confidential Business Information related to the Assets To Be Divested;
  2. deliver all Confidential Business Information related to the Assets To Be Divested to the Acquirer:
    - a. in good faith;
    - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
    - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
  3. pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Assets To Be Divested that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

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4. Not use, directly or indirectly, any Confidential Business Information, other than as necessary to comply with the following: (i) the requirements of this Order; (ii) the Respondents' obligations to the Acquirer under the terms of any Remedial Agreement related to the Assets to be Divested; or (iii) applicable Law, including mandatory regulatory filings;
5. Not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer, (ii) other Persons specifically authorized by the Acquirer to receive such information, (iii) the Commission, and (iv) the Monitor, if any, and the Divestiture Trustee, if any; and
6. No later than thirty (30) days after the Closing Date, provide written notification of the restrictions on the use of the Confidential Business Information to all Respondents' employees who are involved in the manufacture, distribution, sale, or marketing of the Assets to be Divested or who may have or have access to Confidential Business Information ("Designated Employees"); Respondents shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for at least one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Acquirer. Respondents shall maintain complete records at its principal place of business regarding the provision of notification to Designated Employees and shall provide an officer's certification to the Commission stating that such notification program has been implemented and is being complied with. Respondents shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to Designated Employees.

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*provided however*, that this Paragraph II.E. shall not apply:

- a. To any Confidential Business Information related to the Tunneled Home Drainage Catheter System Business that Respondents can demonstrate to the Commission that BD obtained other than in connection with the Acquisition;
- b. To any Confidential Business Information related to the Soft Tissue Core Needle Biopsy Business that Respondents can demonstrate to the Commission that Bard obtained other than in connection with the Acquisition;
- c. To any Confidential Business Information to the extent related to Retained Products or the Retained Business; and
- d. To the use of Confidential Business Information by Respondents to defend against legal claims brought by any Third Party, or investigations or enforcement actions by Government Entities.

F. Respondents shall:

1. No later than the earlier of ten (10) days after a request from the Proposed Acquirer or ten (10) days before the Closing Date if requested by a Proposed Acquirer, provide to the Proposed Acquirer a list of all Employees and, in compliance with and to the extent permitted by all Laws, and an opportunity to inspect the personnel files and other documentation relating to such Employees. The list of Employees that Respondents shall provide shall include the following information for each Employee, as requested by the Proposed Acquirer, and to the extent permitted by Law:

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- a. Name, job title or position, date of hire by the relevant Respondent, and effective service date;
  - b. Specific description of the employee's responsibilities and primary work location;
  - c. The base salary or current wages;
  - d. Most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, current target or guaranteed annual bonus or commission opportunities and target long term incentive opportunities, if applicable;
  - e. Employment and leave status (*i.e.*, active or on leave or disability); full-time or part-time; reason for leave and expected date of return from leave, in each case, if applicable; accrued and unused vacation, sick leave, and personal time off days;
  - f. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly-situated employees; and
  - g. At the Proposed Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Employee.
2. No later than ten (10) days before the Closing Date, allow the Proposed Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of Respondents with any Employee, and to make offers of employment to any one or more of the Employees;

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3. Not interfere, directly or indirectly, with the hiring or employing of any Employee by the Proposed Acquirer, not offer any incentive to any Employee to decline employment with the Proposed Acquirer, not make any counter-offer to any Employee who has an outstanding offer of employment from the Proposed Acquirer or who has accepted an offer of employment from the Proposed Acquirer, and not otherwise interfere with the recruitment or employment of an Employee by the Proposed Acquirer;
4. Remove any impediments within the control of Respondents that may deter any Employee from accepting employment with the Proposed Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of the Employee(s) to accept employment with the Proposed Acquirer;
5. Not, for a period of one (1) year from the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any Employee who has accepted an offer of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, that Respondents may:
  - a. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, as long as this is not targeted specifically at Employees; or
  - b. Hire Employees who apply for employment with Respondents, as long as such Employees were not solicited by Respondents in violation of this Paragraph II.F.



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*Provided, however,* that this Paragraph II.F. shall not prohibit Respondents from making offers of employment to or employing any Employee after the Closing Date where: (i) the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that Employee; (ii) the Acquirer has terminated the employment of the Employee; or (iii) where the Employee's employment with the Acquirer ended for any reason more than ninety (90) days prior to Respondents' solicitation of the Employee.

- G. Until the Closing Date, Respondents shall take such actions as are necessary to:
1. maintain the full economic viability and marketability of the Tunneled Home Drainage Catheter System Business and the Soft Tissue Core Needle Biopsy Business;
  2. minimize any risk of loss of competitive potential for the Tunneled Home Drainage Catheter System Business and the Soft Tissue Core Needle Biopsy Business;
  3. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Tunneled Home Drainage Catheter System Business and the Soft Tissue Core Needle Biopsy Business; and
  4. not sell, transfer, encumber, or otherwise impair the Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy 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 Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business.

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*Provided, however,* that Respondents are required to maintain, for the term of the Contract Manufacturing Agreement, the full economic viability and marketability, other than ordinary wear and tear, of any equipment or machinery included in the Assets To Be Divested that remain in any facility of Respondents during the term of the Contract Manufacturing Agreement.

- H. No later than the Closing Date, Respondents shall waive any rights under any Exclusive Supplier Contracts that would prevent the Acquirer from entering into a contract with the Supplier for the supply of finished goods of, inputs to, or instrumentation for, the Tunneled Home Drainage Catheter System Products or the Soft Tissue Core Needle Biopsy Products. No later than three (3) days after the Closing Date, Respondents shall notify in writing any Supplier that is party to an Exclusive Supplier Contract of such waiver.
- I. The purpose of the divestiture of the Assets To Be Divested to an Acquirer is to create an independent, viable and effective competitor in the markets for the Development, license, manufacture, marketing, distribution, and sale of (1) tunneled home drainage catheter systems and (2) soft tissue core needle biopsy devices, and to remedy the lessening of competition from the Acquisition as alleged in the Commission's Complaint.

**III.**

**IT IS FURTHER ORDERED** that:

- A. Mazars LLP shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix B ("Monitor Agreement") and Non-Public Appendix C ("Monitor Compensation"). The Monitor is appointed to assure that Respondents expeditiously comply with all of

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their obligations and perform all of their responsibilities as required by this Order and the Remedial Agreement(s).

- B. The Monitor Agreement shall require that, not later than three (3) days after the Commission accepts the Order for comment, Respondents transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Order and consistent with the purposes of the Order, and Respondents shall effectuate such transfer.
- C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
  - 1. The Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and related requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this 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 at least until Respondents have fulfilled all their obligations under Paragraphs II.A., II.B., II.C., II.D., and II.E. of this Order.
- D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under this Order, including, but not limited

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to, their obligations related to the Assets To Be Divested. 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.

- E. 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.
- F. 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 the willful default, recklessness, gross negligence or bad faith of the Monitor, its employees, agents or advisors.
- G. 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 Respondents, and any reports submitted by the Acquirer, with respect to the performance of Respondents' obligations under this Order or the Remedial Agreement. Within thirty (30) days 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 this Order.

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- H. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; provided, however, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- I. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- J. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.
- K. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- L. 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 Respondents have not fully complied with the obligations to divest the Assets To Be Divested as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission,

## Decision and Order

Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the Assets To Be Divested. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
  - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive

## Decision and Order

power and authority to divest the Assets To Be Divested.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court appointed Divestiture Trustee, by the court; provided, however, the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the Assets To Be Divested, and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no

## Decision and Order

minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of the Assets To Be Divested.
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or



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

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested; *provided, however*, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order.
  8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
  9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be

## Decision and Order

necessary or appropriate to accomplish the Divestiture required by this Order.

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

- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by Respondents to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- C. Respondents shall include in each Remedial Agreement a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligation to the Acquirer pursuant to this Order.
- D. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to the Assets To Be Divested, a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.
- E. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

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

- A. Within five (5) days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
  
- B. Within thirty (30) days after the Order Date, and every thirty (30) days thereafter until Respondents have fully complied with Paragraphs II.A. and II.E., of this Order, and every sixty (60) days thereafter until Respondents have fully complied with the Paragraphs II.C. and II.D. of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Monitor, if any Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time:
  - 1. A full description of the efforts being made to comply with the relevant Paragraphs of this Order;
  - 2. A detailed plan to deliver all Confidential Business Information required to be delivered to the Acquirer pursuant to Paragraph II.E., and agreed upon by the relevant Acquirer and the Monitor (if applicable) and any updates or changes to such plan;
  - 3. A description of all Confidential Business Information delivered to the Acquirer, including the type of information delivered, method of delivery, and date(s) of delivery;
  - 4. A description of the Confidential Business Information currently remaining to be delivered and a projected date(s) of delivery; and

## Decision and Order

5. A description of all technical assistance provided to the Commission-Approved Acquired during the reporting period.

**VII.**

**IT IS FURTHER ORDERED** that Respondents shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of a Respondent; (2) acquisition, merger or consolidation of Respondents; or (3) other change in the Respondents; in each case that may affect compliance obligations arising out of this Order, including, but not limited to, assignment, and the creation or dissolution of subsidiaries.

**VIII.**

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

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

## Analysis to Aid Public Comment

**IX.**

**IT IS FURTHER ORDERED** that this Order shall terminate on January 19, 2028.

By the Commission.

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

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Becton, Dickinson and Company (“BD”) and C. R. Bard, Inc. (“Bard”) (collectively, the “Respondents”) that is designed to remedy the anticompetitive effects that would likely result from BD’s proposed acquisition of Bard. The proposed Decision and Order (“Order”) requires the Respondents to divest all rights and assets related to Bard’s tunneled home drainage catheter business and BD’s soft tissue core needle biopsy device business to Merit Medical Systems, Inc. (“Merit”). The Order To Maintain Assets requires Respondents to maintain the viability and competitiveness of the businesses pending divestiture.

Pursuant to an Agreement and Plan of Merger, dated as of April 23, 2017, BD and Lambda Corp., a wholly-owned subsidiary of BD, will acquire the issued and outstanding shares of Bard by means of a merger in exchange for cash and stock valued at approximately \$24 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 tunneled home

## Analysis to Aid Public Comment

drainage catheter systems and soft tissue core needle biopsy devices. The Consent Agreement is designed to remedy the alleged violations by preserving the competition that otherwise would be lost in these markets as a result of the proposed Acquisition.

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

## **II. THE RESPONDENTS**

BD, headquartered in Franklin Lakes, New Jersey, is a medical technology company that manufactures and sells a broad range of medical supplies, devices, laboratory equipment, and diagnostic products throughout the world. Its operations consist of two business segments: BD Medical and BD Life Sciences. BD Medical provides a broad array of medical technologies and devices to hospitals, clinics, physicians' office practices, pharmacies, pharmaceutical companies, and healthcare workers.

Bard, headquartered in Murray Hill, New Jersey, is a medical technology company that manufactures medical, surgical, diagnostic, and patient care devices sold to hospitals, healthcare professionals, extended care facilities, and other medical facilities throughout the world. Its operations consist of four principal divisions: Bard Access Systems, Inc., Bard Medical Division, Bard Peripheral Vascular, Inc., and Bard Biopsy Systems.

## **III. THE RELEVANT MARKETS AND STRUCTURE OF THE MARKETS**

### **A. Tunneled Home Drainage Catheter Systems**

Tunneled home drainage catheter systems are medical devices used to treat recurrent fluid buildup in the lungs and abdomen,

### Analysis to Aid Public Comment

conditions known as pleural effusions and malignant ascites, respectively. Patients suffering from these conditions, often due to cancer or other serious illnesses, commonly require frequent fluid drainage. Tunneled home drainage catheter systems drain fluid from the lungs (pleural drainage) or abdomen (peritoneal drainage) through a tunneled, indwelling catheter connected to a disposable receptacle. After a medical doctor places the indwelling catheter, the device allows fluid drainage to take place conveniently in a patient's home or in a hospice setting where the patient or a caregiver can attach, remove, replace, and dispose of the drainage receptacle as frequently as needed. Although patients requiring pleural or peritoneal drainage can undergo an outpatient medical procedure when fluid build-up becomes severe, such procedures are not suitable alternatives to tunneled home drainage catheter systems, because they require a patient to make repeated trips to a healthcare facility to see a doctor. Customers likely would not substitute outpatient medical procedures in response to a small but significant increase in the price of tunneled home drainage catheter systems.

BD and Bard are the two largest manufacturers of tunneled home drainage catheter systems in the United States, with a combined market share of approximately 98%. The remaining market share is divided between Rocket Medical plc ("Rocket Medical") and B. Braun Medical Inc. ("B. Braun"). Rocket Medical is a new entrant to the U.S. market, and both Rocket Medical and B. Braun, in addition to having a much smaller share of the market than BD and Bard, have far less recognition among U.S. customers.

### **B. Soft Tissue Core Needle Biopsy Devices**

Soft tissue core needle biopsy devices are used by medical clinicians, typically interventional radiologists or oncologists, to remove small samples of tissue from soft tissue organs for examination and diagnosis. There are no practical alternatives to soft tissue core needle biopsy devices for clinicians seeking to perform a soft tissue biopsy. Other biopsy devices, such as bone or bone marrow biopsy devices, are not approved or intended to be used for soft tissue biopsies. Soft tissue core needle biopsy devices do not include, and are distinguished from, vacuum-

## Analysis to Aid Public Comment

assisted biopsy (“VAB”) devices which employ a vacuum to remove larger tissue samples. VAB devices are used for breast biopsies involving lesions that are difficult to locate and are not used to perform biopsies of other soft tissues and organs. VAB devices are more complex devices that are sold at a significantly higher price than soft tissue core needle biopsy devices. Accordingly, customers likely would not switch to VAB devices in response to a small but significant increase in the price of soft tissue core needle biopsy devices.

Bard and BD are the two largest manufacturers of soft tissue core needle biopsy devices in the United States, with a combined market share of 60% or greater. Other participants in the market include Cook Medical, Argon Medical Devices, Inc., and Hologic, Inc., but each of these manufacturers has a smaller market share than either Bard or BD. In addition, there is a fringe of other manufacturers with very small market shares.

### **C. The Relevant Geographic Market**

The relevant geographic market for both tunneled home drainage catheter systems and soft tissue core needle biopsy devices is the United States. These relevant 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, are not viable competitive alternatives for U.S. consumers.

## **IV. COMPETITIVE EFFECTS OF THE TRANSACTION**

The proposed Acquisition would likely substantially lessen competition in the U.S. markets for tunneled home drainage catheter systems and soft tissue core needle biopsy devices. The Acquisition would combine the largest and second-largest suppliers of both products in the United States and would substantially increase concentration in already highly concentrated markets. Under the *Horizontal Merger Guidelines*, the Acquisition would presumptively create or enhance market power. By eliminating direct and substantial competition between Respondents, the proposed Acquisition likely would



## Analysis to Aid Public Comment

allow the combined firm to exercise market power unilaterally, resulting in higher prices and/or reduced innovation.

**V. ENTRY**

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 into the markets for each of these devices is difficult, time-consuming, and expensive, requiring a significant investment of time and money for product research and development, regulatory approval by the FDA, and the establishment of a sales and marketing infrastructure sufficient to develop customer awareness and acceptance of the products.

**VI. THE PROPOSED CONSENT AGREEMENT**

The Consent Agreement remedies the competitive concerns raised by the proposed Acquisition by requiring the Respondents to divest all of the assets, facilities, and resources relating to Bard's tunneled home drainage catheter systems business and BD's soft tissue core needle biopsy devices business to Merit. The provisions of the Consent Agreement will enable Merit to become an independent, viable, and effective competitor in the respective relevant markets and maintain the competition that currently exists.

Merit, headquartered in South Jordan, Utah, is a global company with 30 years of experience in the development, manufacture, and distribution of medical devices used in interventional, diagnostic, and therapeutic procedures. Merit offers a portfolio of products that is highly complementary to the tunneled home drainage catheter systems being acquired. Merit also recently introduced its first soft tissue core needle biopsy device product. Merit possesses substantial industry expertise in these product areas and sells its products to similar customers as BD and Bard. For these reasons, Merit is well positioned to restore the benefits of competition that would be lost due to the Acquisition.

## Analysis to Aid Public Comment

Pursuant to the Order, Merit will receive all rights and assets related to Bard's tunneled home drainage catheter system business and BD's soft tissue core needle biopsy device business, including all of the confidential business information used in those businesses. Merit will own or receive a license to all intellectual property necessary to run the businesses. It will also acquire the equipment used in the manufacturing of the products and all documentation and other information related to the products. Respondents will also contract manufacture products for Merit until it is able to manufacture them itself, and Respondents will provide transitional services to Merit to assist the company in establishing manufacturing capabilities for the divested products.

The Respondents must accomplish the divestitures no later than 10 days after the consummation of the proposed Acquisition. If the Commission determines that Merit is not an acceptable acquirer, or that the manner of the divestitures is not acceptable, the proposed Order requires the Respondents to unwind the sale of assets to Merit and then divest the assets to a Commission-approved acquirer(s) within 180 days of the date the Order becomes final. Pursuant to the Order To Maintain Assets, Respondents must maintain the businesses pending divestiture.

The Commission has agreed to appoint a Monitor to ensure that the Respondents comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of assets to Merit. The Commission has appointed Mazars LLP as the Monitor in this matter. The proposed Order further allows the Commission to appoint a trustee in the event the parties fail to divest the products as required.

**VII. OPPORTUNITY FOR PUBLIC COMMENT**

The purpose of this analysis is to facilitate public comment on the Consent Agreement to aid the Commission in determining whether it should make the Order final. This analysis is not intended to constitute an official interpretation of the proposed Consent Agreement and does not modify its terms in any way.

## Complaint

## IN THE MATTER OF

**AGRIUM INC.,  
POTASH CORPORATION OF SASKATCHEWAN  
INC.,  
AND  
NUTRIEN LTD.**

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-4638; File No. 161 0232  
Complaint, December 27, 2017 – Decision, February 5, 2018*

This consent order addresses the merger of Potash Corporation of Saskatchewan Inc. and Agrium Inc. whereby each such entity shall become a subsidiary of Nutrien Ltd. The complaint alleges that the Merger, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the markets for: (1) superphosphoric acid (“SPA”) in North America, and (2) 65%-67% concentration nitric acid in the region near and to the east of PotashCorp’s Lima, Ohio and Agrium’s North Bend, Ohio nitric acid plants. The consent order requires the respondents to divest Agrium’s Conda, Idaho facility and related assets to Itafos and Agrium’s North Bend, Ohio facility and related assets to Trammo, Inc.

*Participants*

For the *Commission*: James Abell, Elizabeth Arens, Peggy Bayer Femenella, Daniel Freer, Frances Anne Johnson, Jon Nathan, and Kristian Rogers.

For the *Respondents*: Michael Egge, Latham & Watkins LLP; Phillip Proger, Jones Day.

**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 Potash Corporation of Saskatchewan Inc. (“PotashCorp”), a corporation

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subject to the jurisdiction of the Commission, and Respondent Agrium Inc. (“Agrium”), a corporation subject to the jurisdiction of the Commission, have agreed to merge, such that each shall become a subsidiary of Respondent Nutrien Ltd. (“Nutrien”), a corporation, 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 PotashCorp 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 122 1st Avenue South, Saskatoon, Saskatchewan, Canada S7K 7G3.

2. Respondent Agrium 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 13131 Lake Fraser Drive S.E., Calgary, Alberta, Canada T2J 7E8.

3. Respondent Nutrien is a corporation organized, existing, and doing business under and by virtue of the laws of Canada with its registered office located at 122 1st Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada S7K 7G3, and its principal places of business to be located at 122 1st Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada, S7K 7G3 and at 13131 Lake Fraser Drive S.E., Calgary, Alberta, Canada T2J 7EK.

**II. JURISDICTION**

4. Respondents PotashCorp and Agrium, 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.

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**III. THE PROPOSED MERGER**

5. Pursuant to an Arrangement Agreement (the “Merger Agreement”) dated September 11, 2016, PotashCorp and Agrium have agreed to a merger (the “Merger”) in which PotashCorp and Agrium shareholders will own 52% and 48% of Nutrien, respectively.

**IV. THE RELEVANT PRODUCT MARKETS****A. Superphosphoric Acid**

6. Superphosphoric acid (“SPA”) is a relevant product market in which to analyze the effects of the Merger. SPA is a highly concentrated form of phosphoric acid that contains phosphate, an essential crop nutrient. SPA is purchased by agricultural wholesalers and retailers, who use it to produce the liquid phosphate fertilizer known as ammonium polyphosphate, which is sold to farmers.

7. A small but significant and non-transitory increase in the price of SPA would not induce customers to switch to dry phosphate fertilizer. Many farmers perceive advantages, including higher crop yield and quality, to using liquid rather than dry phosphate fertilizer, particularly in the early stages of crop development. In addition, liquid phosphates can be applied more directly to the seed than dry phosphates and can more easily be combined with other nutrients. Consistent with these perceived advantages, SPA typically garners a premium price over dry phosphates. This premium has at times expanded significantly without prompting customers to shift their purchases from liquid to dry phosphate fertilizers.

**B. 65%-67% Concentration Nitric Acid**

8. Nitric acid of 65%-67% concentration is a relevant product market in which to analyze the effects of the Merger. Nitric acid is a chemical compound produced through the interaction of ammonia, water, and a catalyzing agent. Nitric acid is used as a feedstock for nitrogen-based fertilizers and explosives and also is sold on the market for a variety of industrial uses,

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including in the production of stainless steel, metal-based specialty chemicals, and water-treatment and cleaning products. Nitric acid of 65%-67% concentration is the preferred concentration for most such industrial uses.

9. A small but significant and non-transitory increase in the price of 65%-67% concentration nitric acid would not induce customers to switch to other nitric acid concentrations or other chemical products. For most customers, there are no functionally equivalent chemical substitutes for 65%-67% concentration nitric acid. Purchasing lower-concentration nitric acid and increasing its concentration is not an economical alternative because the customer would have to pay both higher shipping costs to transport more diluted acid and the costs of constructing evaporation equipment. Purchasing 98% concentration nitric acid and diluting it down also is not an economical alternative due to the significant environmental and safety hazards associated with transporting and storing highly concentrated nitric acid.

**V. THE RELEVANT GEOGRAPHIC MARKETS**

10. The relevant geographic market in which to analyze the effects of the Merger with respect to SPA is no broader than North America. Transporting SPA overseas is logistically challenging and expensive, thus offshore imports of SPA are negligible.

11. The relevant geographic market in which to analyze the effects of the Merger with respect to 65%-67% concentration nitric acid encompasses customer locations near and to the east of PotashCorp's Lima, Ohio and Agrium's North Bend, Ohio nitric acid plants, including customer locations in Ohio, Kentucky, Pennsylvania, Maryland, West Virginia, and New Jersey. Because freight costs for nitric acid are high, and to ensure more reliable and flexible deliveries, customers strongly prefer to purchase nitric acid from more proximate suppliers. Customers near and to the east of PotashCorp's and Agrium's Ohio nitric acid plants lack viable alternative suppliers for 65%-67% concentration nitric acid.

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**VI. MARKET STRUCTURE**

12. PotashCorp and Agrium are two of only three suppliers of SPA in North America.

13. PotashCorp and Agrium are the primary suppliers of 65%-67% concentration nitric acid to customer locations near and to the east of PotashCorp's Lima, Ohio and Agrium's North Bend, Ohio nitric acid plants. Other producers of 65%-67% concentration nitric acid have minimal sales into this region.

14. For both relevant markets, the Merger would result in highly concentrated markets under standards set forth in the 2010 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines and the relevant case law, and the Merger is therefore presumptively unlawful.

**VII. ENTRY CONDITIONS**

15. Entry into the relevant markets would not be timely, likely, or sufficient to prevent or deter the expected anticompetitive effects of the Merger. Producers of SPA or 65%-67% concentration nitric acid outside the relevant geographic markets are unlikely to defeat a price increase within the relevant geographic markets. Construction of new production facilities within the relevant geographic markets would entail significant capital costs.

**VIII. EFFECTS OF THE MERGER**

16. The Merger, if consummated, is likely to substantially lessen competition in the relevant lines of commerce in the following ways, among others:

- a. by eliminating direct and substantial competition between PotashCorp and Agrium;
- b. by increasing the likelihood that the merged entity will unilaterally exercise market power; and

## Complaint

- c. for SPA, by increasing the likelihood of coordinated interaction among the remaining competitors in the relevant market.

17. The ultimate effects of the Merger would be to increase the likelihood that prices of SPA and 65%-67% concentration nitric acid will rise and that quality, selection, service, and innovation will be lessened.

**IX. VIOLATIONS CHARGED**

18. The allegations contained in Paragraphs 1 through 17 above are hereby incorporated by reference as though fully set forth here.

19. The Merger described in Paragraph 5, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

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

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

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

By the Commission.



## Order to Maintain Assets

**ORDER TO MAINTAIN ASSETS**

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger of Agrium Inc. (“Agrium”) and Potash Corporation of Saskatchewan Inc. (“PCS”) whereby each such entity shall become a subsidiary of Nutrien Ltd. (“Nutrien”) and Respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Agrium Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 13131 Lake Fraser Drive S.E., Calgary, Alberta, Canada T2J 7E8. Agrium’s

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principal subsidiary in the United States is located at 4582 South Ulster Street, Suite 1700, Denver, Colorado 80237.

2. Respondent Potash Corporation of Saskatchewan Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 122 1<sup>st</sup> Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada S7K 7G3. PCS's principal subsidiary in the United States is located at 1101 Skokie Blvd., Suite 400, Northbrook, Illinois 60062.
3. Respondent Nutrien Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of Canada with its registered office located at 122 1<sup>st</sup> Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada S7K 7G3, and its principal places of business to be located at 122 1<sup>st</sup> Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada, S7K 7G3 and at 13131 Lake Fraser Drive S.E., Calgary, Alberta, Canada T2J 7EK.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

**ORDER****I.**

**IT IS HEREBY ORDERED** that, as used in this Order to Maintain Assets, the following definitions shall apply (to the extent any capitalized term appearing in this Order to Maintain Assets is not defined below, the term shall be defined as that term is defined in the Decision and Order contained in the Consent Agreement):

- A. "Agrium" means Agrium Inc., its directors, officers, employees, agents, representatives, successors, and

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assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Agrium, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- B. “PCS” means Potash Corporation of Saskatchewan Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by PCS, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Nutrien” means Nutrien Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Nutrien, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer” means any Person that acquires either the Nitrogen Assets or the Phosphate Assets pursuant to this Order.
- F. “Confidential Information” means any and all of the following information:
  - 1. all information that is a trade secret under applicable trade secret or other law;
  - 2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, software and

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computer software and database technologies, systems, structures, and architectures;

3. all information concerning the relevant business (which includes historical and current financial statements, financial projections and budgets, tax returns and accountants' materials, historical, current and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications, client and customer lists and files, contracts, the names and backgrounds of key personnel, and personnel training techniques and materials); and
4. all notes, analyses, compilations, studies, summaries, and other material to the extent containing or based, in whole or in part, upon any of the information described above;

*Provided, however,* that Confidential Information shall not include information that (i) was, is, or becomes generally available to the public other than as a result of a breach of this Order to Maintain Assets; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary, or other obligation restricting disclosure.

G. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance and service of a final Decision and Order by the Commission; and
2. Final Decision and Order issued by the Commission in this matter following the issuance and service of a final Decision and Order by the Commission.

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- H. “Divestiture Agreement” means the Nitrogen Acquisition Agreement, Phosphate Acquisition Agreement, or any other agreement between Respondents or a Divestiture Trustee and an Acquirer to divest the Nitrogen Assets or the Phosphate Assets that has been approved by the Commission pursuant to Paragraph VII.A. of the Decision and Order, including any ancillary agreements relating to the divestiture, all amendments, exhibits, agreements, and schedules thereto.
- I. “Effective Date” means the date the Nutrien Arrangement is completed.
- J. “Itafos” means Itafos Conda LLC a limited liability company organized, existing, and doing business under, and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 109 Post Oak Lane, Suite 145, Houston, Texas 77024.
- K. “Nitrogen Business” means all business activities conducted by Agrium prior to the Effective Date at or relating to Agrium’s North Bend, Ohio, facility, including but not limited to researching, developing, manufacturing, and selling nitric acid and other products.
- L. “Nitrogen Divestiture Date” means the date on which Respondents or the Divestiture Trustee close on a transaction to divest the Nitrogen Assets.
- M. “Nitrogen Employee” means any full-time, part-time, or contract individual employed by Agrium at any time and whose job responsibilities primarily relate or related to the Nitrogen Business.
- N. “Nutrien Arrangement” means the arrangement pursuant to section 192 of the Canada Business Corporations Act involving Agrium, Inc., Potash Corporation of Saskatchewan Inc. and Nutrien Ltd. as

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described in the Arrangement Agreement between Agrium Inc. and Potash Corporation of Saskatchewan Inc. dated September 11, 2016, whereby Agrium Inc. and Potash Corporation of Saskatchewan Inc. will become subsidiaries of Nutrien Ltd. on the date shown in the certificate of arrangement issued by the director appointed pursuant to section 260 of the Canada Business Corporations Act.

- O. “Orders” means this Order to Maintain Assets and the Decision and Order.
- P. “Person” means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.
- Q. “Phosphate Business” means all business activities conducted by Agrium prior to the Effective Date at or relating to Agrium’s Conda, Idaho facility, including but not limited to mining, researching, developing, manufacturing, and selling super phosphoric acid, mono-ammonium phosphate, and merchant grade acid.
- R. “Phosphate Divestiture Date” means the date on which Respondents or the Divestiture Trustee close on a transaction to divest the Phosphate Assets.
- S. “Phosphate Employee” means any full-time, part-time, or contract individual employed by Agrium at any time and whose job responsibilities primarily relate or related to the Phosphate Business.
- T. “Trammo” means Trammo, Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Rockefeller Plaza, 9<sup>th</sup> Floor, New York, New York 10020.

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**II.**

**IT IS FURTHER ORDERED** that from the time that Respondents execute the Consent Agreement until the Nitrogen Divestiture Date:

- A. Respondents shall operate the Nitrogen Business and Nitrogen Assets in the ordinary course of business consistent with past practices, including but not limited to:
1. Maintaining the (i) Nitrogen Business and Nitrogen Assets in substantially the same condition (except for normal wear and tear) existing at the time Respondents sign the Consent Agreement, (ii) relations and good will with suppliers, customers, landlords, creditors, agents, and other having business relationships with the Nitrogen Business and Nitrogen Assets, and (iii) viability, competitiveness, and marketability of the Nitrogen Business and Nitrogen Assets;
  2. Providing the Nitrogen Business with sufficient financial and other resources to (i) operate the Nitrogen Business and Nitrogen Assets at least at the current rate of operation and staffing and to carry out, at their scheduled pace, all business plans, sales and promotional activities in place prior to the Effective Date; (ii) perform all maintenance to, and replacements or remodeling of, the assets of the Nitrogen Business in the ordinary course of business and in accordance with past practice and current plans; (iii) carry on such capital projects, physical plant improvements, and business plans as are already underway or planned for which all necessary regulatory and legal approvals have been obtained, including but not limited to, existing or planned renovation, remodeling, or expansion projects; and

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3. Preserving the Nitrogen Business and Nitrogen Assets as an ongoing business and not take any affirmative action, or fail to take any action within Respondents' control, as a result of which the viability, competitiveness, and marketability of the Nitrogen Business and Nitrogen Assets would be diminished.
- B. No later than the Nitrogen Divestiture Date, Respondents shall obtain all Governmental Authorizations and Consents from any Person that are necessary to transfer the relevant assets; *provided, however,* that in the event that Respondents are unable to obtain any:
1. Governmental Authorization, Respondents shall provide such assistance as Acquirer may reasonably request in Acquirer's efforts to obtain a comparable authorization; and
  2. Consent from a third party, Respondents shall, with the acceptance of the Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.
- C. Respondents shall cooperate and assist with an Acquirer's due diligence investigation of the Nitrogen Assets and Nitrogen Business, including but not limited to access to any and all personnel, properties, contracts, authorizations, documents, and information customarily provided as part of a due diligence process.
- D. Respondents shall:
1. No later than twenty (20) days before the Nitrogen Divestiture Date (i) identify each Nitrogen Employee, (ii) allow Acquirer to inspect the personnel files and other documentation of each Nitrogen Employee, to the extent permissible under applicable laws; and (iii) allow Acquirer an



## Order to Maintain Assets

opportunity to meet with any Nitrogen Employee outside the presence or hearing of Respondents, and to make an offer of employment;

2. Remove any contractual impediments that may deter any Nitrogen Employee from accepting employment with Acquirer, including, any non-compete or confidentiality provision of an employment contract;
3. Provide each Nitrogen Employee with a financial incentive as necessary to accept an offer of employment with Acquirer, including vesting all current and accrued benefits under Respondents' retirement plans as of the date of transition of employment with Acquirer for any Nitrogen Employee who accepts an offer of employment from Acquirer; and
4. Not offer any incentive to any Nitrogen Employee to decline employment with Acquirer or otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Nitrogen Employee by Acquirer.

For purposes of this Paragraph II.D., "Acquirer" shall include any Person with whom Respondents engage in negotiations to acquire the Nitrogen Assets.

**III.**

**IT IS FURTHER ORDERED** that from the time that Respondents execute the Consent Agreement until the Phosphate Divestiture Date:

- A. Respondents shall operate the Phosphate Business and Phosphate Assets in the ordinary course of business consistent with past practices, including but not limited to:

## Order to Maintain Assets

1. Maintaining (i) the Phosphate Business and Phosphate Assets in substantially the same condition (except for normal wear and tear) existing at the time Respondents sign the Consent Agreement, (ii) relations and good will with suppliers, customers, landlords, creditors, agents, and other having business relationships with the Phosphate Business and Phosphate Assets, and (iii) the viability, competitiveness, and marketability of the Phosphate Business and Phosphate Assets;
  2. Providing the Phosphate Business with sufficient financial and other resources to (i) operate the Phosphate Business and Phosphate Assets at least at the current rate of operation and staffing and to carry out, at their scheduled pace, all business plans, sales and promotional activities in place prior to the Effective Date; (ii) perform all maintenance to, and replacements or remodeling of, the assets of the Phosphate Business in the ordinary course of business and in accordance with past practice and current plans; (iii) carry on such capital projects, physical plant improvements, and business plans as are already underway or planned for which all necessary regulatory and legal approvals have been obtained, including but not limited to, existing or planned renovation, remodeling, or expansion projects; and
  3. Preserving the Phosphate Business and Phosphate Assets as an ongoing business and not take any affirmative action, or fail to take any action within Respondents' control, as a result of which the viability, competitiveness, and marketability of the Phosphate Business and Phosphate Assets would be diminished.
- B. No later than the Phosphate Divestiture Date, Respondents shall obtain all Governmental Authorizations and Consents from any Person that are necessary to transfer the relevant assets; *provided,*

## Order to Maintain Assets

*however*, that in the event that Respondents are unable to obtain any:

1. Governmental Authorization, Respondents shall provide such assistance as Acquirer may reasonably request in Acquirer's efforts to obtain a comparable authorization; and
  2. Consent from a third party, Respondents shall, with the acceptance of the Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.
- C. Respondents shall cooperate and assist with an Acquirer's due diligence investigation of the Phosphate Assets and Phosphate Business, including but not limited to access to any and all personnel, properties, contracts, authorizations, documents, and information customarily provided as part of a due diligence process.
- D. Respondents shall:
1. No later than twenty (20) days before the Phosphate Divestiture Date (i) identify each Phosphate Employee, (ii) allow Acquirer to inspect the personnel files and other documentation of each Phosphate Employee, to the extent permissible under applicable laws; and (iii) allow Acquirer an opportunity to meet with any Phosphate Employee outside the presence or hearing of Respondents, and to make an offer of employment;
  2. Remove any contractual impediments that may deter any Phosphate Employee from accepting employment with Acquirer, including, any non-compete or confidentiality provision of an employment contract;

## Order to Maintain Assets

3. Provide each Phosphate Employee with a financial incentive as necessary to accept an offer of employment with Acquirer, including vesting all current and accrued benefits under Respondents' retirement plans as of the date of transition of employment with Acquirer for any Phosphate Employee who accepts an offer of employment from Acquirer; and
4. Not offer any incentive to any Phosphate Employee to decline employment with Acquirer or otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Phosphate Employee by Acquirer.

For purposes of this Paragraph III.D., "Acquirer" shall include any Person with whom Respondents engage in negotiations to acquire the Phosphate Assets.

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

- A. Respondents shall (i) not disclose (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Information received or maintained by Respondents relating to the Nitrogen Assets, Nitrogen Business, Phosphate Assets, Phosphate Business, and the post-divestiture Nitrogen Business and Phosphate Business; *provided, however*, that Respondents may disclose or use such Confidential Information in the course of:
  1. Performing its obligations or as permitted under the Orders or any Divestiture Agreement; or
  2. Complying with financial, regulatory, or other legal obligations, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Nitrogen Assets, Nitrogen

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Business, Phosphate Assets, Phosphate Business or the post-divestiture Nitrogen Business and Phosphate Business, or as required by law.

- B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A. of this Order to Maintain Assets, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.
- C. Respondents shall enforce the terms of this Paragraph IV. as to their employees or any other Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph IV., including implementation of access and data controls, training of its employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

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

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint Richard Gilmore to serve as Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and any Divestiture Agreement.
- B. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the

## Order to Maintain Assets

Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order to Maintain Assets and in consultation with the Commission:

1. The Monitor shall (i) monitor Respondents' compliance with the obligations set forth in the Orders and (ii) act in a fiduciary capacity for the benefit of the Commission;
2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with the Orders or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to the Orders;
3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or

## Order to Maintain Assets

expenses result from the Monitor's gross negligence or willful misconduct; and

5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.
- C. The Monitor shall report in writing to the Commission (i) every thirty (30) days after the Effective Date and (ii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with the Orders.
  - D. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
  - E. The Monitor's power and duties shall terminate when this Order to Maintain Assets terminates at which time the Monitor's power and duties shall continue as set forth under the Decision and Order, or at such other time as directed by the Commission.
  - F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:
    1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within five (5) days after notice by the staff of the Commission to

## Order to Maintain Assets

Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and

2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order to Maintain Assets on the same terms and conditions as provided in this Paragraph V.
- G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

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

- A. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Orders within thirty (30) days from the date Respondents sign the Consent Agreement (as set forth in the Consent Agreement) and every thirty (30) days thereafter until this Order to Maintain Assets terminates.
- B. With respect to any divestiture required by Paragraphs II. and III. of the Decision and Order, Respondents shall include in their compliance reports (i) the status of the divestiture and transfer of the Nitrogen Assets and the Phosphate Assets; (ii) a description of all substantive contacts with a proposed acquirer (in the event that the Nitrogen Assets are not divested to



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Trammo or the Phosphate Assets are not divested to Itafos); and (iii) as applicable, a statement that the divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondents completed such divestiture and the date the divestiture was accomplished.

**VII.**

**IT IS FURTHER ORDERED** that the purpose of this Order to Maintain Assets is to (i) preserve the Nitrogen Business and Phosphate Business and the Nitrogen Assets and Phosphate Assets as a viable, competitive, and ongoing business until the divestitures required by the Decision and Order are achieved; (ii) prevent interim harm to competition pending the divestitures and other relief; and (iii) help remedy any anticompetitive effects of the proposed Acquisition as alleged in the Commission's Complaint.

**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 (other than the Nutrien Arrangement); or
- C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

**IX.**

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with the Orders, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondents, Respondents shall,

## Order to Maintain Assets

without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the Respondents related to compliance with the Orders, which copying services shall be provided by the Respondents at their expense; and
- B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

**X.**

**IT IS FURTHER ORDERED** that this Order to Maintain Assets shall terminate:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. Three (3) business days after the date that Respondents complete the divestiture required by Paragraphs II. and III. of the Decision and Order; *provided, however*, that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate three (3) business days after the Decision and Order becomes final.

By the Commission.

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission, having initiated an investigation of the proposed merger of Respondent Agrium Inc. (“Agrium”) and Respondent Potash Corporation of Saskatchewan Inc. (“PCS”) whereby each such entity shall become a subsidiary of Respondent Nutrien Ltd. (“Nutrien”), 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 (“Consent Agreement”) containing consent orders, 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 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 and served its Complaint and its Order to Maintain Assets and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received from an interested person, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and enters the following Decision and Order (“Order”):

## Decision and Order

1. Respondent Agrium Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 13131 Lake Fraser Drive S.E., Calgary, Alberta, Canada T2J 7E8. Agrium's principal subsidiary in the United States is located at 4582 South Ulster Street, Suite 1700, Denver, Colorado 80237.
2. Respondent Potash Corporation of Saskatchewan Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 122 1<sup>st</sup> Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada S7K 7G3. PCS's principal subsidiary in the United States is located at 1101 Skokie Blvd., Suite 400, Northbrook, Illinois 60062.
3. Respondent Nutrien Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of Canada with its registered office located at 122 1<sup>st</sup> Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada S7K 7G3, and its principal places of business to be located at 122 1<sup>st</sup> Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada, S7K 7G3 and at 13131 Lake Fraser Drive S.E., Calgary, Alberta, Canada T2J 7EK.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

**ORDER****I.**

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

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- A. “Agrium” means Agrium Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Agrium, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “PCS” means Potash Corporation of Saskatchewan Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by PCS, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Nutrien” means Nutrien Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Nutrien, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer” means the Person that acquires either the Nitrogen Assets or the Phosphate Assets pursuant to this Order.
- F. “Confidential Information” means any and all of the following information:
1. all information that is a trade secret under applicable trade secret or other law;
  2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and

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anticipated customer requirements, price lists, market studies, business plans, software and computer software and database technologies, systems, structures, and architectures;

3. all information concerning the relevant business (which includes historical and current financial statements, financial projections and budgets, tax returns and accountants' materials, historical, current and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications, client and customer lists and files, contracts, the names and backgrounds of key personnel and personnel training techniques and materials); and
4. all notes, analyses, compilations, studies, summaries and other material to the extent containing or based, in whole or in part, upon any of the information described above;

*Provided, however,* that Confidential Information shall not include information that (i) was, is, or becomes generally available to the public other than as a result of a breach of this Order; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.

- G. "Consent" means any approval, consent, ratification, waiver, or other authorization.
- H. "Contract" means any agreement, contract, lease, license agreement, consensual obligation, promise or undertaking (whether written or oral and whether express or implied), whether or not legally binding with third parties.

## Decision and Order

- I. “Divestiture Agreement” means the Nitrogen Acquisition Agreement, Phosphate Acquisition Agreement, or any other agreement between Respondents or a Divestiture Trustee and an Acquirer to divest the Nitrogen Assets or the Phosphate Assets that has been approved by the Commission pursuant to Paragraph VII.A. of this Order, including any ancillary agreements relating to the divestiture, all amendments, exhibits, agreements, and schedules thereto.
- J. “Divestiture Trustee” means the Person appointed by the Commission pursuant to Paragraph VI. of this Order.
- K. “Effective Date” means the date the Nutrien Arrangement is completed.
- L. “Governmental Authorization” means any consent, license, registration, or permit issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement.
- M. “Gyp-0” means the stack of phosphogypsum stored at Agrium’s Conda, Idaho, facility, described as Gyp-0.
- N. “Intellectual Property” means all intellectual property, including (i) commercial names, all assumed fictional business names, trade names, “doing business as” (d/b/a names), registered and unregistered trademarks, service marks and applications, and trade dress; (ii) all patents, patent applications and inventions and discoveries that may be patentable; (iii) all registered and unregistered copyrights in both published works and unpublished works; (iv) all rights in mask works; (v) all know-how, trade secrets, confidential or proprietary information, customer lists, software, technical information, data, process technology, plans, drawings, and blue prints; (vi) and all rights in internet web sites and internet domain names presently used.

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- O. “Itafos” means Itafos Conda LLC a limited liability company organized, existing, and doing business under, and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 109 Post Oak Lane, Suite 145, Houston, Texas 77024.
- P. “MAP” means mono-ammonium phosphate.
- Q. “Nitrogen Acquisition Agreement” means the Asset Purchase Agreement between Agrium U.S. Inc. and Trammo Nitrogen Products, Inc., and Trammo, Inc., dated November 5, 2017, including all ancillary agreements, amendments, schedules, exhibits, and attachment thereto.
- R. “Nitrogen Assets” means all of Respondents’ right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, relating to the Nitrogen Business, including, but not limited to:
1. all real property interests (including fee simple interests and real property leasehold interests), including all easements, and appurtenances, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
  2. all Tangible Personal Property, including any Tangible Personal Property removed from any location of the Nitrogen Business since the date of the announcement of the Nutrien Arrangement and not replaced;
  3. all inventories;
  4. all Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;



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5. all Governmental Authorizations and all pending applications therefor or renewals thereof, to the extent transferable;
6. all data and Records, including client and customer lists and Records, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, notices, orders, inquiries, correspondence, and other similar documents and Records, and copies of all personnel Records (to the extent permitted by law); and
7. all intangible rights and property, including Intellectual Property owned or licensed (as licensor or licensee) by Respondents (to the extent transferable or licensable), going concern value, goodwill, and telephone and telecopy listings;

*Provided, however,* that the Nitrogen Assets need not include (i) Nitrogen Retained Assets or (ii) any assets that would otherwise be part of the Nitrogen Assets if not needed by Acquirer and the Commission approves the divestiture without such assets.

- S. “Nitrogen Business” means all business activities conducted by Agrium prior to the Effective Date at or relating to Agrium’s North Bend, Ohio, facility, including but not limited to researching, developing, manufacturing, and selling nitric acid or other products.
- T. “Nitrogen Divestiture Date” means the date on which Respondents or the Divestiture Trustee close on a transaction to divest the Nitrogen Assets.

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- U. “Nitrogen Employee” means any full-time, part-time, or contract individual employed by Agrium at any time and whose job responsibilities primarily relate or related to the Nitrogen Business.
- V. “Nitrogen Retained Assets” means:
1. corporate or regional offices operated by Respondents that are not primarily related to the Nitrogen Business;
  2. corporate, business, or other names of Agrium, or any logo, trademark, service mark, domain name, trade or other name or any derivation thereof of Agrium;
  3. software that can readily be purchased or licensed from sources other than Respondents and that has not been materially modified (other than through user preference settings);
  4. enterprise software that Respondents used primarily to manage and account for businesses other than the relevant business to be divested;
  5. the portion of any Record that contains information about any business that Agrium operated prior to the Effective Date that it is not required to divest; and
  6. any Record of which Respondents have a legal, contractual, or fiduciary obligation to retain the original; *provided, however*, that Respondents shall provide copies of the Record and shall provide the Acquirer access to the original materials if copies are insufficient for regulatory or evidentiary purposes.
- W. “Nutrien Arrangement” means the arrangement pursuant to section 192 of the Canada Business Corporations Act involving Agrium, Inc., Potash

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Corporation of Saskatchewan Inc. and Nutrien Ltd. as described in the Arrangement Agreement between Agrium Inc. and Potash Corporation of Saskatchewan Inc. dated September 11, 2016, whereby Agrium Inc. and Potash Corporation of Saskatchewan Inc. will become subsidiaries of Nutrien Ltd. on the date shown in the certificate of arrangement issued by the director appointed pursuant to section 260 of the Canada Business Corporations Act.

- X. “Person” means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.
- Y. “Phosphate Acquisition Agreement” means the Asset Purchase Agreement by and among Itafos Conda LLC, Itafos, and Nu-West Industries, Inc., Nu-West Mining, Inc., and Agrium Inc., dated November 6, 2017, including all ancillary agreements, amendments, schedules, exhibits, and attachment thereto.
- Z. “Phosphate Assets” means all of Respondents’ right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, relating to the Phosphate Business, including, but not limited to:
1. all real property interests (including fee simple interests and real property leasehold interests), including all easements, and appurtenances, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
  2. all Tangible Personal Property, including any Tangible Personal Property removed from the Phosphate Business since the date of the announcement of the Nutrien Arrangement and not replaced;

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3. all inventories;
4. all Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;
5. all Governmental Authorizations and all pending applications therefor or renewals thereof, to the extent transferable;
6. all data and Records, including client and customer lists and Records, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, notices, orders, inquiries, correspondence, and other similar documents and Records, and copies of all personnel Records (to the extent permitted by law); and
7. all intangible rights and property, including Intellectual Property owned or licensed (as licensor or licensee) by Respondents (to the extent transferable or licensable), going concern value, goodwill, and telephone and telecopy listings;

*Provided, however,* that the Phosphate Assets need not include (i) Phosphate Retained Assets or (ii) any assets that otherwise would be part of the Phosphate Assets if not needed by Acquirer and the Commission approves the divestiture without such assets.

- AA. “Phosphate Business” means all business activities conducted by Agrium prior to the Effective Date at or relating to Agrium’s Conda, Idaho facility, including but not limited to mining, researching, developing, manufacturing, and selling super phosphoric acid, mono-ammonium phosphate, and merchant grade acid.

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- BB. “Phosphate Divestiture Date” means the date on which Respondents or the Divestiture Trustee close on a transaction to divest the Phosphate Assets.
- CC. “Phosphate Employee” means any full-time, part-time, or contract individual employed by Agrium at any time and whose job responsibilities primarily relate or related to the Phosphate Business.
- DD. “Phosphate Products” means any products or services relating to the Phosphate Business manufactured or provided by Agrium from a property or facility that is not included in the Phosphate Assets, including but not limited to, ammonia, SPA processing, and storage.
- EE. “Phosphate Retained Assets” means:
1. corporate or regional offices operated by Respondents that are not primarily related to the Phosphate Business;
  2. Agrium facilities located at or near the Homestead distribution terminal in Nebraska or near Standard, Alberta, Granum, Alberta and Watson, Saskatchewan;
  3. Gyp-0, North Rasmussen Ridge Mine, and other mines that no longer actively produce phosphate ore;
  4. corporate, business, or other names of Agrium, or any logo, trademark, service mark, domain name, trade or other name or any derivation thereof of Agrium with respect to, or associated with, the foregoing other than “Conda Phosphate Operations.”
  5. software that can readily be purchased or licensed from sources other than Respondents and that has

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not been materially modified (other than through user preference settings);

6. enterprise software that Respondents primarily use to manage and account for businesses other than the relevant business to be divested;
  7. the portion of any Record that contains information about any business that Agrium operated prior to the Effective Date that it is not required to divest; and
  8. any Record of which Respondents have a legal, contractual, or fiduciary obligation to retain the original; *provided, however*, that Respondents shall provide copies of the Record and shall provide the Acquirer access to the original materials if copies are insufficient for regulatory or evidentiary purposes.
- FF. “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- GG. “Respondents” means Agrium, PCS, and Nutrien, individually and collectively.
- HH. “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, 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.
- II. “Trammo” means Trammo, Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Delaware, with its

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office and principal place of business located at One Rockefeller Plaza, 9<sup>th</sup> Floor, New York, New York 10020.

- JJ. “Transitional Services” means administrative, operational, and technical assistance, consultation, services, or training with respect to the operation of the relevant business.
- KK. “UAN” means urea ammonium nitrate.

**II.****(Divestiture of the Nitrogen Assets)****IT IS FURTHER ORDERED** that:

- A. No later than ten (10) business days from the Effective Date, Respondents shall divest the Nitrogen Assets, absolutely and in good faith, to Trammo pursuant to the Nitrogen Acquisition Agreement; *provided, however,* that if Respondents have divested the Nitrogen Assets to Trammo prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
1. Trammo is not acceptable as the Acquirer of the Nitrogen Assets, then Respondents shall immediately rescind the Nitrogen Acquisition Agreement, and shall divest the Nitrogen Assets no later than 180 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or
  2. The manner in which the divestiture to Trammo was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications (that shall be incorporated into a revised Nitrogen

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Acquisition Agreement) to the manner of divestiture of the Nitrogen Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

## B. Respondents shall:

1. At the option of the Acquirer of the Nitrogen Assets and in a manner that receives the prior approval of the Commission:
  - a. Provide Transitional Services to the Acquirer for twelve (12) months from the Nitrogen Divestiture Date; and
  - b. Purchase (i) ammonia as a customer from the Acquirer for five (5) years from the Nitrogen Divestiture Date and (ii) UAN terminaling services as a customer from the Acquirer for three (3) years from the Nitrogen Divestiture Date;
2. Provide the assistance set forth in Paragraph II.B.1. (collectively "Transitional Assistance") in quality and quantity and on terms and conditions sufficient for an Acquirer to operate the Nitrogen Business post-divestiture in substantially the same manner as Agrium prior to the Effective Date (including the ability to develop new products, increase sales of current products, and maintain the competitiveness of the Nitrogen Business);

*Provided, however,* that Respondents shall give priority to Acquirer's requirements for Transitional Assistance over Respondents' own requirements and take all actions that are reasonably necessary to ensure uninterrupted Transitional Assistance;

*Provided further* that (i) Acquirer may terminate any Transitional Services at any time upon commercially reasonable notice and without cost or penalty and (ii)



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at Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of any Transitional Services needed to achieve the purposes of this Order; and

*Provided further* that Respondents shall not seek to limit the damages (such as indirect, special, and consequential damages) which Acquirer would be entitled to receive in the event of Respondents' breach of any agreement relating to Transitional Services.

- C. No later than the Nitrogen Divestiture Date, Respondents shall obtain all Governmental Authorizations and Consents from any Person that are necessary to transfer the relevant assets; *provided, however,* that in the event that Respondents are unable to obtain any:
1. Governmental Authorization, Respondents shall provide such assistance as Acquirer may reasonably request in Acquirer's efforts to obtain a comparable authorization; and
  2. Consent from a third party, Respondents shall, with the acceptance of the Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.
- D. Respondents shall cooperate and assist with an Acquirer's due diligence investigation of the Nitrogen Assets and Nitrogen Business, including but not limited to, access to any and all personnel, properties, contracts, authorizations, documents, and information customarily provided as part of a due diligence process. For purposes of this Paragraph II.D., "Acquirer" shall include any Person with whom Respondents engage in negotiations to acquire the Nitrogen Assets.

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## E. Respondents shall:

1. No later than twenty (20) days before the Nitrogen Divestiture Date (i) identify each Nitrogen Employee, (ii) allow Acquirer to inspect the personnel files and other documentation of each Nitrogen Employee, to the extent permissible under applicable laws; and (iii) allow Acquirer an opportunity to meet with any Nitrogen Employee outside the presence or hearing of Respondents, and to make an offer of employment;
2. Remove any contractual impediments that may deter any Nitrogen Employee from accepting employment with Acquirer, including, any non-compete or confidentiality provision of an employment contract;
3. Provide each Nitrogen Employee with a financial incentive as necessary to accept an offer of employment with Acquirer, including vesting all current and accrued benefits under Respondents' retirement plans as of the date of transition of employment with Acquirer for any Nitrogen Employee who accepts an offer of employment from Acquirer; and
4. Not offer any incentive to any Nitrogen Employee to decline employment with Acquirer or otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Nitrogen Employee by Acquirer.

For purposes of this Paragraph II.E., "Acquirer" shall include any Person with whom Respondents engage in negotiations to acquire the Nitrogen Assets.

- F. For a period of two (2) years after the Nitrogen Divestiture Date, Respondents shall not solicit or induce any Nitrogen Employee who has accepted an offer of employment with an Acquirer to terminate

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such employment; *provided, however,* that Respondents may (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the employees or (ii) hire employees if employment has been terminated by an Acquirer or who apply for employment with Respondents, so long as such employees were not solicited by Respondents in violation of this paragraph.

- G. Notwithstanding any other provision of this Order, Respondents shall allow an Acquirer to use any of the names and marks referenced in Paragraph I.V.2. on a temporary basis during the removal and replacement of signage and replacement of other business items and materials.
- H. The purpose of the divestiture of the Nitrogen Assets is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Nutrien Arrangement by Respondents and to remedy the lessening of competition resulting from the Nutrien Arrangement as alleged in the Commission's Complaint.

**III.****(Divestiture of the Phosphate Assets)****IT IS FURTHER ORDERED** that:

- A. No later than ten (10) business days from the Effective Date, Respondents shall divest the Phosphate Assets, absolutely and in good faith, to Itafos pursuant to the Phosphate Acquisition Agreement; *provided, however,* that if Respondents have divested the Phosphate Assets to Itafos prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
  - 1. Itafos is not acceptable as the Acquirer of the Phosphate Assets, then Respondents shall

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immediately rescind the Phosphate Acquisition Agreement, and shall divest the Phosphate Assets no later than 180 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture to Itafos was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications (that shall be incorporated into a revised Phosphate Acquisition Agreement) to the manner of divestiture of the Phosphate Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Respondents shall:

1. At the option of the Acquirer of the Phosphate Assets and in a manner that receives the prior approval of the Commission:
  - a. Provide Transitional Services to the Acquirer for twelve (12) months from the Phosphate Divestiture Date;
  - b. Provide Phosphate Products to the Acquirer for six (6) years from the Phosphate Divestiture Date; and
  - c. Purchase MAP as a customer from the Acquirer for six (6) years from the Phosphate Divestiture Date;
2. Provide the assistance set forth in Paragraph III.B.1. (collectively “Transitional Assistance”) in quality and quantity and on terms and conditions sufficient for an Acquirer to operate the Phosphate Business post-divestiture in substantially the same

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manner as Agrium prior to the Effective Date (including the ability to develop new products, increase sales of current products, and maintain the competitiveness of the Phosphate Business);

*Provided, however,* that Respondents shall give priority to Acquirer's requirements for Transitional Assistance over Respondents' own requirements and take all actions that are reasonably necessary to ensure uninterrupted Transitional Assistance;

*Provided further* that (i) Acquirer may terminate any Transitional Services at any time upon commercially reasonable notice and without cost or penalty and (ii) at Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of any Transitional Services needed to achieve the purposes of this Order; and

*Provided further* that Respondents shall not seek to limit the damages (such as indirect, special, and consequential damages) which Acquirer would be entitled to receive in the event of Respondents' breach of any agreement relating to Transitional Services.

- C. No later than the Phosphate Divestiture Date, Respondents shall obtain all Governmental Authorizations and Consents from any Person that are necessary to transfer the relevant assets; *provided, however,* that in the event that Respondents are unable to obtain any:
1. Governmental Authorization, Respondents shall provide such assistance as Acquirer may reasonably request in Acquirer's efforts to obtain a comparable authorization; and
  2. Consent from a third party, Respondents shall, with the acceptance of the Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.

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- D. Respondents shall cooperate and assist with an Acquirer's due diligence investigation of the Phosphate Assets and Phosphate Business, including but not limited to, access to any and all personnel, properties, contracts, authorizations, documents, and information customarily provided as part of a due diligence process. For purposes of this Paragraph III.D., "Acquirer" shall include any Person with whom Respondents engage in negotiations to acquire the Phosphate Assets.
- E. Respondents shall:
1. No later than twenty (20) days before the Phosphate Divestiture Date (i) identify each Phosphate Employee, (ii) allow Acquirer to inspect the personnel files and other documentation of each Phosphate Employee, to the extent permissible under applicable laws; and (iii) allow Acquirer an opportunity to meet with any Phosphate Employee outside the presence or hearing of Respondents, and to make an offer of employment;
  2. Remove any contractual impediments that may deter any Phosphate Employee from accepting employment with Acquirer, including, any non-compete or confidentiality provision of an employment contract;
  3. Provide each Phosphate Employee with a financial incentive as necessary to accept an offer of employment with Acquirer, including vesting all current and accrued benefits under Respondents' retirement plans as of the date of transition of employment with Acquirer for any Phosphate Employee who accepts an offer of employment from Acquirer; and
  4. Not offer any incentive to any Phosphate Employee to decline employment with Acquirer or

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otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Phosphate Employee by Acquirer.

For purposes of this Paragraph III.E., “Acquirer” shall include any Person with whom Respondents engage in negotiations to acquire the Phosphate Assets.

- F. For a period of two (2) years after the Phosphate Divestiture Date, Respondents shall not solicit or induce any Phosphate Employee who has accepted an offer of employment with an Acquirer to terminate such employment; *provided, however,* that Respondents may (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the employees or (ii) hire employees if employment has been terminated by an Acquirer or who apply for employment with Respondents, so long as such employees were not solicited by Respondents in violation of this paragraph.
- G. Notwithstanding any other provision of this Order, Respondents shall allow an Acquirer to use any of the names and marks referenced in Paragraph I.EE.4. on a temporary basis during the removal and replacement of signage and replacement of other business items and materials.
- H. The purpose of the divestiture of the Phosphate Assets is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Nutrien Arrangement by Respondents and to remedy the lessening of competition resulting from the Nutrien Arrangement as alleged in the Commission’s Complaint.

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

- A. Respondents shall (i) not disclose (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Information received or maintained by Respondents relating to the Nitrogen Assets, Nitrogen Business, Phosphate Assets, Phosphate Business and the post-divestiture Nitrogen Business and Phosphate Business; *provided, however*, that Respondents may disclose or use such Confidential Information in the course of:
1. Performing their obligations or as permitted under this Order, the Order to Maintain Assets, or any Divestiture Agreement; or
  2. Complying with financial, regulatory, or other legal obligations, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Nitrogen Assets, Nitrogen Business, Phosphate Assets, Phosphate Business or the post-divestiture Nitrogen Business and Phosphate Business, or as required by law.
- B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A. of this Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.
- C. Respondents shall enforce the terms of this Paragraph IV. as to their employees or any other Person, and take such action as is necessary to cause each of its



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employees and any other Person to comply with the terms of this Paragraph IV., including implementation of access and data controls, training of its employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

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

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint Richard Gilmore to serve as Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and any Divestiture Agreement.
- B. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:
  - 1. The Monitor shall (i) monitor Respondents' compliance with the obligations set forth in this Order and (ii) act in a fiduciary capacity for the benefit of the Commission;
  - 2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with this Order or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the

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ability of, the Monitor to perform his duties pursuant to this Order;

3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
  4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct; and
  5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.
- C. The Monitor shall report in writing to the Commission (i) every thirty (30) days after the Effective Date for a period of two (2) years after the Effective Date and thereafter every ninety (90) days, (ii) no later than ten (10) days after Respondents have completed their obligations required by Paragraphs II. and III. of this Order ("Final Report"), and (iii) at any other time as

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requested by the staff of the Commission, concerning Respondents' compliance with this Order.

- D. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- E. The Monitor's power and duties shall terminate ten (10) business days after the Monitor has completed his Final Report, or at such other time as directed by the Commission.
- F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:
  - 1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within five (5) days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
  - 2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order on the same terms and conditions as provided in this Paragraph V.

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

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

- A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraphs II. and III. of this Order, the Commission may appoint a Divestiture Trustee to divest any of the Nitrogen Assets or the Phosphate Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor.
- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.
- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise

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in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

- D. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
  - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Nitrogen Assets or the Phosphate Assets, as the case may be, and perform Respondents' other obligations in a manner that satisfies the requirements of this Order;
  - 2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the

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end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph VI. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;
4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall

## Decision and Order

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

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the

## Decision and Order

preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph VI.E.6., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph VI.E.5. of this Order;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order;
  8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and
  9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- F. The Commission may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.



## Decision and Order

- H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

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

- A. If Trammo does not acquire the Nitrogen Assets or Itafos does not acquire the Phosphate Assets, then Respondents shall set forth the manner in which they will accomplish the relevant divestiture and other obligations under this Order in one or more agreements with the Acquirer and submit such agreements to the Commission for the prior approval required by this Order.
- B. Respondents shall comply with all terms of the Divestiture Agreement, which is incorporated into this Order and made a part hereof; *provided, however*, that the Divestiture Agreement shall not limit, or be construed to limit, the terms of this Order. In the event of a conflict between the terms of this Order and the Divestiture Agreement, such that Respondents cannot fully comply with both, the terms of this Order shall govern.
- C. Respondents shall not modify, replace, or extend the terms of the Divestiture Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

## Decision and Order

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

- A. Respondents shall notify the Commission via email to [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov) of the Effective Date no later than five (5) days after the Effective Date.
- B. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order:
  - 1. Thirty (30) days from the date this Order is issued and every thirty (30) days thereafter for a period of one (1) year (for a total of twelve reports) and every ninety (90) days thereafter for a second period of one (1) year (for a total of four reports); and
  - 2. No later than one (1) year after the date this Order is issued and annually thereafter until this Order terminates, and at such other times as the Commission staff may request.
- C. With respect to any divestiture required by Paragraphs II. and III. of this Order, Respondents shall include in their compliance reports (i) the status of the divestiture and transfer of the Nitrogen Assets and the Phosphate Assets; (ii) if Trammo does not acquire the Nitrogen Assets or Itafos does not acquire the Phosphate Assets, a description of all substantive contacts with a proposed acquirer; and (iii) as applicable, a statement that the divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondents completed such divestiture and the date the divestiture was accomplished.

## Decision and Order

**IX.**

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

- A. Any proposed dissolution of any Respondents;
- B. Any proposed acquisition, merger, or consolidation of any Respondents (other than the Nutrien Arrangement or internal consolidation of subsidiaries of Nutrien Ltd.); or
- C. Any other change in any 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.

**X.**

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

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and
- B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

## Analysis to Aid Public Comment

**XI.**

**IT IS FURTHER ORDERED** that this Order shall terminate on February 5, 2028.

By the Commission.

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

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) with Potash Corporation of Saskatchewan Inc. (“PotashCorp”), Agrium Inc. (“Agrium”), and Nutrien Ltd. (“Nutrien”). The proposed Consent Agreement is intended to remedy the anticompetitive effects that would otherwise result from the proposed merger of PotashCorp and Agrium. Under the Consent Agreement, the merging parties must divest Agrium’s Conda, Idaho facility and related assets to Itafos or another buyer approved by the Commission and must divest Agrium’s North Bend, Ohio facility and related assets to Trammo, Inc. (“Trammo”) or another buyer approved by the Commission. The Consent Agreement provides the acquirers with the manufacturing plants and other tangible and intangible assets needed to compete effectively in the markets for the manufacture and sale of superphosphoric acid (“SPA”) and 65%-67% concentration nitric acid.

On September 11, 2016, PotashCorp and Agrium agreed to a merger (the “Merger”) in which PotashCorp and Agrium shareholders will own 52% and 48% of the combined firm, respectively. The Commission’s Complaint alleges that the Merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal

### Analysis to Aid Public Comment

Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the markets for (1) SPA in North America and (2) 65%-67% concentration nitric acid in the region near and to the east of PotashCorp's Lima, Ohio and Agrium's North Bend, Ohio nitric acid plants.

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

## **II. The Parties**

PotashCorp, headquartered in Saskatoon, Saskatchewan, Canada, and Agrium, headquartered in Calgary, Alberta, Canada, are both large producers of crop nutrients, including potash, phosphate, and nitrogen products. PotashCorp and Agrium are two of only three firms in North America that manufacture SPA, a key input for liquid phosphate fertilizers. PotashCorp and Agrium are also two of a small number of firms that make 65%-67% concentration nitric acid, a nitrogen product sold for industrial uses, in North America, and both PotashCorp and Agrium own nitric acid plants in Ohio.

## **III. The Relevant Markets**

### **A. Superphosphoric Acid**

Phosphate is an essential plant nutrient that farmers apply to crops on a seasonal basis. SPA, a highly concentrated form of phosphoric acid, is used to produce the liquid phosphate fertilizer known as ammonium polyphosphate ("APP"). SPA is purchased by agricultural wholesalers and retailers, who convert it to APP and sell APP to farmers.

The relevant product market does not include dry phosphate fertilizers such as monoammonium phosphate ("MAP") or diammonium phosphate ("DAP"). Many farmers perceive

## Analysis to Aid Public Comment

advantages, including higher crop yield and quality, to using liquid rather than dry phosphate fertilizer, particularly in the early stages of crop development. In addition, liquid phosphates can be applied more directly to the seed than dry phosphates and can easily be combined with other nutrients. Consistent with these perceived advantages, SPA typically garners a premium price over dry phosphates. This premium has at times expanded significantly without prompting customers to shift their purchases substantially from liquid to dry phosphate fertilizers.

The relevant geographic market in which to analyze the effects of the Merger for SPA is no broader than North America. SPA is caustic, requires special handling and equipment, and is perishable outside certain temperature ranges. As a result, importing offshore SPA is logistically challenging and expensive, and imports of SPA are rare and do not constrain the prices of SPA produced in North America.

Currently, three firms – PotashCorp, Agrium, and J.R. Simplot Company (“Simplot”) – manufacture all the SPA produced in North America. PotashCorp has two SPA plants, located in Aurora, North Carolina and White Springs, Florida. Agrium’s sole SPA plant is located in Conda, Idaho. Simplot has SPA plants in Rock Springs, Wyoming and Pocatello, Idaho. Absent the proposed remedy, the Merger would result in the merged entity controlling more than 75% of SPA production capacity in North America.

**B. 65%-67% Concentration Nitric Acid**

Nitric acid is a chemical compound produced through the interaction of ammonia, water, and a catalyzing agent. Nitric acid is used as a feedstock for nitrogen-based fertilizers and explosives and is also sold for a variety of industrial uses, including the production of stainless steel, metal-based specialty chemicals, and water-treatment and cleaning products. Nitric acid is produced at different concentration levels, which reflect the amount of water present together with the pure nitric acid. Both PotashCorp’s plant in Lima, Ohio and Agrium’s plant in North Bend, Ohio produce nitric acid at 65%-67% concentration, which is the preferred concentration for most industrial uses.

## Analysis to Aid Public Comment

Customers could not quickly or easily switch from 65%-67% concentration nitric acid to other nitric acid concentrations or other chemical products. For most customers, there are no chemical substitutes that are functionally equivalent to nitric acid. Purchasing lower-concentration nitric acid and increasing its concentration is not an economical alternative because customers would need to invest in constructing an evaporation tower, which few if any nitric acid customers have today. Additionally, buying lower-concentration nitric acid requires customers to pay to ship and store more water to receive the same amount of acid. Purchasing 98% concentration nitric acid and diluting it down is also not an economical alternative due to the significant environmental and safety hazards associated with transporting and storing highly concentrated nitric acid. The relevant product market is therefore limited to 65%-67% concentration nitric acid.

The relevant geographic market in which to analyze the effects of the Merger with respect to 65%-67% concentration nitric acid encompasses customer locations near and to the east of PotashCorp's and Agrium's nitric acid plants in Lima, Ohio and North Bend, Ohio, respectively. The relevant geographic market includes customer locations in Ohio, Kentucky, Pennsylvania, Maryland, West Virginia, and New Jersey. These customers are vulnerable to a price increase on nitric acid sold by the merged entity for several reasons. Nitric acid is a corrosive chemical requiring special care in handling and storage. As a result, the costs of transporting nitric acid are high, making the relative locations of suppliers and customers critical to the total delivered costs. Most nitric acid customers rely on truck delivery, which further limits their ability to buy from more remote suppliers. Other sellers of 65%-67% concentration nitric acid are far more distant from customers in the relevant geographic market than North Bend and Lima, and therefore these sellers are not viable alternative sources of supply. Finally, the merging parties have the ability to price discriminate on sales of nitric acid by customer location.

PotashCorp and Agrium are the primary suppliers of 65%-67% concentration nitric acid to customer locations near and to the east of PotashCorp's Lima, Ohio and Agrium's North Bend, Ohio nitric acid plants. Other producers of 65%-67%

## Analysis to Aid Public Comment

concentration nitric acid, such as Dyno Nobel, Inc. and LSB Industries Inc., have minimal sales into this region. Absent the proposed remedy, the Merger would result in the merged entity having more than 90% of sales of 65%-67% concentration nitric acid into the relevant geographic market.

**IV. Effects of the Acquisition**

Absent the proposed remedy, the Merger would pose a significant risk of harm to competition in the relevant markets. The Merger would eliminate head-to-head competition between PotashCorp and Agrium on SPA sales and would enhance the merged firm's ability and incentive to raise market prices by reducing SPA output. The Merger would also increase the likelihood of coordination in a market that is already vulnerable to coordination, given that SPA is a commodity and SPA pricing and output information is often disseminated through customers and industry publications. For sales of 65%-67% concentration nitric acid to customers in the relevant geographic market the Merger would also eliminate the vigorous competition on pricing and service that exists today between PotashCorp and Agrium.

**V. Entry**

Entry into the relevant markets would not be timely, likely, or sufficient to deter or counteract the expected anticompetitive effects of the Merger. New entry into SPA production, even of modest capacity, would likely take years and cost at least \$100 million. No entry has occurred into North American SPA production in the past five years, nor is any in progress or anticipated. Although two new nitric acid facilities have been constructed in recent years, those facilities are outside the relevant geographic market and make nitric acid for their internal use at a lower concentration. Existing suppliers of 65%-67% concentration nitric acid are unlikely to expand their sales footprint enough to defeat a price increase by the merged entity in the relevant geographic market.



## Analysis to Aid Public Comment

**VI. The Consent Agreement**

The proposed Consent Agreement remedies the competitive concerns raised by the Merger by requiring the merging parties to divest Agrium's Conda, Idaho facility to Itafos and Agrium's North Bend, Ohio facility to Trammo. These divestitures will preserve the competition that currently exists in the relevant markets.

Under the proposed Consent Agreement, Agrium's phosphate operations at Conda, Idaho, as well as related phosphate mines, customer and supplier contracts, and intellectual property, will be sold to Itafos. Itafos is an integrated producer of phosphate-based fertilizers with a phosphate mining and manufacturing operation located in Brazil. Itafos also owns other phosphate mining properties, including a mine in Paris Hills, Idaho, located 35 miles from Conda. Paris Hills is expected to become operational in 2019 and will serve as a source of high-grade phosphate ore for the Conda operations. As a new entrant into the sale of SPA in North America, Itafos is well positioned to preserve the SPA competition that would otherwise be lost through the Merger.

The proposed Consent Agreement further provides that Agrium's nitric acid plant and related operations at North Bend, Ohio, as well as customer and supplier contracts and intellectual property, will be sold to Trammo. Trammo is a global trader, distributor, and transporter of commodity chemicals, including anhydrous ammonia, the primary feedstock for nitric acid production. Trammo owns three ammonia terminals in Illinois as well as specialized refrigerated barges for ammonia distribution. Through its trading and storage activities, Trammo expects to realize efficiencies in the supply of anhydrous ammonia to North Bend. Trammo will be a new entrant in the sale of 65%-67% concentration nitric acid and will replace Agrium's position in the market today.

The merged entity must complete the divestiture within ten days of closing the Merger. If the Commission determines that Itafos or Trammo is not an acceptable acquirer, the Decision and Order requires the parties to unwind the sale and accomplish the divestiture to another Commission-approved acquirer within 120

## Analysis to Aid Public Comment

days of the date the Decision and Order becomes final. If the merging parties fail to carry out the divestiture in the manner prescribed by the Decision and Order, the Commission may appoint a divestiture trustee to accomplish the divestiture.

The Commission will appoint an interim monitor to ensure the merging parties' compliance with the Decision and Order and to keep the Commission informed about the status of the divestiture. 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

**ALIMENTATION COUCHE-TARD INC.  
AND  
CROSSAMERICA PARTNERS LP**

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-4635; File No. 171 0184*

*Complaint, December 15, 2017 – Decision, February 15, 2018*

This consent order addresses the \$1.62 billion acquisition by Alimentation Couche-Tard Inc. of certain assets of Holiday Companies. 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 the retail sale of diesel in ten local markets in Minnesota and Wisconsin. The consent order requires respondents to divest to a Commission-approved buyer (or buyers) certain retail fuel outlets and related assets in ten local markets in Minnesota and Wisconsin.

*Participants*

For the *Commission: Michael E. Blaisdell and Nicholas Bush.*

For the *Respondents: Brian Byrne and David Gelfand, Cleary Gottlieb Steen & Hamilton LLP; Craig Coleman and Richard Duncan, Faegre Baker Daniels 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 Alimentation Couche-Tard Inc. has, through its wholly owned subsidiary Oliver Acquisition Corp., entered into an agreement to acquire certain equity interests of Holiday Companies (“Holiday”) subsidiaries, 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

## Complaint

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. Circle K Stores, Inc. (“Circle K”) is a wholly owned subsidiary of ACT.

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.

**CAPL**

4. Respondent CrossAmerica Partners LP (“CAPL”) is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 515 Hamilton Street, Suite 200 Allentown, Pennsylvania, 18101. Circle K indirectly owns all of the membership interests in CrossAmerica GP LLC, CAPL’s general partner.

5. Respondent CAPL 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 CAPL and the corporate entities under its control are, and at all times relevant herein have been, engaged in

## Complaint

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 Equity Interest Purchase Agreement dated July 10, 2017, ACT proposes to acquire, through its wholly owned subsidiary Oliver Acquisition Corp., all of the equity interests of certain Holiday subsidiary companies. ACT proposes to acquire the equity interests of the following Holiday subsidiaries, each of which was a Minnesota corporation at the time the Equity Interest Purchase Agreement was signed: Holiday Stationstores, Inc.; Lyndale Terminal Co.; Erickson Petroleum Corporation; Independent Diversified Transportation, Inc.; and Holiday Diversified Services, Inc.

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 ten local markets within the following cities: Aitkin, Hibbing, Minnetonka, Mora, Saint Paul, and Saint Peter in Minnesota, and Hayward, Siren, and Spooner in Wisconsin.

11. The relevant geographic markets for retail gasoline and retail diesel are highly localized, ranging up to a few miles, depending on local circumstances. Each relevant market is distinct and fact-dependent, reflecting the commuting patterns,

## Complaint

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 reduce the number of competitively constraining independent market participants from three to two in five local markets, and from four to three in five other local markets. The Acquisition would result in a highly concentrated market in each of these ten 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 Respondents ACT and CAPL 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.

## Order to Maintain Assets

**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.

The Equity Interest Purchase Agreement entered into by Holiday and Oliver Acquisition Corp. 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 fifteenth day of December, 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 Oliver Acquisition Corp.) of certain equity interests of Holiday Companies subsidiaries, and ACT and its affiliate CrossAmerica Partners LP (together, “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

## Order to Maintain Assets

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 Alimentation Couche-Tard Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 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 CrossAmerica Partners LP is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 515 Hamilton Street, Suite 200 Allentown, Pennsylvania 18101.
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 to Maintain Assets

**I.**

**IT IS ORDERED** that, as used in this Order to Maintain Assets, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, which are incorporated herein by reference and made a part hereof, shall apply:

- A. “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 ACT (including Circle K Stores Inc., Oliver Acquisition Corp., and CrossAmerica Partners LP), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “CAPL” means CrossAmerica Partners LP, its partners, directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by CAPL, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Holiday” means Holiday Companies, a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 4567 American Boulevard West, Minneapolis, Minnesota 55437.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer” means any Person that acquires any of the Retail Fuel Assets pursuant to the Decision and Order.
- F. “Acquisition” means the proposed acquisitions described in the Equity Interest Purchase Agreement

## Order to Maintain Assets

by and among Holiday Companies and Oliver Acquisition Corp., dated as of July 10, 2017.

- G. “Acquisition Date” means the date the Acquisition is consummated.
- H. “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 Retail Fuel Assets, 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 an Acquirer to operate the Retail Fuel

## Order to Maintain Assets

Outlet Business(es) in a manner consistent with the purposes of the Decision and Order.

- I. “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 Retail Fuel Assets or the conduct of the Retail Fuel Outlet Business(es). 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 Retail Fuel Assets 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 the Orders; (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) the disclosure of which is consented to by an Acquirer; (e) is necessary to be exchanged in the course of consummating the Acquisition or transactions pursuant to the Divestiture Agreement; (f) is disclosed in complying with the Orders; (g) 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.
- J. “Consent” means any approval, consent, ratification, waiver, or other authorization.
- K. “Contract(s)” means all agreements, contracts, licenses, leases (including, but not limited to, ground

## Order to Maintain Assets

leases and subleases), consensual obligations, binding commitments, promises and undertakings (whether written or oral and whether express or implied), whether or not legally binding.

- L. “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.
- M. “Divestiture Agreement” means any agreement between Respondents (or between a Divestiture Trustee) and an Acquirer to divest the Retail Fuel Assets and any ancillary agreements relating to the divestiture of the relevant assets (such as for the provision of Transition Services) that has been approved by the Commission pursuant to the Decision and Order, including all amendments, exhibits, agreements, and schedules thereto.
- N. “Divestiture Date” means the date on which Respondents (or the Divestiture Trustee) close on a transaction to divest the Retail Fuel Assets.
- O. “Divestiture Trustee” means the Person appointed by the Commission pursuant to Paragraph VI. of the Decision and Order.
- P. “Fuel Products” means refined petroleum gasoline and diesel products.
- Q. “Governmental Entity” means any federal, state, local, or non-U.S. government, or any court, legislature,

## Order to Maintain Assets

governmental agency or commission, or any judicial or regulatory authority of any government.

- R. “Governmental Permit(s)” means all Consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any Governmental Entity(ies) necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to an Acquirer and for such Acquirer to operate any aspect of a Retail Fuel Outlet Business.
- S. “Inventories” means all inventories of every kind and nature for retail sale associated with the Retail Fuel Assets, including: (1) all Fuel Products, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public; 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.
- T. “Monitor” means any Person appointed by the Commission to serve as a Monitor pursuant to Paragraph IV. of this Order to Maintain Assets.
- U. “Orders” means the Decision and Order in this matter and this Order to Maintain Assets.
- V. “Person” means any individual, or any partnership, joint venture, firm, corporation, limited liability company, limited liability partnership, joint stock company, association, trust, unincorporated organization, or other business entity.
- W. “Products” means any Fuel Products or merchandise products relating to the Retail Fuel Outlet Business(es).
- X. “Respondents’ Brands” means all of Respondents’ trademarks, trade dress, logos, service marks, trade

## Order to Maintain Assets

names, brand names, and all associated intellectual property rights, including rights to the names “Circle K,” “Freedom Valu,” and “Holiday.”

- Y. “Retail Fuel Assets” means the assets defined in Paragraph I.BB. of the Decision and Order.
- Z. “Retail Fuel Employee” means any full-time, part-time, or contract individual employed by CAPL or Holiday, as applicable, at their respective locations identified in Appendix A of this Order, as of July 10, 2017, or by Respondents at the time of the divestiture required by Paragraph II. of this Order to Maintain Assets and whose job responsibilities primarily relate or related to the Retail Fuel Outlet Business.
- AA. “Retail Fuel Outlet Business” means all business activities conducted by CAPL or Holiday, as applicable, prior to the Acquisition Date at or relating to each of CAPL’s or Holiday’s respective locations identified in Appendix A of this Order, including, but not limited to: (1) the retail sale, promotion, marketing, and provision of Fuel Products, 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 location identified in Appendix A of this Order to Maintain Assets.
- BB. “Transition Services” means technical services, personnel, assistance, training, the supply of Products, and other logistical, administrative, and other

## Order to Maintain Assets

transitional support as required by an Acquirer and approved by the Commission to facilitate the transfer of the Retail Fuel Assets from the Respondents to an 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.

- CC. "Transition Services Agreement(s)" means any agreements that receive the prior approval of the Commission between Respondents and an 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 Retail Fuel Assets to the Acquirer and to operate the Retail Fuel Outlet Businesses in a manner consistent with the purposes of the Orders.

**II.**

**IT IS FURTHER ORDERED** that from the date Respondents execute the Consent Agreement until the Divestiture Date:

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Retail Fuel Assets, and shall not cause the wasting or deterioration of any of the Retail Fuel Assets. Respondents shall not cause the Retail Fuel Assets 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 Retail Fuel Assets.

## Order to Maintain Assets

- B. Respondents shall conduct or cause the business of the Retail Fuel Assets 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 Retail Fuel Assets in the regular and ordinary course of business, in accordance with past practice.
- C. Respondents shall not terminate the operation of any of the Retail Fuel Assets, and shall continue to maintain the Inventory of each of the Retail Fuel Assets 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 Retail Fuel Assets, 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 Retail Fuel Assets. Among other actions as may be necessary to comply with these obligations, Respondents shall, without limitation:
  - 1. Maintain all operations at each of the Retail Fuel Assets 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 Retail Fuel Assets; 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 Retail Fuel Assets;
  - 3. Provide each employee of the Retail Fuel Assets with reasonable financial incentives, including



## Order to Maintain Assets

continuation of all employee benefits and regularly scheduled raises and bonuses, to continue in his or her position pending divestiture of the Retail Fuel Assets;

4. Not transfer Inventory from any Retail Fuel Asset, other than in the regular and 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 Retail Fuel Assets, in each case in a manner in accordance with past practice;
6. Maintain the Books and Records of each of the Retail Fuel Assets;
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 Retail Fuel Asset to another location, or that indicates a Retail Fuel Asset will close;
8. Not conduct any “going out of business,” “close-out,” “liquidation,” or similar sales or promotions at or relating to any Retail Fuel Asset;
9. Continue existing pricing or advertising practices, including marketing programs and policies, merchandising programs and policies, and price zones for or applicable to any of the Retail Fuel Assets, 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 Retail Fuel Assets with sufficient working capital to operate at least at current rates of operation, to meet all capital calls

## Order to Maintain Assets

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 Retail Fuel Assets;

11. Continue, at least at their scheduled pace, any additional expenditures for each of the Retail Fuel Assets 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 Retail Fuel Assets;
13. Make available for use by each of the Retail Fuel Assets 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 Retail Fuel Assets;
14. Provide support services to each of the Retail Fuel Assets at least at the level as were being provided to such Retail Fuel Assets 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 Retail Fuel Asset;

*Provided, however,* that it shall not be a violation of 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 Retail Fuel Assets and consistent with the purposes of the Orders.

## Order to Maintain Assets

- E. The purpose of this Order to Maintain Assets is to: (1) maintain and preserve the Retail Fuel Assets 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 Retail Fuel Assets,

- 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 Divestiture 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; and
  2. Disclose or convey any Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer, (ii) other Persons

## Order to Maintain Assets

specifically authorized by such Acquirer to receive such information, (iii) the Commission, or (iv) the Monitor (if any has been appointed).

- 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 Divestiture 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 Paragraph III. as to any of Respondents' employees, agents, and representatives, and take

## Order to Maintain Assets

such actions as are necessary to cause each such Person to comply with the terms of 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, the Commission may appoint Anthony P. Bartys to serve as Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Divestiture Agreement, including any Transition Services Agreement approved by the Commission.
- B. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:
  - 1. The Monitor shall have the power and authority to monitor Respondents' compliance with the obligations set forth in the Orders, and shall act in a fiduciary capacity for the benefit of the Commission;
  - 2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and

## Order to Maintain Assets

facilities relating to compliance with the Orders or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to the Orders;

3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
  4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct; and
  5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.
- C. The Monitor shall report in writing to the Commission (i) every thirty (30) days after this Order to Maintain Assets is issued and (ii) at any other time as requested

## Order to Maintain Assets

by the staff of the Commission, concerning Respondent's compliance with the Orders.

- D. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- E. The Monitor's power and duties shall terminate when this Order to Maintain Assets terminates at which time the Monitor's power and duties shall continue pursuant to the Decision and Order, or at such other time as directed by the Commission.
- F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:
  - 1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within five (5) days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
  - 2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order to Maintain

## Order to Maintain Assets

Assets on the same terms and conditions as provided in Paragraph IV.

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

**V.**

**IT IS FURTHER ORDERED** that within thirty (30) days after this Order to Maintain Assets is issued, and every thirty (30) days thereafter until this Order to Maintain Assets terminates, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all provisions of this Order to Maintain Assets; *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 the Respondents;
- B. Any proposed acquisition, merger, or consolidation of the Respondents; or
- C. Any other change in the Respondents, including, but not limited to, assignment and the creation or



## Order to Maintain Assets

dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

**VII.**

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

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order to Maintain Assets, which copying services shall be provided by the Respondents at their expense; and
- B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

**VIII.**

**IT IS FURTHER ORDERED** that this Order to Maintain Assets shall terminate:

- 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 Respondents complete the divestiture required by Paragraph II.A. of the Decision and Order; *provided, however*, that if at the time such divestiture has been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain

## Order to Maintain Assets

Assets shall terminate the day after the Decision and Order becomes final; or

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

By the Commission.

### Appendix A

#### Retail Fuel and Convenience Store Properties To Be Divested

Owner	State	Area	Property Name & Address
ACT	Minnesota	Aitkin	Freedom Valu 13 2 <sup>nd</sup> Street NW Aitkin, Minnesota 56431
ACT	Minnesota	Hibbing	Freedom Valu 1135 E. 37 <sup>th</sup> Street Hibbing, Minnesota 55746
ACT	Minnesota	Minnetonka	Freedom Valu 17516 Highway 7 Minnetonka, Minnesota 55345
ACT	Minnesota	Mora	Freedom Valu 900 Highway 65 S Mora, Minnesota 55051
ACT	Minnesota	St. Paul	Super America 1015 Geneva Avenue N St. Paul, Minnesota 55128

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ACT	Minnesota	St. Paul	Freedom Valu 2490 County Road FE St. Paul, Minnesota 55110
Holiday	Minnesota	St. Peter	Holiday 123 Saint Julien Street St. Peter, Minnesota 56082
ACT	Wisconsin	Hayward	Holiday 15771 Highway 63 Hayward, Wisconsin 54843
ACT	Wisconsin	Siren	Holiday 24184 WI State Route 35 Siren, Wisconsin 54872
ACT	Wisconsin	Spooner	Holiday 730 S. River Street Spooner, Wisconsin 54801

**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 Oliver Acquisition Corp.) of certain equity interests of Holiday Companies subsidiaries, and ACT and its affiliate CrossAmerica Partners LP (together, “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

## Decision and Order

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 and served its Complaint and Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received from an interested person, 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 enters the following Decision and Order (“Order”):

1. Respondent Alimentation Couche-Tard Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 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.

## Decision and Order

2. Respondent CrossAmerica Partners LP is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 515 Hamilton Street, Suite 200 Allentown, Pennsylvania 18101.
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 HEREBY 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 ACT (including Circle K Stores Inc., Oliver Acquisition Corp., and CrossAmerica Partners LP), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “CAPL” means CrossAmerica Partners LP, its partners, directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by CAPL, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Holiday” means Holiday Companies, a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 4567

## Decision and Order

American Boulevard West, Minneapolis, Minnesota  
55437.

- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer” means any Person that acquires any of the Retail Fuel Assets pursuant to this Order.
- F. “Acquisition” means the proposed acquisitions described in the Equity Interest Purchase Agreement by and between Holiday Companies and Oliver Acquisition Corp., dated as of July 10, 2017.
- G. “Acquisition Date” means the date the Acquisition is consummated.
- H. “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 Retail Fuel Assets, 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;

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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 an Acquirer to operate the Retail Fuel Outlet Business(es) in a manner consistent with the purposes of this Order.

- I. “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 Retail Fuel Assets or the conduct of the Retail Fuel Outlet Business(es). 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 Retail Fuel Assets 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) the disclosure of which is consented to by an Acquirer; (e) is necessary to be exchanged in the course of consummating the Acquisition or transactions pursuant to the Divestiture Agreement; (f) is disclosed in complying with the Order; (g) the disclosure of which is necessary to allow Respondents to comply with the requirements and obligations of the laws of the

## Decision and Order

United States and other countries, and decisions of Governmental Entities; or (h) is disclosed in obtaining legal advice.

- J. “Consent” means any approval, consent, ratification, waiver, or other authorization.
- K. “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.
- L. “Cost” means costs not to exceed the actual cost of labor, goods and material, travel, third party vendors, and other expenditures that are directly incurred by Respondents to provide and fulfill any Transition Services; *provided, however*, that with respect to the transitional supply of Fuel Products, Fuel Products Cost shall be calculated net of any rebates, RIN sharing, or other discounts or allowances and shall not include any mark-up, profit, overhead, minimum volume penalties, or other upward adjustments by Respondents.
- M. “Divestiture Agreement” means any agreement between Respondents (or between a Divestiture Trustee) and an Acquirer to divest the Retail Fuel Assets and any ancillary agreements relating to the divestiture of the relevant assets (such as for the provision of Transition Services) that has been approved by the Commission pursuant to this Order, including all amendments, exhibits, agreements, and schedules thereto.
- N. “Divestiture Date” means the date on which Respondents (or the Divestiture Trustee) close on a transaction to divest the Retail Fuel Assets.



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- O. “Divestiture Trustee” means the Person appointed by the Commission pursuant to Paragraph VI. of this Order.
- P. “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 Outlet Business associated with the Retail Fuel Assets at each of the locations specified in Appendix A to this Order, 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 the Retail Fuel Outlet Business associated with the Retail Fuel Assets at each of the locations specified in Appendix A to this Order, 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.
- Q. “Fuel Products” means refined petroleum gasoline and diesel products.
- R. “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.

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- S. “Governmental Permit(s)” means all Consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any Governmental Entity(ies) necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to an Acquirer and for such Acquirer to operate any aspect of a Retail Fuel Outlet Business.
- T. “Inventories” means all inventories of every kind and nature for retail sale associated with the Retail Fuel Assets, including: (1) all Fuel Products, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public; 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.
- U. “Monitor” means any Person appointed by the Commission to serve as a Monitor pursuant to Paragraph V. of this Order or Paragraph IV. of the Order to Maintain Assets.
- V. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.
- W. “Person” means any individual, or any partnership, joint venture, firm, corporation, limited liability company, limited liability partnership, joint stock company, association, trust, unincorporated organization, or other business entity.
- X. “Prior Notice Outlet” means (i) the Retail Fuel Assets and (ii) any existing retail fuel facility (including any successors) identified in Non-Public Appendix B.
- Y. “Products” means any Fuel Products or merchandise products relating to the Retail Fuel Outlet Business(es).

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- Z. “Proposed Acquirer” means any proposed acquirer of any of the Retail Fuel Assets that Respondents or the Divestiture Trustee intend to submit or have submitted to the Commission for its approval under this Order.
- AA. “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,” “Freedom Valu,” and “Holiday.”
- BB. “Retail Fuel Assets” means all of Respondents’ right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, relating to, used in, or reserved for use in, the Retail Fuel Outlet Business, 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, including any Equipment removed from any location of the Retail Fuel Outlet Business since the date of the announcement of the Acquisition and not replaced;
  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;

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5. All Governmental Permits, and all pending applications therefor or renewals thereof, to the extent transferable;
6. All intangible rights and property, including intellectual property, owned or licensed (as licensor or licensee) by Respondents (to the extent transferable or licensable), going concern value, goodwill, and telephone and telecopy listings; and
7. Books and Records; *provided, however*, that in cases in which Books and Records included in the Retail Fuel Assets contain information: (a) that relates both to the Retail Fuel Assets 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 Retail Fuel Assets, 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;

*Provided, however*, that the Retail Fuel Assets need not include the Retained Assets.

- CC. “Retail Fuel Employee” means any full-time, part-time, or contract individual employed by CAPL or Holiday, as applicable, at their respective locations identified in Appendix A of this Order, as of July 10, 2017, or by Respondents at the time of the divestiture required by Paragraph II. of this Order and whose job responsibilities primarily relate or related to the Retail Fuel Outlet Business.

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- DD. “Retail Fuel Location” means: (1) any facility engaged in the retail sale, promotion, marketing, and provision of Fuel Products and other fuels, automotive services, and related services; and (2) any property site where construction of a retail facility to be engaged in the retail sale, promotion, marketing, and provision of Fuel Products and other fuels, automotive services, and related services is planned or underway.
- EE. “Retail Fuel Outlet Business” means all business activities conducted by CAPL or Holiday, as applicable, prior to the Acquisition Date at or relating to each of CAPL’s or Holiday’s respective locations identified in Appendix A of this Order, including, but not limited to: (1) the retail sale, promotion, marketing, and provision of Fuel Products, 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 location identified in Appendix A of this Order.
- FF. “Retained Assets” means:
1. Respondents’ Brands, except with respect to any purchased Inventories (including private label inventory);
  2. Tangible assets that are not located at any site of the Retail Fuel Outlet Business (unless included in the Retail Fuel Assets pursuant to Paragraph I.BB.2.); and

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3. Intellectual property; *provided, however*, that the Retained Assets shall not include software that cannot readily be purchased or licensed from sources other than Respondents or that has been materially modified (other than through user preference settings).
- GG. “Third Party(ies)” means any Person other than the Respondents or an Acquirer.
- HH. “Transition Services” means technical services, personnel, assistance, training, the supply of Products, and other logistical, administrative, and other transitional support as required by an Acquirer and approved by the Commission to facilitate the transfer of the Retail Fuel Assets from the Respondents to an 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.
- II. “Transition Services Agreement(s)” means any agreements that receive the prior approval of the Commission between Respondents and an 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 Retail Fuel Assets to the Acquirer and to operate the Retail Fuel Outlet Businesses in a manner consistent with the purposes of this Order.

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

- A. No later than 120 days from the date this Order is issued, Respondents shall divest the Retail Fuel Assets, absolutely and in good faith, at no minimum price, as an on-going business, to an Acquirer or Acquirers that receive the prior approval of the Commission and in a manner that receives the prior approval of the Commission.
- B. No later than the Divestiture Date of the Retail Fuel Assets, Respondents shall obtain, at their sole expense, all Consents from Third Parties and all Governmental Permits that are necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to the Acquirer and for the Acquirer to operate any aspect of a Retail Fuel Outlet Business;

*Provided, however, that:*

1. Respondents may satisfy the requirement to obtain all Consents from Third Party(ies) by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant Third Party(ies) that are acceptable to the Commission, or has otherwise obtained all necessary consents and waivers; and
2. With respect to any Governmental Permits relating to the Retail Fuel Assets that are not transferable, allow the Acquirer to operate the Retail Fuel Assets 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.

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## C. Respondents shall:

1. At the option of the Acquirer, and pursuant to a Transition Services Agreement and in a manner that receives the prior approval of the Commission, provide Transition Services to the Acquirer for a period of twelve (12) months from the Divestiture Date;
2. Provide the Transition Services at a price not to exceed Cost and of a quality and quantity sufficient for the Acquirer to operate the Retail Fuel Outlet Business(es) in substantially the same manner as CAPL or Holiday, as applicable, at their respective locations identified in Appendix A of this Order, prior to the Acquisition Date (including the ability to develop new services and products and increase sales of current services and products);

*Provided, however,* that Respondents shall give priority to the Acquirer's requirements for Transition Services over Respondents' own requirements and take all actions that are reasonably necessary to ensure uninterrupted Transition Services;

*Provided further* that (i) Acquirer may terminate any Transition Services at any time upon commercially reasonable notice to the Respondents and without cost or penalty to the Acquirer and (ii) at Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of any Transition Services needed to achieve the purposes of this Order, so long as the total duration of any Transition Services does not exceed eighteen (18) months (including the initial twelve (12) month term); and

*Provided further* that Respondents shall not seek to limit the damages (such as indirect, special, and consequential damages) that Acquirer would be



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entitled to receive in the event of Respondents' breach of any agreement relating to Transition Services.

- D. 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 Retail Fuel Assets 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).
- E. The purpose of the divestiture of the Retail Fuel Assets is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. Respondents shall cooperate and assist with an Acquirer's due diligence investigation of the Retail Fuel Assets and Retail Fuel Outlet Business, including, but not limited to access to any and all personnel, properties, contracts, authorizations, documents, and information customarily provided as part of a due diligence process.
- B. Respondents shall:
  - 1. No later than twenty (20) days before the Divestiture Date (i) identify each Retail Fuel Employee; (ii) allow a Proposed Acquirer to inspect the personnel files and other documentation of each Retail Fuel Employee, to the extent permissible under applicable laws; and (iii) allow a Proposed Acquirer an opportunity to meet with any Retail Fuel Employee outside the presence or

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- hearing of Respondents, and to make an offer of employment;
2. Remove any contractual impediments that may deter any Retail Fuel Employee from accepting employment with an Acquirer, including, any non-compete or confidentiality provision of an employment contract;
  3. Vest all current and accrued benefits under Respondents' retirement plans as of the date of transition of employment with an Acquirer for any Retail Fuel Employee who accepts an offer of employment from an Acquirer; and provide each Retail Fuel Employee with a reasonable financial incentive as necessary to accept an offer of employment with an Acquirer; and
  4. Not offer any incentive to any Retail Fuel Employee to decline employment with an Acquirer or otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Retail Fuel Employee by an Acquirer.
- C. For a period of one (1) year after Divestiture Date, Respondents shall not solicit or induce any Retail Fuel Employee who has accepted an offer of employment with an Acquirer to terminate such employment; *provided, however*, that Respondents may (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the Retail Fuel Employees; (ii) hire Retail Fuel Employees if employment has been terminated by an Acquirer or who apply for employment with Respondents, so long as such Retail Fuel Employees were not solicited by Respondents in violation of this paragraph; or (iii) hire any Retail Fuel Employees if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that Retail Fuel Employee, or where such an offer has been made and the Retail Fuel Employee has declined the offer.

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

- A. Respondents shall (i) not disclose (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Business Information received or maintained by Respondents relating to the Retail Fuel Assets, Retail Fuel Outlet Business, and the post-divestiture Retail Fuel Outlet Business; *provided, however*, that Respondents may disclose or use such Confidential Business Information in the course of:
1. Performing their obligations or as permitted under this Order, the Order to Maintain Assets, or the Divestiture Agreement; or
  2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Retail Fuel Assets, Retail Fuel Outlet Business or the post-divestiture Retail Fuel Outlet Business, or as required by law.
- B. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A. of this Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.
- C. Respondents shall enforce the terms of this Paragraph IV. as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the

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terms of this Paragraph IV., including implementation of access and data controls, training of employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

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

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint David Mock to serve as Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Divestiture Agreement, including any Transition Services Agreement approved by the Commission.
- B. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:
  - 1. The Monitor shall have the power and authority to monitor Respondents' compliance with the obligations set forth in this Order and the Order to Maintain Assets, and shall act in a fiduciary capacity for the benefit of the Commission;
  - 2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with this Order and the Order to Maintain Assets or to any other relevant information as the Monitor may

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reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order and the Order to Maintain Assets;

3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
  4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct; and
  5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.
- C. The Monitor shall report in writing to the Commission (i) every thirty (30) days after this Order is issued, (ii) no later than ten (10) days after Respondents have completed their obligations as required by Paragraph II. of this Order ("Final Report"), and (iii) at any other

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time as requested by the staff of the Commission, concerning Respondents' compliance with this Order and/or the Order to Maintain Assets.

- D. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- E. The Monitor's power and duties shall terminate ten (10) business days after the Monitor has completed his final report pursuant to Paragraph V.C.(ii) of this Order, or at such other time as directed by the Commission.
- F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:
  - 1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within five (5) days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
  - 2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order on the same

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terms and conditions as provided in this Paragraph V.

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

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

- A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the Retail Fuel Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor.
- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.
- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent

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shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

- D. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Retail Fuel Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order;
  2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trustee agreement described herein to accomplish the divestiture, which shall be subject



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to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph VI. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;
4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such

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

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other

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expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph VI.E.6., the term “Divestiture Trustee” shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph VI.E.5. of this Order;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Retail Fuel Assets required to be divested by this Order;
  8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee’s efforts to accomplish the divestiture; and
  9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee’s consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- F. The Commission may require the Divestiture Trustee and each of the Divestiture Trustee’s consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee’s duties.
- G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.

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- H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

**VII.****IT IS FURTHERED 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 (“Notification”) 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 Prior Notice Outlet.
- B. With respect to the Notification:
1. The prior notification required by this Paragraph VII. 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 include a description of the proposed acquisition and provide:
    - a. A map showing all retail fuel outlets by ownership (*e.g.*, OPIS Corporate Brand) within

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five (5) driving miles of the relevant Prior Notice Outlet;

- b. For each retail fuel outlet owned by Respondents within five (5) driving miles of the relevant Prior Notice Outlet, a list of the retail fuel outlets that Respondents monitored at any time within the preceding twelve (12) month period (to the extent such information is available); and
  - c. Respondents' pricing strategy in relation to each monitored retail fuel outlet identified in response to Paragraph VII.B.2.(b) of this Order.
3. 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.
  4. Early termination of the waiting periods in this Paragraph VII. 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.

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**VIII.****IT IS FURTHERED ORDERED** that:

- A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and Respondents shall comply with all terms of the Divestiture Agreement. Any failure by Respondents to comply with the terms of a Divestiture Agreement shall constitute a violation of this Order. The Divestiture Agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order. In the event of a conflict between the terms of this Order and a Divestiture Agreement, or any ambiguity in the language used in a Divestiture Agreement, the terms of this Order shall govern to resolve such conflict or ambiguity.
- B. Respondents shall not modify, replace, or extend the terms of the Divestiture Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

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

- A. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order:
  - 1. Thirty (30) days from the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraph II. of this Order; and
  - 2. No later than one (1) year after the date this Order is issued and annually thereafter until this Order

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terminates, and at such other times as the Commission or its staff may request.

- B. With respect to the divestiture required by Paragraph II.A. of this Order, Respondents shall include in its compliance reports (i) the status of the divestiture and transfer of any of the Retail Fuel Assets; (ii) a description of all substantive contacts with a proposed acquirer; and (iii) as applicable, a statement that the divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondents have completed such divestiture and the date the divestiture was accomplished.

**X.**

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

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

**XI.**

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

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books,

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ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and

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

**XII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on February 15, 2028.

By the Commission.

**Public Appendix A****Retail Fuel and Convenience Store Properties To Be Divested**

<b>Owner</b>	<b>State</b>	<b>Area</b>	<b>Property Name &amp; Address</b>
ACT	Minnesota	Aitkin	Freedom Valu 13 2 <sup>nd</sup> Street NW Aitkin, Minnesota 56431
ACT	Minnesota	Hibbing	Freedom Valu 1135 E. 37 <sup>th</sup> Street Hibbing, Minnesota 55746



## Decision and Order

ACT	Minnesota	Minnetonka	Freedom Valu 17516 Highway 7 Minnetonka, Minnesota 55345
ACT	Minnesota	Mora	Freedom Valu 900 Highway 65 S Mora, Minnesota 55051
ACT	Minnesota	St. Paul	Super America 1015 Geneva Avenue N St. Paul, Minnesota 55128
ACT	Minnesota	St. Paul	Freedom Valu 2490 County Road FE St. Paul, Minnesota 55110
Holiday	Minnesota	St. Peter	Holiday 123 Saint Julien Street St. Peter, Minnesota 56082
ACT	Wisconsin	Hayward	Holiday 15771 Highway 63 Hayward, Wisconsin 54843
ACT	Wisconsin	Siren	Holiday 24184 WI State Route 35 Siren, Wisconsin 54872
ACT	Wisconsin	Spoooner	Holiday 730 S. River Street Spoooner, Wisconsin 54801

Analysis to Aid Public Comment

## **Non-Public Appendix B**

### **Prior Notice Outlets**

**[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 CrossAmerica Partners LP (“CAPL”) (collectively, the “Respondents”). The Consent Agreement is designed to remedy the anticompetitive effects that likely would result from ACT’s proposed acquisition of Holiday Companies (“Holiday”).

Under the terms of the proposed Consent Agreement, ACT and CAPL must divest to a Commission-approved buyer (or buyers) certain CAPL and Holiday retail fuel outlets and related assets in ten local markets in Minnesota and Wisconsin. ACT and CAPL must complete the divestiture no later than 120 days after the closing of ACT’s acquisition of Holiday. 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

## Analysis to Aid Public Comment

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 is the parent of wholly owned subsidiary Circle K Stores Inc. (“Circle K”). ACT’s current U.S. network consists of approximately 7,200 stores located in 42 states. Over 5,000 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. ACT convenience store locations operate primarily under the Circle K, Kangaroo Express, and Corner Store banners, while its retail fuel outlets operate under a variety of company and third-party brands.

Respondent CAPL, a publicly traded master limited partnership headquartered in Allentown, Pennsylvania, markets fuel at wholesale, and owns and operates convenience stores and retail fuel outlets. ACT, via Circle K, acquired CST Brands, Inc. in June 2017, which gave Circle K operational control and management of CAPL. CAPL supplies fuel to nearly 1,200 sites across 29 states.

**III. The Proposed Acquisition**

On July 10, 2017, ACT, through its wholly owned subsidiary Oliver Acquisition Corp., entered into an agreement to acquire certain Holiday equity interests, including Holiday’s retail fuel outlets (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 that the Transaction agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially

## Analysis to Aid Public Comment

lessening competition for the retail sale of gasoline and the retail sale of diesel in ten local markets in Minnesota and Wisconsin.

**IV. The Retail Sales 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 include ten local markets within the following cities: Aitkin, Hibbing, Minnetonka, Mora, Saint Paul, and Saint Peter in Minnesota, and Hayward, Siren, and Spooner in Wisconsin.

The geographic markets for retail gasoline and retail diesel are highly localized, ranging up to a few miles, depending on local circumstances. Each relevant market is distinct and fact-dependent, reflecting 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. The geographic markets for the retail sale of diesel may be similar to the corresponding geographic markets for retail gasoline as many diesel consumers exhibit the same preferences and behaviors as gasoline consumers.

The Transaction would substantially increase the market concentration in each of the ten local markets, resulting in highly concentrated markets. In five local markets, the Transaction would reduce the number of competitively constraining independent market participants from three to two. In the remaining five local markets, the Transaction would reduce the

## Analysis to Aid Public Comment

number of competitively constraining 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 ACT and Holiday are close competitors. Absent the Transaction, ACT and Holiday 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 two or three competitively constraining 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 would remedy the Acquisition's likely anticompetitive effects by requiring ACT and CAPL to divest certain CAPL and Holiday retail fuel outlets and related assets in ten local markets.

The proposed Consent Agreement requires that the divestiture occur no later than 120 days after ACT consummates the

## Analysis to Aid Public Comment

Acquisition. This Agreement protects the Commission's ability to obtain complete and effective relief given the small number of outlets to be divested. Further, based on Commission staff's investigation, the Commission believes that ACT can identify an acceptable buyer (or buyers) within 120 days.

The proposed Consent Agreement further requires ACT and CAPL to maintain the economic viability, marketability, and competitiveness of each divestiture asset until the Commission approves a buyer (or buyers) and the divestiture is complete. For up to twelve months following the divestiture, ACT and CAPL must make available transitional services, as needed, to assist the buyer of each divestiture asset.

In addition to requiring outlet divestitures, the proposed Consent Agreement also requires ACT and CAPL to provide the Commission notice before acquiring designated outlets in the ten local areas for ten years. The prior notice provision is necessary because acquisitions of the designated outlets likely raise competitive concerns and may fall below the HSR Act premerger notification thresholds.

The proposed Consent Agreement contains additional provisions designed to ensure the effectiveness of the proposed relief. For example, Respondents have agreed to an Order to Maintain Assets that will issue 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 Respondents' complete divestiture of the outlet. During this period, and until such time as the buyer (or buyers) no longer requires transitional assistance, the Order to 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 purpose of this analysis is to facilitate public comment on the proposed Consent agreement, and 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

**RED VENTURES HOLDCO, LP  
AND  
BANKRATE, 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-4627; File No. 171 0196  
Complaint, November 2, 2017 – Decision, March 1, 2018*

This consent order addresses the \$1.24 billion acquisition by Red Ventures Holdco, LP of certain assets of Bankrate, Inc. The complaint alleges that such transaction, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by significantly reducing competition in the market for third-party paid referral services for senior living facilities. Under the order, Red Ventures will divest Caring.com, a subsidiary of Bankrate.

*Participants*

For the *Commission*: *Stuart Hirschfeld, Joe Lipinsky, Connor Shively, and Maxine Stansell.*

For the *Respondents*: *Peter Guryan, Simpson Thacher & Bartlett; Damian Didden, Wachtell, Lipton, Rosen & Katz.*

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Red Ventures Holdco, LP (“Red Ventures”) has entered into a transaction with Respondent Bankrate, Inc. (“Bankrate”), that such transaction, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows:

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**I. RESPONDENTS**Red Ventures

1. Respondent Red Ventures is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of North Carolina, with its principal place of business located at 1101 Red Ventures Drive, Fort Mill, SC 29707.

2. Two private equity shareholders, General Atlantic, LLC and Silver Lake Partners, LP, own approximately 34% of Respondent Red Ventures. These shareholders each have one board seat and approval rights over two other board members of the seven person board of directors for Red Ventures GP, LLC, which is the management company that controls Respondent Red Ventures. These two shareholders must also approve certain significant capital expenditures by Red Ventures.

3. Respondent Red Ventures is a marketing company providing proprietary internet content and customer leads for providers in a variety of industries. Red Ventures' two private equity shareholders operate the following relevant domains: APlaceforMom.com, SeniorAdvisor.com, Caregivers.com, NursingHomes.com, OurParents.com, and SeniorLiving.net, which generate revenue by providing customer leads for senior living facilities.

4. Respondent Red Ventures 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.

Bankrate

5. Respondent Bankrate is a corporation organized, existing, and doing business under, and by virtue of, the laws of Delaware, with its principal place of business located at 1675 Broadway, 22<sup>nd</sup> Floor, New York, NY 10019.



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6. Respondent Bankrate is a marketing company providing proprietary internet content and customer leads for providers in a variety of industries. In connection with providing leads for senior living facilities, Bankrate operates the following relevant domains: Caring.com and SeniorHomes.com.

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

## **II. THE PROPOSED MERGER**

8. Respondent Red Ventures and affiliated companies under its control entered into a merger agreement (“Merger Agreement”) with Respondent Bankrate, dated July 2, 2017, pursuant to which Baton Merger Corp., a newly created indirect wholly owned subsidiary of Red Ventures, will merge with and into Bankrate, with Bankrate surviving the merger ( the “Merger”). On July 2, 2017, the Merger’s total estimated dollar value was \$1.4 billion.

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

## **III. THE RELEVANT MARKET**

10. A relevant product market in which to analyze the effects of the Merger is third-party paid referral services for senior living facilities. Senior living facilities provide a range of specialized long-term residential living options tailored to the needs of senior consumers. Referral services companies generate and collect customer leads for senior living facilities. Many small referral services generate leads through marketing and networking efforts similar to those used by real estate agents. Larger referral services are internet-based; they attract consumers to their websites through both paid search advertising and search engine optimization, which includes, among other things, creating compelling free content to help the websites appear higher in search engine result pages. The referral services companies

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provide leads of qualified consumers to the senior living facilities. The senior living facilities' sales staff then contacts the consumers and seeks to consummate sales. When a consumer moves into a senior living facility, the senior living facility pays the referral services company a referral fee, typically based on a percentage of the first month's rent and care.

11. The relevant geographic market in which to analyze the effects of the Merger is the United States. Although the individual looking to move into a senior living facility has highly localized interests, large third-party paid referral services companies, like those controlled by the Respondents, compete on a nationwide basis to generate, collect, and refer qualified leads to senior living facilities located throughout the United States.

12. If there were a 5-10 percent post-merger price increase, senior living facilities likely would not switch to other lead sources in sufficient numbers to make the post-merger price increase unprofitable.

#### IV. MARKET STRUCTURE

13. Respondent Red Ventures' two large private equity shareholders jointly own A Place for Mom.com ("APFM"), which is the largest third-party paid referral service for senior living facilities.

14. Respondent Bankrate's Caring.com is generally recognized as the second largest third-party paid referral service for senior living facilities and its website claims to have the largest volume of traffic for individuals seeking information and support for placement of seniors into senior living facilities.

15. Caring.com is APFM's closest competitor. In addition to being the two largest third-party paid referral services for senior living facility operators, the two companies have similar business models. They both are internet-based referral services providers that compete to attract consumers via websites with national reach. They enter into contracts with senior housing operators both locally and nationally. Due to the popularity of its website, Caring.com represents one of APFM's most serious competitive

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threats. Besides APFM and Caring.com, there are numerous small third-party paid referral services for senior living facility operators, each with a negligible share of the relevant market.

## **V. BARRIERS TO ENTRY**

16. There are substantial barriers to entering the third-party paid referral service for senior living facilities market. Network and scale effects on both the acquisition of potential leads and the supply of qualified leads to senior living facilities are significant. Achieving minimal viable scale means that entry into the relevant market would not be timely, likely, or sufficient in scope to deter or counteract the anticompetitive effects of the Merger.

## **VI. EFFECTS OF THE MERGER**

17. The effects of the Merger, if consummated, may be substantially to lessen competition and tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45 by:

- a. increasing the likelihood that Respondent Red Ventures would unilaterally exercise market power in the relevant market; and
- b. increasing the likelihood of or facilitating coordinated interaction between APFM and Caring.com in the relevant market.

## **VII. VIOLATIONS CHARGED**

18. The Merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

19. The Merger Agreement entered into by Respondents Red Ventures and Bankrate constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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**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 second day of November, 2017, issues its complaint against Respondents.

By the Commission.

**ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS  
[Public Record Version]**

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed merger of Baton Merger Corp. (“Baton”), a wholly-owned subsidiary of Red Ventures Holdco, L.P., (“Red Ventures”), and Bankrate, Inc. (“Bankrate”), 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 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

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stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues the following Order to Hold Separate and Maintain Assets (“Hold Separate Order”):

1. Respondent Red Ventures Holdco, LP, is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its headquarters and principal place of business located at 1423 Red Ventures Drive, Fort Mill, SC 29707.
2. Respondent Bankrate, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 1675 Broadway, 22<sup>nd</sup> Floor, New York, NY 10019.
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 Hold Separate Order, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

- A. “Red Ventures” means Red Ventures Holdco, L.P., its directors, officers, partners, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Red Ventures

## Order to Hold Separate

Holdco, L.P., including, but not limited to, Baton Merger Corp., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Red Ventures includes Bankrate, after the Merger Date.

- B. “Bankrate” means Bankrate, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Bankrate, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Red Ventures and Bankrate, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Caring.com Held Separate Business” means Caring.com, the Caring.com Assets, the Caring.com Business, and the Caring.com Held Separate Employees.
- F. “Caring.com Held Separate Employees” means the Caring.com Employees, including the Caring.com Key Employees.
- G. “Decision and Order” means the:
  - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of the final Decision and Order by the Commission; and
  - 2. Final Decision and Order issued by the Commission following the issuance and service of the final Decision and Order by the Commission.
- H. “Hold Separate Period” means the time period beginning as of the date on which Respondents sign

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the Consent Agreement in this matter, and shall terminate pursuant to the provisions of Paragraph IX. of this Hold Separate Order.

- I. “Monitor” means any monitor appointed pursuant to Paragraph V. of this Hold Separate Order or Paragraph V. of the Decision and Order.
- J. “Orders” means the Decision and Order and this Hold Separate Order.

**II.**

**IT IS FURTHER ORDERED** that during the Hold Separate Period:

- A. Respondents shall take such actions as necessary to maintain the full economic viability, marketability, and competitiveness of the Caring.com Held Separate Business, and shall prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets of the Caring.com Held Separate Business, except for ordinary wear and tear, and shall not sell, transfer, encumber, or otherwise impair the Caring.com Held Separate Business or any assets related thereto.
- B. Until Respondents have fully divested the Caring.com Assets, Respondents shall:
  - 1. Keep and hold the Caring.com Held Separate Business separate, apart, and independent of Respondents’ other businesses and assets as required by this Hold Separate Order and shall vest the Caring.com Held Separate Business with all rights, powers, and authority necessary to conduct its business; and
  - 2. Not exercise direction or control over, or influence directly or indirectly, the Caring.com Held Separate Business or any of its operations, or the

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Monitor, except to the extent that Respondents must exercise direction and control over the Caring.com Held Separate Business as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, the Decision and Order, and all applicable laws.

- C. Respondents shall maintain the operations of the Caring.com Held Separate Business in the regular and ordinary course of business and in accordance with their past practice (including regular repair and maintenance of the assets of such business) and shall use their best efforts to preserve the existing relationships with the following: customers; suppliers; vendors and distributors; employees; and others having business relationships with the Caring.com Held Separate Business. Respondents' responsibilities pursuant to this Paragraph II.C. shall include, but are not limited to, the following:
1. Respondents shall provide the Caring.com Held Separate Business with sufficient 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 the Caring.com Held Separate Business;
  2. Respondents shall continue, at least at their scheduled pace, any additional expenditures for the Caring.com Held Separate Business authorized prior to or as of July 2, 2017, including, but not limited to, all research, development, manufacture, distribution, marketing, and sales expenditures;
  3. Respondents shall provide such resources as may be necessary to respond to competition against the Caring.com Held Separate Business and/or prevent any diminution of sales related to Senior Care Paid Referral Services prior to or as of July 2, 2017;



## Order to Hold Separate

4. Respondents shall provide such resources as may be necessary to maintain the competitive strength and positioning of Caring.com at major customer accounts;
5. Respondents shall make available for use by the Caring.com Held Separate Business funds sufficient to perform all routine maintenance of the Caring.com Held Separate Business;
6. Respondents shall provide the Caring.com Held Separate Business with such funds necessary to maintain the viability, marketability, and competitiveness of the Caring.com Held Separate Business;
7. Respondents shall provide the same or equivalent support services to the Caring.com Held Separate Business as were being provided to this business by Respondent Bankrate prior to or as of July 2, 2017; and
8. Respondents shall cooperate with the Monitor in the performance of his or her obligations under Paragraph V. of this Hold Separate Order;

*provided, however,* that: (i) Respondents' personnel providing services to the Caring.com Held Separate Business must maintain all Caring.com Confidential Business Information on a confidential basis, and except as expressly permitted by the Orders, shall be prohibited from disclosing, providing, discussing, exchanging, circulating, or otherwise transmitting such information to or with any person whose employment involves Respondents' retained businesses, other than the Caring.com Held Separate Business; and (ii) such personnel shall also execute appropriate confidentiality agreements prohibiting the disclosure of any Caring.com Confidential Business Information in accordance with Paragraph IV.D. of this Hold Separate Order.

## Order to Hold Separate

- D. The purpose of this Hold Separate Order is to (1) maintain and preserve the Caring.com Held Separate Business as a viable, competitive, and ongoing business independent of Respondents until the divestiture required by the Decision and Order is achieved; (2) assure that no Caring.com Confidential Business Information is exchanged between Respondents and the Caring.com Held Separate Business except in accordance with the provisions of this Hold Separate Order; and (3) prevent interim harm to competition pending the divestiture and other relief.

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

- A. Respondents shall cooperate with, and take no action to interfere with, or impede the ability of: (1) the Monitor, (2) any Caring.com Held Separate Employee, or (3) any of Respondents' employees providing support services to the Caring.com Held Separate Business, to perform his or her duties and responsibilities consistent with the terms of this Hold Separate Order.
- B. Respondents shall cooperate with and assist the proposed Acquirer of the Caring.com Held Separate Business to evaluate independently and retain the Caring.com Employees, such cooperation to include at least the following:
1. Not later than forty-five (45) days before the Divestiture Date, Respondents shall, to the extent permitted by applicable law: (i) provide the proposed Acquirer a list of all Caring.com Held Separate Employees, identifying which Persons are Caring.com Key Employees; and (ii) provide Employee Information for each Person on the list;

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2. Not later than thirty (30) days before the Divestiture Date, 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 Caring.com 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. to make offers of employment to any Caring.com Employee;
3. Respondents shall: (i) not interfere, directly or indirectly, with the hiring or employing by a proposed Acquirer of any Caring.com Employee; (ii) not offer any incentive to any Caring.com Employee to decline employment with a proposed Acquirer; (iii) not make any counteroffer to any Caring.com 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 Caring.com 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 Hold Separate Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee.

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- C. Respondents shall provide reasonable financial incentives:
1. to the Caring.com Held Separate Employees including the continuation of all employee benefits offered by Respondents (*i.e.*, regularly schedule or merit raises and bonuses, and regularly scheduled vesting of all pension benefits) during the Hold Separate Period, to encourage such employees to continue in his/her position with the Caring.com Business until the Divestiture Date; and
  2. to the Caring.com Key Employees as needed to facilitate the employment of such employees by the proposed Acquirer.

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

- A. During the Hold Separate Period, Respondents shall not:
1. Possess or control any APFM Confidential Business Information; or
  2. Request, solicit, seek, receive, obtain, or otherwise have access to, directly or indirectly, any APFM Confidential Business Information from any Person(s), including the Firewalled Entities; or
  3. Provide any services to or have any business dealings with the Firewalled Entities as related to APFM.
- B. During the Hold Separate Period, Respondents shall not, except as expressly permitted by or as necessary to comply with this Hold Separate Order:
1. Provide, disclose, share, convey, discuss, exchange, circulate, or otherwise grant access to,

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directly or indirectly, any Caring.com Confidential Business Information, including information related to the divestiture of the Caring.com Held Separate Business, to or with any Person(s), including the Firewalled Individuals; or

2. Use, directly or indirectly, the Caring.com Confidential Business Information for any purpose.
- C. As of the date Respondents sign the Consent Agreement, Respondents shall: (1) take all actions as are necessary and appropriate to prevent access to, or the disclosure or use of, Caring.com Confidential Business Information by or to any Person(s) not authorized to access, receive, or use such Confidential Business Information pursuant to the terms of this Order; and (2) with the advice and assistance of the Monitor, develop and implement procedures and requirements with respect to such Confidential Business Information to ensure that:
1. The Caring.com Held Separate Business does not provide, disclose, or otherwise make available any Caring.com Confidential Business Information to the Firewalled Entities, and is in compliance with the requirements of the Orders;
  2. Employees of Respondents' retained businesses, including the Firewalled Individuals, do not request, solicit, seek, receive, obtain, use or otherwise have access to, directly or indirectly, any Caring.com Confidential Business Information from the Caring.com Held Separate Business;

*provided, however,* employees of Respondents' retained businesses are not in violation of this Paragraph if: (1) they provide or are involved in the provision of Transition Services under the (i) Hold Separate Order or the Decision and Order, or (ii) any Remedial Agreement; or (2) are complying with financial reporting requirements or environmental,

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health, and safety policies and standards, ensuring the integrity of the financial and operational controls on the Caring.com Held Separate Business, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against the Caring.com Held Separate Business, or as required by law;

3. The Firewalled Individuals are:
  - a. In compliance with the requirements of the Orders;
  - b. Prohibited from, directly or indirectly, influencing or attempting to influence or participate in any vote of Respondents' Board pertaining to the Caring.com Held Separate Business; and
  - c. Prohibited from participating in any discussions or communications with Respondents and the Firewalled Entities about the Caring.com Held Separate Business.
- D. As part of the procedures and requirements described in Paragraph IV.C. of this Hold Separate Order, Respondents shall:
  1. Within ten (10) days of the date Respondents sign the Consent Agreement, require all Respondents' employees who have access to Caring.com Confidential Business Information, including the Firewalled Individuals, to sign an appropriate non-disclosure agreement agreeing to comply with the prohibitions and confidentiality requirements of this Order; *provided, however,* for Respondents' employees with access to Caring.com Confidential Business Information who have clerical positions but no operational or commercial responsibilities, Respondents may send an appropriate notification regarding the prohibitions and confidentiality

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requirements of this Order by email with return receipt requested or other similar transmission, and shall keep a file of such return receipts for one (1) year;

2. Require and enforce compliance with appropriate remedial action in the event of non-compliant access, use, or disclosure of Caring.com Confidential Business Information in violation of this Order;
3. Institute all necessary information technology procedures, authorizations, protocols, and any other controls necessary to comply with the Order's requirements.

**V.****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 Hold Separate Order and the Remedial Agreements. The Commission hereby appoints Richard A. Shermer as the Monitor and approves the Monitor Agreement between R. Shermer & Company and Respondents.
- B. Not later than one (1) day after the appointment of the Monitor, Respondents shall, pursuant to the Monitor Agreement and to the Orders, confer 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.
- C. The Monitor shall serve until the later of (1) twelve (12) months after the Divestiture Date or (2) the

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termination of all Respondents' obligations under all Remedial Agreements; *provided, however*, the Commission may extend or modify this period as may be necessary to accomplish the purposes of the Orders.

- 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, hold separate 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, 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 the Orders 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 Acquirer, except as allowed in the Orders;
  2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission;
  3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of the Orders and the Remedial Agreements;



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

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all persons retained by the Monitor pursuant to Paragraph V.D.5 of this Hold Separate Order;

7. Respondents shall report to the Monitor in accordance with the requirements of the Orders 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 the Orders 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 as otherwise requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondents' of their obligations under the Orders and the Remedial Agreements;
  9. Respondents may require the Monitor and each of the Monitor's consultants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor.

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- 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 Hold Separate Order, the Decision and 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 the Orders and the Remedial Agreements.
- I. A Monitor appointed pursuant to this Hold Separate Order may be, but need not be, the same Person(s) appointed, pursuant to the relevant provisions of the Decision and Order, as either the Monitor or the Divestiture Trustee.

**VI.**

**IT IS FURTHER ORDERED** that, within thirty (30) days after this Hold Separate Order becomes final, and every thirty (30) days thereafter until this Hold Separate Order terminates, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all

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provisions of this Hold Separate Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Hold Separate Order.

**VII.**

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

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

**VIII.**

**IT IS FURTHER ORDERED** that for the purpose of determining or securing compliance with this Hold Separate Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, with respect to any matter contained in this Hold Separate 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

## Order to Hold Separate

- 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.

**IX.**

**IT IS FURTHER ORDERED** that this Hold Separate Order shall terminate at the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after Respondents (or a Divestiture Trustee) complete the divestiture of the Caring.com Assets as required by the Decision and Order.

By the Commission.

**NON-PUBLIC APPENDIX A**

[Monitor Agreement]

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

## Decision and Order

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

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed merger of Baton Merger Corp. (“Baton”), a wholly-owned subsidiary of Red Ventures Holdco, L.P., (“Red Ventures”), and Bankrate, Inc. (“Bankrate”), 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 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 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 Hold Separate and Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Red Ventures Holdco, LP, is a limited partnership organized, existing, and doing business

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under and by virtue of the laws of the State of North Carolina, with its headquarters and principal place of business located at 1423 Red Ventures Drive, Fort Mill, SC 29707.

2. Respondent Bankrate, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 1675 Broadway, 22<sup>nd</sup> Floor, New York, NY 10019.
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, and all other definitions used in the Hold Separate Order, shall apply:

- A. “Red Ventures” means Red Ventures Holdco, L.P., its directors, officers, partners, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Red Ventures Holdco, L.P., including, but not limited to, Baton Merger Corp., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Red Ventures includes Bankrate, after the Acquisition.
- B. “Bankrate” means Bankrate, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, including, but not limited to, Caring.com, partnerships, divisions, groups, and affiliates in each case controlled by Bankrate, Inc., and the respective

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

- C. “Respondents” means Red Ventures and Bankrate, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer” means the Person approved by the Commission to acquire the Caring.com Assets pursuant to this Decision and Order.
- F. “Acquisition” means the proposed merger of Baton Merger Corp., a wholly-owned subsidiary of Respondent Red Ventures, and Respondent Bankrate as described in the Agreement and Plan of Merger by and among Red Ventures Holdco, LP, Baton Merger Corp., and Bankrate, Inc., dated July 2, 2017, and any amendments, exhibits, or schedules attached thereto.
- G. “Acquisition Date” means the date on which the Acquisition closes.
- H. “APEX” means APEX Super Parent, L.P., a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its headquarters and principal place of business located at Park Avenue Plaza, 55 East 42<sup>nd</sup> Street, 33<sup>rd</sup> Floor, New York, NY 10055.
- I. “APFM” means A Place For Mom, Inc., a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Washington, with its headquarters and principal place of business located at 701 5<sup>th</sup> Avenue, Suite 3200, Seattle, WA 98104.
- J. “APFM Confidential Business Information” means all Confidential Business Information relating to APFM.
- K. “Board” means any board of directors or board of managers of a specified entity.



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- L. “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.
- M. “Caring.com” means Caring, Inc., 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 2600 South El Camino Real, Suite 300, San Mateo, CA 94403.
- N. “Caring.com Assets” means all of Respondents’ rights, title, and interests in and to all of Caring.com’s tangible and intangible assets and property of any kind, wherever located, used for or related to Caring.com or the Caring.com Business, and all improvements or additions thereto, including, but not limited to:

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1. The Caring.com Corporate and Technical Facility;
2. All Tangible Personal Property;
3. All Caring.com Contracts;
4. All Intellectual Property relating to Caring.com;
5. All intangible rights and property, including goodwill, going concern value, and telephone and email address and listings;
6. 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 Caring.com, and all pending applications therefor or renewals thereof;
7. All Business Records relating to Caring.com; *provided, however*, that where documents or other materials included in the Business Records to be divested contain information: (a) that relates both to the Caring.com Assets to be divested and Respondents' other products or businesses, and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Caring.com Assets to be divested; or (b) for which Respondents have a legal obligation to retain the original copies, Respondents shall be required to provide only copies or relevant excerpts of the documents and materials containing this information, then Respondents may keep such records and provide copies with appropriate redactions to the Acquirer. In instances where such copies are provided to the Acquirer, Respondents shall provide the Acquirer access to original documents under circumstances where copies of the documents are insufficient for evidentiary or regulatory purposes.

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- O. “Caring.com Business” means the business of Caring.com related to the provision of paid referral services for senior living facilities, and all other operations and businesses related to Caring.com or the Caring.com Assets, including, but not limited to, any online website providing, among other things: (1) original editorial content related to senior care; (2) any comprehensive online senior living community directory(ies) for the United States; (3) any local directory(ies) covering other senior caregiving services; and (4) access to support and advice from Caring.com Family Advisors.
- P. “Caring.com Confidential Business Information” means all Confidential Business Information relating to Caring.com, the Caring.com Assets, and the Caring.com Business.
- Q. “Caring.com Contracts” means all agreements and contracts with customers (including, but not limited to, Senior Care Paid Referral Services Contracts), 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 to the Caring.com Business.
- R. “Caring.com Corporate and Technical Facility” means the facility located at 2600 South El Camino Real, Suite 300, San Mateo, CA 94403, including, but not limited to, all real property interests (including fee simple interests and real property leasehold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held by Respondents, and all Tangible Personal Property therein, and parts, inventory, and all other assets relating to the Caring.com Business.

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- S. “Caring.com Family Advisor” means any Caring.com Employee who provides individualized support and information to potential clients and their families regarding potential entry into a senior care facility or other senior caregiving services.
- T. “Caring.com Employee(s)” means any Person employed by Caring.com on a full-time, part-time, or contract basis as of, and at any time after July 2, 2017: (1) at the Caring.com Corporate and Technical Facility; (2) as a Caring.com Family Advisor, information technology specialist, or sales and/or marketing support staff; or (3) otherwise identified by agreement between Respondents and an Acquirer and made a part of a Remedial Agreement.
- U. “Caring.com Key Employee(s)” means those Caring.com Employees who are identified in Non-Public Confidential Appendix B attached to this Order.
- V. “Confidential Business Information” means any information that is not in the public domain. The term “Confidential Business Information”:
1. Includes, but is not limited to, all operating, financial or other documents, information, data, computer files (including files stored on a computer’s hard drive or other storage media), electronic files, books, records, papers, instruments, and all other materials, whether located, stored, or maintained in paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, including, without limitation: bid proposals and all related documents, data, and materials, including initial bid terms, final bid terms, documents that support cost and rate structures underlying the bids; term sheets, responses to requests for proposals or other solicitation for bids; customer files and records; customer contracts; customer lists; customer

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service and support materials; customer approvals and related information; price lists; credit records and information; correspondence; referral sources; vendor and supplier agreements; vendor and supplier files and lists; advertising, promotional and marketing materials, including website content; sales materials; marketing methods, research and developments data, files, and reports; technical information; data bases; studies; drawings, specifications and creative materials; cost information; expansion and other plans and projects; proprietary design and engineering standards; operating guides and manuals; employee personnel records; education materials; financial and accounting records; and other documents, information, and files of any kind; and

2. Excludes the following:
  - a. Information that is protected by attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition law; or
  - b. Information that Respondents demonstrate to the satisfaction of the Commission, in the Commission's sole discretion:
    - i. was or becomes generally available to the public other than as a result of disclosure by Respondents;
    - ii. is necessary to be included by Respondents' mandatory regulatory filings; *provided, however,* that Respondents shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;

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- iii. was available, or becomes available, to the public other than as a result of disclosure by Respondents;
  - iv. is information the disclosure of which is consented to by the Acquirer;
  - v. is necessary to be exchanged in the course of consummating the Acquisition or the transaction under any Remedial Agreement;
  - vi. is disclosed in complying with this Order;
  - vii. is information the disclosure of which is necessary to allow Respondents to comply with the requirements and obligations of the laws of the United States and other countries, and decisions of Government Entities; or
  - viii. is disclosed obtaining legal advice.
- W. “Consents” means all consents, approvals, permissions, waivers, ratifications, or other authorizations that are necessary to effect the complete transfer and divestiture of the Caring.com Assets to an Acquirer and for the Acquirer to operate any aspect of the Caring.com Business.
- X. “Copyrights” means all rights to all original works of authorship of any kind owned or created by or for or related to Caring.com, the Caring.com Assets, or the Caring.com Business, and any registrations and applications for registrations thereof, and all copyrightable works, registered and unregistered copyrights in both published works and unpublished works, and all applications, registrations, and renewals in connection therewith, including, but not limited to, all such rights with respect to promotional materials and educational materials; market research data,

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market intelligence reports, and statistical programs (if any) used for marketing and sales research; customer information, promotional, and marketing materials; sales forecasting models; records, including customer lists, sales forces call activity reports, vendor lists, sales data, reimbursement data, and speaker lists.

- Y. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service.
- Z. “Director” means an individual who is elected, or appointed by, or who is an agent or representative of, a specified Person to serve on a Board of a specified entity.
- AA. “Divestiture Date” means the date on which Respondents (or a Divestiture Trustee) closes on the divestiture of the Caring.com Assets as required by Paragraph II. (or Paragraph VI.) of this Order.
- BB. “Domain Names” means the domain name(s) (universal resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration.
- CC. “Employee Information” means, for each Caring.com Employee, a profile prepared by Respondents summarizing the employment history of each employee including, but not limited to, the following information:
1. Name, job title or position, date of hire and effective service date;
  2. A specific description of the employee’s responsibilities;
  3. The base salary or current wages;

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4. The most recent bonus paid, aggregate annual compensation for Caring.com Business's 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. Copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employee.
- DD. "Firewalled Entity(ies)" means APEX, Silver Lake and General Atlantic individually and collectively, and includes the Firewalled Individuals.
- EE. "Firewalled Individuals" means the following:
1. All Persons appointed by, approved by, or who otherwise represent Silver Lake as Director on any Board of Respondents; and
  2. All Persons appointed by, approved by, or who otherwise represent General Atlantic as Director on any Board of Respondents.
- FF. "General Atlantic" means General Atlantic LLC, a limited liability 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 55 East 52<sup>nd</sup> Street, Park Avenue Plaza, 33<sup>rd</sup> Floor, New York, NY 10055.
- GG. "Geographic Territory" means the United States.
- HH. "Government Entities" means any Federal, state, local or non-U.S. government, or any court, legislature,



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government agency, or government commission, or any judicial or regulatory authority of any government.

- II. “Hold Separate Order” means the Order to Hold Separate and Maintain Assets incorporated into and made a part of the Consent Agreement.
- JJ. “Hold Separate Period” means the time period beginning as of the date on which Respondents sign the Consent Agreement in this matter, and shall terminate pursuant to the provisions of Paragraph IX. of the Hold Separate Order.
- KK. “Intellectual Property” means, and includes without limitation, all:
  - 1. Patents;
  - 2. Copyrights;
  - 3. Trademarks, trade dress, logos, slogans, service marks, Websites and Domain Names, together with all translations, adaptations, derivations, and combinations thereof, and including all goodwill associated therewith, and all applications, registrations, and renewals in connection therewith;
  - 4. Marketing Materials;
  - 5. Computer software (including source code, executable code, data, databases, and related documentation);
  - 6. Plans (including proposed and tentative plans, whether or not adopted or commercialized), research and development, specifications, drawings, and other assets (including the right to use Patents, know-how, and other intellectual property relating to such plans);

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7. Trade secrets, technology, know-how, and confidential or proprietary information (including ideas, research and developments, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, development, and other information), whether patented, patentable, or otherwise;
  8. Licenses including, but not limited to, third party software, if transferrable, and sublicenses to software modified by Caring.com; and
  9. Any other intellectual property used prior to the Divestiture Date in connection with Caring.com or the Caring.com Business; and
  10. All rights to obtain and file for Patents, Copyrights, Trademarks, and registrations thereof and to bring suit against a third party for the past, present, or future infringement, misappropriation, dilution, misuse or other violations of any of the foregoing.
- LL. “Marketing Materials” means all materials used in the marketing or sale of services or products by Caring.com or the Caring.com Business as of the Divestiture Date, including, without limitation, all advertising and display materials, promotional and marketing materials, training materials, educational materials, speaker lists, product data, mailing lists, sales materials, marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs used for marketing and sales research), customer information, sales forecasting models, Website content, and other materials related to the marketing or sale of services or products by Caring.com or the Caring.com Business.
- MM. “Monitor” means any monitor appointed pursuant to Paragraph V. of this Order or Paragraph V of the Hold Separate Order.

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- NN. “Monitor Agreement” means the Monitor Agreement between Respondents and R. Shermer & Company. The Monitor Agreement is attached as Appendix A to this Order.
- OO. “Patents” means pending patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Acquisition Date, and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.
- PP. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other business entity other than Respondents.
- QQ. “Remedial Agreement(s)” means any agreement between Respondents and the Acquirer (or between a Divestiture Trustee and the Acquirer) that have been approved by the Commission to accomplish the requirements of this Order, including any divestiture or assets purchase agreement(s) related to the Caring.com Assets, any Transition Services Agreement(s), and 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.
- RR. “Senior Care Paid Referral Service Contracts” means contracts with senior care facilities or other senior caregiving service providers for paid referrals to potential clients seeking entry into a senior care facility or senior caregiving services.

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- SS. “Silver Lake” means Silver Lake Partners LP, a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its headquarters and principal place of business located at 2775 Sand Hill Road, Suite 100, Menlo Park, CA 94025.
- TT. “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 the Caring.com 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.
- UU. “Trademarks” 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, adaptations, 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.
- VV. “Transition Services” means any transitional services required by the Acquirer for the operation of the Caring.com Business including, but not limited to administrative assistance (including, but not limited to, accounting, and information transitioning services), technical assistance, and supply agreements.
- WW. “Transition Services Agreement(s)” means any agreement entered into between Respondents and an Acquirer (or the Divestiture Trustee and an Acquirer) for the provision of Transition Services.

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- XX. “Website and Domain Names” means the content of the Website(s) located at the Domain Names, the Domain Names, and all Copyrights in such Website(s), to the extent owned by Respondents.

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

- A. No later than six (6) months after the Acquisition Date, Respondents shall divest the Caring.com Assets, absolutely and in good faith and at no minimum price, to the Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.
- B. At the Acquirer’s option, and subject to the prior approval of the Commission, Respondents shall provide, at no greater than Direct Cost, Transition Services from knowledgeable employees of Respondents to assist the Acquirer in the transfer of the Caring.com Assets from Respondents to the Acquirer in a timely and orderly manner pursuant to a Transition Services Agreement. The Transition Services Agreement:
1. Shall be for a period of one (1) year following the Divestiture Date, with an opportunity to extend for up to one (1) year at the option of the Acquirer;
  2. May be terminated at any time by the Acquirer without cost or penalty to the Acquirer upon commercially reasonable notice to Respondents; and
  3. Must include provisions that:
    - a. comply with the requirements and prohibitions of Paragraph IV. of this Order to ensure that Caring.com Confidential Business Information remains confidential; and

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- b. require Respondents, with the concurrence of the Acquirer, to 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.

## C. Prior to the Divestiture Date:

## 1. Respondents shall secure at their sole expense:

- a. Consents from all Persons that relate to or are necessary to divest the Caring.com Assets to the Acquirer and for the Acquirer to operate any tangible or intangible assets of the Caring.com Business in a manner that will achieve the purposes of this Order; and
- b. Consents from all Persons necessary for the assignment or transfer to the Acquirer of all the Caring.com Contracts;

*provided, however,* Respondents shall not be required to secure the consent of any Governmental Agency relating to any permit, license, or right that Respondents have no legal right to divest or transfer to the Acquirer; and

*provided further, however,* the failure of Respondents or the Acquirer to obtain any Consents that relate to or are necessary to divest the Caring.com Assets shall not extend the date by which Respondents must divest the Caring.com Assets.

2. Respondents shall use best efforts to assist the Acquirer to obtain the transfer from Respondents or issuance to the Acquirer of any permit, license, asset, or right that Respondents have no legal right to divest or transfer to the Acquirer.

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- D. Within ten (10) days of the Divestiture Date, Respondents shall submit to the Acquirer, at Respondents' expense, all Business Records of the Caring.com Assets, 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 Caring.com Assets to the Acquirer, Respondents shall provide the Acquirer, and the Monitor with access to all such Business Records of the Caring.com Assets and employees who possess or able to locate such information for the purposes of identifying the books, records, and files directly related to the Caring.com Assets and facilitating the delivery in a manner consistent with this Order.
- E. Until Respondents (or the Divestiture Trustee) complete the divestiture and other obligations to transfer the Caring.com Assets as required by this Order, Respondents shall take all actions as are necessary to:
1. Maintain the full economic viability and marketability of the Caring.com Assets and the Caring.com Business;
  2. Minimize any risk of loss of competitive potential for the Caring.com Assets;
  3. Prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Caring.com Business; and
  4. Not sell, transfer, encumber, or otherwise impair the Caring.com Business (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of Caring.com, the Caring.com Assets, or the Caring.com Business.

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- F. The purpose of this Paragraph II. is to ensure the continued use of the Caring.com 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 Caring.com Business, minimize the risk of disclosure or unauthorized use of Caring.com Confidential Business Information; to prevent the destruction, removal, wasting, deterioration, or impairment of the Caring.com Business, except for ordinary wear and tear; and to remedy the potential lessening of competition resulting from the Merger as alleged in the Commission's Complaint.

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

- A. Respondents shall cooperate with and assist the proposed Acquirer of the Caring.com Assets to evaluate independently and retain the Caring.com Employees, such cooperation to include at least the following:
1. Not later than forty-five (45) days before the Divestiture Date, Respondents shall, to the extent permitted by applicable law: (i) provide the proposed Acquirer a list of all Caring.com Employees, identifying which Persons are Caring.com Key Employees; and (ii) provide Employee Information for each Person on the list;
  2. Not later than thirty (30) days before the Divestiture Date, 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 Caring.com Employee;



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- 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. to make offers of employment to any Caring.com Employee;
3. Respondents shall: (i) not interfere, directly or indirectly, with the hiring or employing by a proposed Acquirer of any Caring.com Employee; (ii) not offer any incentive to any Caring.com Employee to decline employment with a proposed Acquirer; (iii) not make any counteroffer to any Caring.com 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 Caring.com 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.

- B. Respondents shall provide reasonable financial incentives:
- 1. to the Caring.com Employees including the continuation of all employee benefits offered by Respondents (*i.e.*, regularly schedule or merit raises and bonuses, and regularly scheduled vesting of all pension benefits) during the Hold Separate Period, to encourage such employees to continue in his/her position with the Caring.com Business until the Divestiture Date; and

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2. to the Caring.com Key Employees as needed to facilitate the employment of such employees by the proposed Acquirer.
- C. 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 Caring.com Employee employed by the Acquirer or any Person employed by the Acquirer whose job responsibilities predominantly relate to the Caring.com Business, to terminate his or her employment relationship with the Acquirer;

*provided, however,* Respondents may: (1) advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, so long as these actions are not targeted specifically at any Caring.com Employee; and (2) hire employees of the Caring.com Business who apply for employment with Respondents, so long as such individuals 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 employee of the Caring.com Business 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 individual's employment has been terminated by the Acquirer.

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

- A. Beginning on the date the Hold Separate Order is issued until six (6) months after the Divestiture Date, Respondents shall not:

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1. Possess or control any APFM Confidential Business Information;
  2. Request, solicit, seek, receive, obtain, or otherwise have access to, directly or indirectly, any APFM Confidential Business Information from any Person(s), including the Firewalled Entities; or
  3. Provide any services to or have any business dealings with the Firewalled Entities as related to APFM.
- B. Respondents shall not, except as expressly permitted by or as necessary to comply with the Hold Separate Order or this Order:
1. Provide, disclose, share, convey, discuss, exchange, circulate, or otherwise grant access to, directly or indirectly, any Caring.com Confidential Business Information, including information related to the divestiture of the Caring.com Assets, to or with any Person(s), including the Firewalled Individuals; or
  2. Use, directly or indirectly, the Caring.com Confidential Business Information for any purpose.
- C. As of the date Respondents sign the Consent Agreement, Respondents shall: (1) take all actions as are necessary and appropriate to prevent access to, or the disclosure or use of, Caring.com Confidential Business Information by or to any Person(s) not authorized to access, receive, or use such Confidential Business Information pursuant to the terms of this Order; and (2) with the advice and assistance of the Monitor, develop and implement procedures and requirements with respect to such Confidential Business Information to ensure that:
1. Caring.com or the Caring.com Business does not provide, disclose, or otherwise make available any

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Caring.com Confidential Business Information to the Firewalled Entities, and are in compliance with the requirements of this Order;

2. Employees of Respondents' retained businesses, including the Firewalled Individuals, do not request, solicit, seek, receive, obtain, use or otherwise have access to, directly or indirectly, any Caring.com Confidential Business Information from the Caring.com Business;

*provided, however,* employees of Respondents' retained businesses are not in violation of this Paragraph if: (1) they provide or are involved in the provision of Transition Services under the (i) Hold Separate Order or this Order, or (ii) any Remedial Agreement; or (2) are complying with financial reporting requirements or environmental, health, and safety policies and standards, ensuring the integrity of the financial and operational controls on the Caring.com Assets or the Caring.com Business, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against Caring.com or the Caring.com Business, or as required by law;

3. The Firewalled Individuals are:
  - a. In compliance with the requirements of this Order;
  - b. Prohibited from, directly or indirectly, influencing or attempting to influence or participate in any vote of Respondents' Board pertaining to Caring.com or the Caring.com Business; and
  - c. Prohibited from participating in any discussions or communications with Respondents and the Firewalled Entities about Caring.com or the Caring.com Business.

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- D. As part of the procedures and requirements described in Paragraph IV.C. of this Order, Respondents shall:
1. Within ten (10) days of the date Respondents sign the Consent Agreement, require all Respondents' employees who have access to Caring.com Confidential Business Information, including the Firewalled Individuals, to sign an appropriate non-disclosure agreement agreeing to comply with the prohibitions and confidentiality requirements of this Order; *provided, however,* for Respondents' employees with access to Caring.com Confidential Business Information who have clerical positions but no operational or commercial responsibilities, Respondents may send an appropriate notification regarding the prohibitions and confidentiality requirements of this Order by email with return receipt requested or other similar transmission, and shall keep a file of such return receipts for one (1) year;
  2. Require and enforce compliance with appropriate remedial action in the event of non-compliant access, use, or disclosure of Caring.com Confidential Business Information in violation of this Order; immediately report any event to the Monitor, if one has been appointed, and to the Commission or its staff; and include detailed information about any event and any remedial action taken by Respondents in Respondents' compliance reports to the Commission; and
  3. Institute all necessary information technology procedures, authorizations, protocols, and any other controls necessary to comply with the Order's requirements.

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## V.

**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 Hold Separate Order and the Remedial Agreements. The Commission hereby appoints Richard A. Shermer as the Monitor and approves the Monitor Agreement between R. Shermer & Company 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 this Order in a manner consistent with the purposes of this Order.
- C. The Monitor shall serve until the later of (1) twelve (12) months after the Divestiture Date or (2) the termination of all Respondents’ obligations under all Remedial Agreements; *provided, however*, the Commission may extend or modify this period as may be necessary to accomplish the purposes of this Order and the Hold Separate 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, hold separate 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

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

- a. Assuring that Respondents expeditiously comply with all of their obligations and performs all of their responsibilities as required by this Order, the Hold Separate 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 Acquirer, except as allowed in this Order and in the Hold Separate 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, the Hold Separate 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, the Hold Separate 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, the Hold Separate Order, and the Remedial Agreements;

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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 V.D.6, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph V.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, the Hold Separate Order, and the Remedial Agreements;



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8. Within one (1) month from the date the Monitor is appointed pursuant to this Paragraph, every sixty (60) days thereafter, and otherwise requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order, the Hold Separate Order, and the Remedial Agreements;
  9. Respondents may require the Monitor and each of the Monitor's consultants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor.
- G. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondents shall execute an agreement that, subject

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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, the Hold Separate 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, the Hold Separate Order, and the Remedial Agreements.
- I. A Monitor appointed pursuant to this Order may be, but need not be, the same Person appointed as the Divestiture Trustee pursuant to the relevant provisions of this Order.

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

- A. If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Caring.com Assets and otherwise fully complied with the obligations as required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the Caring.com Assets in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of 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

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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 or transfer required by the Order.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
  - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license,

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divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to enter into 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 that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph VI. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;

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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

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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 VI.E.6., the term "Divestiture Trustee" shall include all persons retained by the Divestiture Trustee pursuant to Paragraph VI.E.5. of this Order;
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order;
8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 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

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

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

- A. 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

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(“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 Remedial 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.

**VIII.****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 Caring.com Business to an Acquirer;



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3. Every three (3) months thereafter so long as Respondents have a continuing obligation under this Order and/or the Remedial Agreements to render Transition Services to the Acquirer; and
  4. One (1) year after this Order is issued, annually for the next nine (9) years on the anniversary of that date, setting forth in detail the manner and form in which they have complied and are complying with this Order.
- 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.

**IX.**

**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.

**X.**

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

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- 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.

**XI.**

**IT IS FURTHER ORDERED** that this Order shall terminate on March 1, 2028.

By the Commission.

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**PUBLIC APPENDIX A****Redacted Monitor Agreement****MONITOR AGREEMENT**

This Monitor Agreement (this "Agreement"), entered into this 20<sup>th</sup> day of October, 2017, by and among R. Shermer & Company ("Shermer" or the "Monitor") and Red Ventures Holdco, LP ("Red Ventures") (Shermer and Red Ventures together, the "Parties") provides as follows:

WHEREAS the Federal Trade Commission (the "Commission"), in the Matter of Red Ventures Holdco/Bankrate, File No. 171-0196, has accepted or will shortly accept for public comment an Agreement Containing Consent Orders incorporating a Decision and Order and an Order to Hold Separate and Maintain Assets (collectively, the "Orders"), which, among other things, requires Red Ventures to divest Caring.com and certain related assets (the "Caring.com Assets"), as defined in the Orders, and contemplates the appointment of a Monitor to monitor Red Ventures' compliance with its obligations under the Orders;

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

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

WHEREAS, this Agreement, although executed by Monitor and Red Ventures, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Red Ventures or Monitor under the Orders, except for those obligations under the confidentiality provisions herein, until it has been approved by the Commission; and

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

NOW, THEREFORE, the Parties agree as follows:

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

**ARTICLE I**

1.1 Powers of the Monitor. Monitor shall have all of the powers and responsibilities conferred upon Monitor by the Orders, including but not limited to monitoring Red Ventures' compliance with the divestiture, asset maintenance obligations, and other related requirements of the Orders.

1.2 Access to Relevant Information and Facilities. Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to Red Ventures' person-

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nel, 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 Red Ventures' compliance with the obligations of Red Ventures under the Orders in this matter. Documents, records and other relevant information are to be provided in an electronic format if they exist in that form. Red Ventures shall cooperate with any reasonable request of Monitor. Monitor shall give Red Ventures 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 Red Ventures' operations. At the request of the Monitor, Red Ventures shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of Red Ventures who have knowledge relevant to the proper discharge of its responsibilities under the Orders.

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

1.4 Confidentiality. Monitor shall:

(a) maintain the confidentiality of all confidential information provided to the Monitor by Red Ventures, the acquirer of the Caring.com Assets, any supplier or customer of Red Ventures, or the Commission ("Confidential Information"), 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. Monitor may disclose Confidential Information only to (i) persons employed by or working with Monitor pursuant to the Orders or (ii) persons employed at the Commission;

(b) require any consultants, accountants, attorneys, and any other representatives and/or assistants retained by Monitor to assist in carrying out the duties and responsibilities of Monitor to execute a confidentiality agreement, which Red Ventures will provide if requested, 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;

(c) act in a fiduciary capacity for the benefit of the Commission;

(d) maintain a record and inform the Commission of all third parties (other than representatives of the Commission) to whom Confidential Information has been disclosed;

(e) for a period of five (5) years after the termination of this Agreement, maintain the confidentiality of all other aspects of the performance of its duties under this Agreement and not disclose any Confidential Information relating thereto; and

(f) upon the termination of the Monitor's duties under this Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and elec-

## Decision and Order

tronic materials (including materials that Red Ventures 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 Red Ventures to return or destroy materials that Red Ventures 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 Red Ventures' request. Notwithstanding the foregoing, the Monitor shall not be required to return or destroy confidential information contained in an archived computer back-up system for its disaster recovery and/or security purposes, and it may retain a copy of confidential information, subject to the terms of this Agreement, in accordance with its internal record retention procedures for legal or regulatory purposes. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor for ten (10) years after termination of this Agreement. For the avoidance of doubt, the expiration of the ten year period following the termination of this Agreement shall not abrogate the duties under this Section 1.4 which prevent the Monitor's disclosure of any Confidential Information.

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, Red Ventures, or any director, officer, employee, agent, consultant or affiliate of the Monitor or Red Ventures, when such source was not known to recipient after due inquiry to be restricted from making such disclosure to such recipient.

## 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 Red Ventures, such attorneys, consultants, accountants, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities pursuant to the Orders. Prior to engaging any such parties and prior to commissioning additional work to be performed by a party who has already been so engaged, Monitor shall notify Red Ventures of its intention to do so, and provide an estimate of the anticipated costs.

2.2 Monitor Compensation. Red Ventures shall pay Monitor in accordance with the fee schedule and procedure attached as Confidential Appendix A for all reasonable time spent in the performance of the Monitor's duties, including all monitoring activities related to the efforts of the acquirer of the Caring.com Assets, all work in connection with the negotiation and preparation of this Agreement, and all reasonable and necessary travel time.

(a) In addition, Red Ventures shall pay: (i) all out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the Orders; and (ii) all reasonable fees of, and disbursements reasonably incurred by, any advisor appointed by Monitor pursuant to the first paragraph in Article II.

## Decision and Order

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

2.3 Workspace and Access. To the extent available, Red Ventures will provide the Monitor with temporary workspace and access to office equipment at sites the Monitor is required to visit in order to fulfill its obligations under this Agreement. Monitor Agrees to comply with Red Ventures' safety and security regulations, instructions and procedures while at Red Ventures' sites.

2.4 Monitor's Indemnification; Limitation on Liability. Red Ventures shall indemnify and hold harmless Monitor and its employees and agents 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 Monitor's gross negligence or willful misconduct. Monitor shall not be liable hereunder for any amount in excess of the fees paid to it, except in the event of Monitor's gross negligence, willful misconduct or fraud. Monitor shall not be liable hereunder for any incidental, consequential, special or punitive damages, regardless of whether it has been informed of the possibility thereof.

2.5 Disputes. In the event of a disagreement or dispute between Red Ventures and Monitor concerning Red Ventures' obligations under the Orders, and, in the event that such disagreement or dispute cannot be resolved by the Parties, either party may seek the assistance of the individual in charge of the Commission's Compliance Division.

2.6 Conflicts of Interest. In the event that, during the term of this Agreement, Monitor becomes aware it has or may have a conflict of interest that may affect, or could have the appearance of affecting, performance by Monitor or persons employed by, or working with, Monitor, of any of its duties under this Agreement, Monitor shall promptly inform Red Ventures and the Commission of any such conflict or potential conflict.

## ARTICLE III

3.1 Termination. This Agreement shall terminate the earlier of: (a) the expiration or termination of the Orders; (b) Red Ventures' 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 Red Ventures and to the Commission, upon resignation of the Monitor; or (d) when the Monitor completes its Final Report pursuant to the Decision and Order; provided, however, that the Commission may require that Red Ventures extend this Agree-

## Decision and Order

ment as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force, as will the provisions of Articles 2.2 and 2.3 of this Agreement.

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

3.3 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 the Orders may be declared null and void by the Commission and any provision not in conflict shall survive and remain a part of this Agreement.

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

3.5 Assignment. This Agreement may not be assigned or otherwise transferred by Red Ventures or Monitor without the consent of Red Ventures and Monitor and the approval of the Commission. Any such assignment or transfer shall be consistent with the terms of the Orders.

3.6 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 Commission. Any such amendment, modification, termination, or waiver shall be consistent with the terms of the Orders.

3.7 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission, other than the Parties' obligations under the confidentiality provisions herein.

3.8 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.

3.9 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.

3.10 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.

Decision and Order

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



Decision and Order

**MONITOR**

R. Shermer & Company

\_\_\_\_\_  
Richard Shermer  
President

**Respondent**

Red Ventures Holdco, LP

  
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Ric Eliás  
CEO

Decision and Order

MONITOR

R. Shermer & Company



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Richard Shermer  
President

Respondent

Red Ventures Holdco, LP

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Ric Elias  
CEO

Analysis to Aid Public Comment

## **NON-PUBLIC APPENDIX B**

### **Caring.com Key Employees**

**[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 Order (“Consent Agreement”) with Red Ventures Holdco, LP (“Red Ventures”) and Bankrate, Inc. (“Bankrate”). The Consent Agreement is intended to remedy the anticompetitive effects that likely would result from Red Ventures’ proposed acquisition of Bankrate (the “Transaction”). Under the Consent Agreement, Red Ventures will divest Caring.com, a subsidiary of Bankrate.

The Transaction, if consummated, would result in the likely lessening of competition between the two leading providers of third-party paid referral services for senior living facilities. Senior living facility operators use a variety of methods to find residents, including in-house marketing efforts, unpaid referrals from doctors or other professionals working with the elderly, and third-party paid referral services. The evidence shows that third-party paid referral services for senior living facilities represents a relevant product market, and that A Place for Mom (“APFM”) and Caring.com are the two largest third-party paid referral services for senior living facilities and each other’s closest competitors. General Atlantic, LLC (“General Atlantic”) and Silver Lake Partners, LP (“Silver Lake”) jointly own all of

## Analysis to Aid Public Comment

APFM, own approximately 34 percent of Red Ventures, and have significant control over certain Red Ventures decisions.

The Proposed Order preserves competition between APFM and Caring.com by accepting a Consent Agreement under which Red Ventures will divest Caring.com.

## **II. The Parties**

### **A. Red Ventures**

Red Ventures is a marketing company providing proprietary internet content and customer leads in a variety of industries. Two of its largest shareholders are private equity firms General Atlantic and Silver Lake Partners. They control two of the seven positions on the board of Red Ventures GP, LLC, the entity that manages Red Ventures, and they have approval rights for two other positions. They also must approve significant capital expenditures by Red Ventures. General Atlantic and Silver Lake jointly own APFM, which is the largest third-party paid referral service company for senior living facilities.

### **B. Bankrate**

Bankrate is a marketing company providing proprietary internet content and customer leads for providers in a variety of industries. In connection with the market for providing leads for senior living facilities, Bankrate owns and operates Caring.com, the second largest third-party referral service company for senior living facilities after APFM.

## **III. The Proposed Transaction**

Pursuant to an agreement executed on July 2, 2017, Red Ventures agreed to acquire 100 percent of Bankrate.

## **IV. The Relevant Market**

The Commission's Complaint alleges that the relevant product market within which to analyze the Transaction is third-party paid referral services for senior living facility operators.

#### Analysis to Aid Public Comment

Senior living facilities provide a range of specialized long-term residential living options tailored to the needs of senior consumers. Referral services companies generate and collect customer leads for senior living facilities. While many small referral services companies generate leads through marketing and networking efforts similar to those used by real estate agents, APFM and Caring.com use the internet to generate and collect leads. They attract these leads to their websites through both paid search advertising and search engine optimization, which includes, among other things, creating compelling free content to help the websites appear higher in search engine result pages.

Once the referral services companies qualify the leads, they provide the customer leads to the senior living facilities operators. The senior living facilities' sales staff then contacts the leads and seeks to consummate sales. When a consumer moves into a senior living facility, the senior living facility operator pays the referral services company a referral fee, typically based on a percentage of the first month's rent and care.

The Commission's Complaint alleges that the relevant geographic market in which to analyze the effects of the Merger is the United States. Although each senior's search for a senior living facility is highly localized, APFM and Caring.com operate, compete and contract with senior living facility operators on a national basis.

#### **V. Market Structure**

The Commission's Complaint alleges that Caring.com is APFM's closest competitor, they are the two largest third-party paid referral services companies for seniors, and they have similar business models. APFM and Caring.com are internet-based referral services providers that compete to attract consumers via websites with national reach, and they enter into contracts with senior living facility operators both locally and nationally. Other than APFM and Caring.com, there is a fringe of small regional and local companies that act as third-party paid referral services companies.

## Analysis to Aid Public Comment

**VI. Effects of the Transaction**

The Commission's Complaint alleges that the Transaction, if consummated, may substantially lessen present and future competition between APFM and Caring.com by increasing the likelihood that Red Ventures would unilaterally exercise market power and increasing the likelihood of coordinated interaction between APFM and Caring.com.

General Atlantic and Silver Lake have the ability to influence or control the management of Caring.com. They are both active investors with board representation on, and other substantial rights over, Red Ventures. General Atlantic and Silver Lake's ownership of APFM may create incentives for them to exercise influence or control over Red Ventures in a manner that could substantially reduce competition between APFM and Caring.com.

**VII. Entry Conditions**

Entry into the relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Transaction. The primary barrier to entry is the network and scale needed to acquire and convert qualified leads into actual move-ins at senior living facilities. This requires the ability not only to compete effectively in search engine optimization and marketing, but also to establish contracts with hundreds of senior living facilities nationwide, and have the necessary infrastructure, including experienced senior advisors, to convert leads into paying referrals.

**VIII. The Agreement Containing Consent Order**

The Proposed Order resolves the anticompetitive concerns raised by the Transaction by eliminating the only overlap between Red Ventures/Bankrate and APFM. The Proposed Order restores current and potential competition by accepting a divestiture of the Caring.com business. Caring.com was independent before it was acquired by Bankrate.com in 2014, and it continues to operate semi-autonomously. The Proposed Order gives the Commission the right to approve a buyer, and prevents General Atlantic and Silver Lake from being involved in the divestiture process.

*Analysis to Aid Public Comment*

The Proposed Order allows the Commission to appoint a monitor to ensure compliance with the terms of the Proposed Order, including the provision of transition services to an acquirer and firewalls related to Caring.com's confidential business information. The Proposed Order also prevents Red Ventures from possessing or seeking any confidential business information from APFM or providing any services to APFM for six months after the divestiture of Caring.com. The Commission may appoint a trustee if Red Ventures has not divested Caring.com and its related assets within the prescribed time-period.

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

Complaint

IN THE MATTER OF

**THE J.M. SMUCKER COMPANY  
AND  
CONAGRA BRANDS, INC.**COMPLAINT AND FINAL ORDER IN REGARD TO ALLEGED  
VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION  
ACT AND SECTION 7 OF THE CLAYTON ACT*Docket No. 9381; File No. 171 0182  
Complaint, March 5, 2018 – Decision, March 8, 2018*

This case addresses the \$285 million acquisition by The J.M. Smucker Company of certain assets of Conagra Brands, 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 significantly reducing competition in the markets for canola and vegetable oils sold in the United States. The Order dismisses the Complaint, on the grounds that the Respondents have terminated their Asset Purchase Agreement, and have withdrawn the Hart-Scott-Rodino Notification and Report Forms that they filed for the proposed acquisition.

*Participants*

For the *Commission*: Elizabeth Arens, Charles Dickinson, Jamie France, Christopher Harris, Michael Mikawa, David Owyang, Anthony Saunders, and Robert Zuver.

For the *Respondents*: Ilene Gotts and Lori Sherman, Wachtell, Lipton, Rosen & Katz LLP; Douglas Matthews, Vorys, Sater, Seymour and Pease LLP; Kathryn M. Fenton, Jones Day LLP.

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act (“FTC Act”), and by the virtue of the authority vested in it by the FTC Act, the Federal Trade Commission (“Commission”), having reason to believe that Respondents The J.M. Smucker Company (“Smucker”) and Conagra Brands, Inc. (“Conagra”) have executed an asset purchase 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



## Complaint

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. Crisco, which is owned by Smucker, and Wesson, which is owned by Conagra, are by far the two dominant brands of canola and vegetable oils sold in the United States. Pursuant to an Asset Purchase Agreement, Smucker plans to acquire the Wesson brand, including intellectual property, inventory, and some manufacturing equipment, from Conagra for \$285 million (the “Acquisition”), paying nearly [REDACTED] more than any other bidder offered. Smucker is not acquiring the Memphis, Tennessee plant where Conagra produces Wesson products today or hiring any Conagra employees.

2. Respondents’ own documents show that the effect of the Acquisition “may be substantially to lessen competition, or to tend to create a monopoly” in violation of the Clayton Act, and harm U.S. consumers. In a document submitted with Smucker’s Hart-Scott-Rodino filing, which means that it was created by or for corporate officers or directors to evaluate the Acquisition, Smucker stated that a “strategic rationale” for the Acquisition is that it “[t]akes [a] competitor [Wesson] out of the marketplace and allows us to more effectively manage pricing/trade.” This statement clearly acknowledges that Smucker would have the power and incentive to increase prices on Crisco and Wesson products post-acquisition. Put simply, by “taking out” Wesson as a competitor, Smucker would be able to eliminate the price discounts that each Respondent has been forced to offer as a result of their vigorous head-to-head competition. Year after year, Respondents have internally complained about each other’s use of price discounts as “irresponsible” and “irrational”. In Smucker’s view, this price competition is a “race to the bottom” that “unnecessarily tak[es] dollars out of the category.” Retailers and consumers have and continue to benefit from the discounts that

## Complaint

head-to-head competition between Crisco and Wesson has generated.

3. Smucker's documents go further, including a model showing that the company recognizes that raising prices on both Wesson and Crisco products would be profitable even though price increases would decrease the brands' overall sales volume. In fact, Smucker admits that it will increase prices: "Once we close the deal, our plan would be to execute a price increase on Wesson consistent with our latest Crisco pricing action." These quintessential anticompetitive effects are rarely so clearly touted by merging parties as intended consequences of a merger or acquisition.

4. Conagra also recognizes that the Acquisition will enable Smucker to increase prices, ultimately harming U.S. consumers. Ordinary course documents make clear that the presence of an independent Wesson constrains Crisco's prices today. In trying to persuade a retailer to resume carrying Wesson products, Conagra's broker stated:

[P]art of Wesson's reason-to-be is that we keep Crisco 'honest'. Without another National Brand, [Crisco] play[s] off the fact that they will be highest priced Cooking Oil and will appeal to the Consumer looking for a National Brand and willing to pay a little more for it. The drawback is that they don't have to get 'ultra' aggressive with their pricing to meet that objective.

5. Respondents sell their Crisco and Wesson products to retailers—including grocery stores (such as Giant), mass merchants (such as Target), club stores (such as BJ's Wholesale Club), and convenience stores—who, in turn sell to consumers, the end customers. Crisco and Wesson each have a national price list that they provide to all retailers. Crisco and Wesson incentivize retailers to purchase their products by offering trade funds (sometimes called "promotional funds"), which serve as a discount off of the list price and lower the prices that retailers pay to procure Crisco and Wesson products. The amount of trade funds is determined in individual negotiations between Crisco or

## Complaint

Wesson and each retailer. Crisco and Wesson set their list prices and the amount of trade funds offered to specific retailers with the goal of setting the on-the-shelf price that retailers charge to consumers.

6. Over the last several years, Smucker and Conagra each attempted to raise its list prices on canola and vegetable oils, expecting the other brand to follow its lead. But each attempt to increase prices has been undermined when the other brand did not follow and also raise its list prices. Instead, the other brand took advantage of its now comparatively lower prices to win sales and market share away from its competitor—in other words, choosing to compete vigorously. Without Wesson following Crisco’s lead, and vice versa, each brand has had to “invest[] back” by offering additional discounts to retailers in an attempt to regain lost sales and customers resulting from its price increase attempt.

7. This dynamic played out most recently in early 2017, when Smucker announced a list price increase on Crisco products of approximately 12.5%. Conagra declined to follow the price increase for its Wesson products—indeed, it still has not done so, [REDACTED]. As a result, Wesson’s sales of canola and vegetable oils increased and Crisco’s decreased. To combat the decline, Smucker was forced to provide additional trade funds to retailers—that is, to lower its prices on Crisco.

8. On May 26, 2017, a few months after Wesson upset the Crisco list price increase, Smucker agreed to acquire Wesson for a premium of nearly [REDACTED] more than any other bidder. With control of both Crisco and Wesson, Smucker can stop Wesson’s “irresponsible” pricing strategy and ensure that a price increase on one brand will never be disrupted by the other brand again, resulting in retailers and their end consumers paying higher prices.

9. Ordinary course documents show that Respondents have competed vigorously for many years, resulting in lower prices on Respondents’ Crisco and Wesson canola and vegetable oils paid by retailers across the United States and U.S. consumers. The Acquisition, if consummated, would eliminate this vigorous head-to-head competition between Crisco and Wesson, leading to

## Complaint

higher prices on canola and vegetable oils for retailers and their U.S. customers, the end consumer.

**II.****BACKGROUND****A.****Jurisdiction**

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

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

**B.****Respondents**

12. Respondent Smucker is a publicly traded corporation organized under the laws of Ohio with headquarters in Orrville, Ohio. Smucker manufactures and sells a diversified portfolio of branded food products, including baking mixes, cooking oils, coffee, peanut butter, and jellies. Smucker’s Crisco brand includes canola oil, vegetable oil, corn oil, peanut oil, shortening, and cooking sprays. Crisco produces all its cooking oil and shortening products at its plant in Cincinnati, Ohio. Smucker purchases crude oil from the commodities market, refines it, and then packages it in the bottles found on retailers’ store shelves. In calendar year 2016, retail sales of Crisco products totaled approximately \$379 million, including approximately \$225 million from sales of Crisco canola and vegetable oils.

13. Respondent Conagra is a publicly traded corporation organized under the laws of Delaware with headquarters in Chicago, Illinois. Conagra manufactures and sells a broad

### Complaint

portfolio of food products to retail, foodservice, and industrial customers. Conagra's Wesson brand of cooking oils includes canola oil, vegetable oil, and corn oil. Conagra produces all Wesson products at its plant in Memphis, Tennessee. Conagra both refines crude oil that it purchases on the commodities market and buys refined oil from large agri-businesses. Conagra then packages refined oil in the bottles sold to retailers. In calendar year 2016, retail sales of Wesson products totaled approximately \$198 million, including approximately \$185 million from sales of Wesson canola and vegetable oils.

### C.

#### **The Acquisition**

14. On May 26, 2017, Smucker and Conagra signed an Asset Purchase Agreement pursuant to which Smucker will acquire assets relating to the Wesson brand, including intellectual property, inventories, and packaging equipment, for approximately \$285 million. The Acquisition does not include the refining and bottling plant in Memphis, where Conagra currently produces all Wesson oils. Smucker eventually plans to manufacture all Wesson and Crisco products at its plant in Cincinnati although it will not do so for up to one year after the Acquisition closes, with Conagra continuing to manufacture Wesson on Smucker's behalf.

### III.

#### **BACKGROUND**

15. Smucker and Conagra each produce and sell canola oil and vegetable oil; Smucker under its Crisco brand and Conagra under its Wesson brand. The basic ingredient used to produce canola oil is rapeseeds and for vegetable oil it is soybeans. Large agri-businesses grow and crush rapeseeds and soybeans to produce crude canola and vegetable oils, respectively. Some suppliers of canola and vegetable oils, including Respondents, purchase crude oil from these agri-businesses and refine, bleach, and deodorize it to make the finished oil that is packaged and labeled. Other suppliers of canola and vegetable oils purchase

## Complaint

refined oil from agri-businesses and merely package and label it at their own facilities. Both Respondents refine crude oil and purchase some refined oil to produce their canola and vegetable oils.

16. Respondents do not sell their products directly to end consumers. Instead, both Respondents sell their branded canola and vegetable oils to retailers, including grocery stores (such as Giant), mass merchants (such as Target), club stores (such as BJ's Wholesale Club), and convenience stores. Retailers purchase canola and vegetable oils at wholesale from suppliers such as Smucker and Conagra and sell them at retail to their in-store customers, the end consumers.

17. Each Respondent establishes the prices paid by retailers for canola and vegetable oils in two stages. First, each Respondent publishes a list price that generally applies to all retailers. Second, each Respondent negotiates trade funding (sometimes called "promotional funds") individually with each retailer. Trade funding acts as a discount off the list price. Retailers frequently play Respondents against each other to induce them to offer more trade funds during these negotiations. Retailers then apply a markup and set the shelf price paid by end consumers. Retailers, often in consultation with Respondents, commonly use trade funding in ways designed to encourage sales of Respondents' products, including reduced everyday shelf prices, temporary reductions in shelf prices, promotional prices (e.g., buy-one-get-one-free), features in promotional and advertising materials, prominent shelf space, and placement on in-store displays (e.g., "endcap" displays at the end of a grocery aisle). Some retailers take a consistent, "every-day-low-price" ("EDLP") approach to pricing, while other retailers (called "hi-lo" retailers) vary prices through in-store promotions, coupons, and other vehicles.

18. Depending on the retailer (e.g., grocery stores, mass merchants, club stores), different retailers procure different sizes of canola and vegetable oils to offer to their end consumers. Grocery stores and mass merchants generally offer canola and vegetable oils in a wide variety of sizes, including 16-, 32-, 48-, 96-, and 128-ounce (i.e., one-gallon) bottles. The highest selling,

### Complaint

and therefore most important, sizes of canola and vegetable oils for grocery stores are 48- and 128-ounce bottles. Club stores, including Costco, Sam's Club, and BJ's Wholesale, tend to carry larger package sizes such as 160-ounce (i.e., five-quart) bottles.

19. In addition to buying canola and vegetable oils from the national brands, retailers also frequently sell canola and vegetable oils under their own label. Most retailers that have "private label" canola and vegetable oils typically price it at a lower retail price than the national brands, usually 10-20% below the brand price. Retailers generally contract with a third-party oil producer, such as Cargill or Stratas, to manufacture their private label oils. The process by which retailers supply themselves with private label canola and vegetable oils is separate, and different, from the way retailers buy and sell branded canola and vegetable oils.

20. The private label supply process generally differs from the branded supply process. It does not involve negotiations over trade funds, but instead begins with a request-for-proposal in which the retailer sets forth its requirements in terms of oil type, degree of refinement, package size, and terms of delivery and payment. Private label suppliers submit bids and the retailer selects the winner, generally choosing the lowest-cost option. The price that the retailer pays for private label oil is closely tied to the cost of the input product (for example, crude canola oil) on the commodities market. The prices retailers pay their private label suppliers tend to be substantially lower than the price they pay for national-brand oils, despite the fact that private label suppliers do not offer trade funds. The winning private label supplier that the retailer selects produces and bottles the oil with the retailer's label, and ships it to the retailer.

21. Smucker and Conagra do not participate in or bid to supply private label to retailers. While one of the rationales for the Acquisition is to fill excess capacity at Smucker's Cincinnati plant by buying the Wesson brand and its corresponding volume, Smucker has elected not to increase its capacity utilization through a less anticompetitive alternative. For example, Smucker could supply private label oils to retailers or produce private label oils for a private label supplier that lacks sufficient capacity itself, which Smucker recently did for Cargill.

## Complaint

22. Other than retailers, there are two other major groups of customers to which suppliers of canola and vegetable oils sell their products: foodservice customers and industrial customers. Food service customers include restaurants, distributors that resell to restaurants, and other institutional entities that use canola and vegetable oils as an input into food they cook and serve to their customers. Industrial customers include food manufacturing companies and others that use canola and vegetable oils as an input into their packaged food products.

23. Sales of canola and vegetable oils to foodservice and industrial customers differ in at least two ways from sales to retailers. First, foodservice and industrial customers buy canola and vegetable oils in much larger package sizes than retailers. A 35-pound “jug-in-a-box” is a popular size in foodservice and industrial channels. Second, foodservice and industrial customers also buy different types of canola and vegetable oils, many of which are formulated specifically for the demands of large-scale commercial cooking and which are not even available to retail customers. Respondent Smucker sells canola and vegetable oils only to retailers, though it licenses the Crisco brand to a third party for sales to foodservice customers. Respondent Conagra supplies canola and vegetable oils to retailers, foodservice customers, and industrial customers.

24. Canola and vegetable oils fall into the category of cooking oils. The cooking oils category is made up of several subcategories: base oils, olive oil, and specialty oils. Base oils, which include canola oil, vegetable oil, corn oil, and peanut oil, generally are produced by crushing the seeds of different types of plants. Vegetable oil and canola oil are, by far, the two best-selling types of base oils sold to retailers in the United States. Vegetable oil alone accounts for around half of all retail base oil sales, while canola oil accounts for roughly one-quarter of sales. Olive oil is made from olives, which are pressed rather than crushed. Because of its means of production, the cost of inputs, and the cost of freight (most olive oil originates in Europe), olive oil generally is much more expensive than base oils. Specialty oils are oils with niche uses such as coconut oil, avocado oil, grapeseed oil, sunflower oil, and other flavored oils. Specialty oils also tend to be much more expensive than base oils.



## Complaint

## IV.

**RELEVANT MARKET**

25. The relevant market in which to evaluate the effects of the Acquisition is no broader than the sale of canola and vegetable oils (“CV oils”) to retailers in the United States.

## A.

**Relevant Product Market**

26. The sale of CV oils to retailers is a relevant product market.

27. Canola and vegetable oils have similar physical properties and are suitable for similar uses. They have relatively high smoke points (i.e., the temperature at which an oil burns). Both oils appear light in color and are odorless and flavorless. Because of these properties, canola and vegetable oils are suitable for—and consumers use them for—a wide range of cooking applications, including baking, frying, and sautéing, as well as using them in marinades and vinaigrettes.

28. Canola and vegetable oils are typically the least expensive cooking oil types, sitting at the bottom of the price spectrum among all cooking oils. Canola and vegetable oils are similarly priced and are often included in the same promotions and advertisements. Each Respondent’s list price for canola oil is similar to its list price for vegetable oil. Retailers also generally price canola oil and vegetable oil similarly. Respondents and retailers promote canola and vegetable oils at the same time, often discounting them at the same time and including both in the same promotions and advertisements.

29. Even if canola and vegetable oils are not sufficiently interchangeable to compose a single relevant market, the sale of CV oils to retailers can be analyzed as a cluster market. The competitive conditions for the sale of canola oil to retailers and the sale of vegetable oil to retailers are similar. The set of

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competitors and their market shares for the sale of each oil to retailers are similar, as are the customers to which they are sold.

30. Retailers could not switch their purchases of CV oils to other oils, or non-oil cooking agents, in sufficient numbers to render unprofitable a small but significant non-transitory increase in price (“SSNIP”) on CV oils.

31. The sale of branded CV oils to retailers is also a relevant product market. Retailers would not switch their purchases of branded CV oils to other products in sufficient numbers to render unprofitable a SSNIP on branded CV oils. Differences in the prices that retailers pay to procure branded and private label CV oils reflect their perception of meaningful product differentiation between branded and private label CV oils. Differences in shelf prices for branded and private label CV oils reflect end consumers’ perception of meaningful product differentiation between branded and private label CV oils. End consumers who buy branded CV oils generally pay a significantly higher price for a branded CV oil than for a private label CV oil.

**Other Products Are Not Substitutes for CV Oils**

32. Retailers and end consumers do not view other base oils—in particular, corn oil and peanut oil—as substitutes for CV oils. Consumers who buy CV oils perceive other base oils to be of lower quality than CV oils, as imparting distinctive flavors to food, as appropriate for only limited applications, such as deep frying, or possessing a combination of all three of these characteristics. These oils also typically have higher prices than CV oils because they have higher ingredient and refining costs. For example, corn oil is typically at least 10% more expensive than canola and vegetable oils, and peanut oil is typically twice as expensive as canola and vegetable oils. For these reasons, retailers could not switch their purchases of CV oils to other base oils in response to a SSNIP on CV oils.

33. Retailers and end consumers do not view olive oil as a substitute for CV oils. Extra virgin olive oil (“EVOO”), the most common type, has a dark green color and a strong, distinctive flavor. It also has a relatively low smoke point. These features

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render EVOO unsuitable for many of the most common oil applications, including baking and deep frying. There are other types of olive oil that are highly refined and share some physical properties with CV oils, but retailers and end consumers do not consider them as substitutes for CV oils. All types of olive oil are much more expensive than CV oils (on average, three to four times the price of CV oils). For these reasons, retailers could not switch their purchases of CV oils to olive oil in response to a SSNIP on CV oils.

34. Specialty oils such as coconut oil, avocado oil, grapeseed oil, sunflower oil, and other flavored oils, are not substitutes for CV oils in the eyes of retailers or end consumers. These oils often are heavily flavored and used for specific cooking applications and recipes. They also tend to be priced at a substantial premium—even higher than olive oil. For these reasons, retailers could not switch their purchases of CV oils to specialty oils in response to a SSNIP on CV oils.

35. Non-oil cooking agents, such as pan sprays, shortening, and lard, are not substitutes for CV oils in the eyes of retailers and end consumers. These products are very limited in application. Pan sprays, for example, are suitable only for greasing pans and light sautéing, and consumers generally view shortening as unsuitable for uses other than baking or (in the southern United States) frying. Retailers could not switch their purchases of CV oils to non-oil cooking agents in response to a SSNIP on CV oils.

## **B.**

### **Relevant Geographic Market**

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

37. Smucker and Conagra each produce and package all of their CV oils at a single facility. They each have a national distribution network to transport their CV oils to retailers.

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38. Smucker and Conagra, as well as other suppliers of branded CV oils, have list prices for their CV oils that apply nationally.

39. Many large retailers have locations across multiple regions of the United States.

40. Smucker and Conagra negotiate trade funds separately for each retail customer. The relevant market may be evaluated as a cluster of retailers for which competitive conditions for suppliers of CV oils are sufficiently similar.

41. There are no major non-United States-based suppliers of CV oils in the United States. A foreign supplier would need to establish a distribution and sales network in the United States to be a significant competitor in the U.S. market.

## V.

**MARKET STRUCTURE AND THE ACQUISITION'S  
PRESUMPTIVE ILLEGALITY**

42. Smucker and Conagra, through their Crisco and Wesson brands, are the two largest suppliers of branded CV oils to retailers in the United States.

43. Other branded suppliers of CV oils, including Mazola, LouAna, 1-2-3, and Spectrum, are significantly smaller than Respondents and have limited competitive significance.

44. Mazola focuses on corn oil and has limited competitive significance in CV oils outside of the western and southwestern United States, Florida, and parts of New York.

45. LouAna focuses on peanut oil and has limited competitive significance outside of the southeastern United States and small parts of the northeastern United States.

46. Typically, retailers also offer private label CV oils on their shelves. At most, suppliers of branded CV oils compete for the business of a retailer against that one retailer's private label (i.e.,

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Walmart could not use Kroger's private label as leverage to get more trade funds and better pricing from either Crisco or Wesson). From the perspective of a retailer buying CV oils, private label is one competitor to branded oils. Respondents also treat private label as a single competitor in the ordinary course of business.

47. Combined, Crisco and Wesson would account for at least 35% of the market for the sale of CV oils to retailers in the United States. Based on ordinary course documents, Crisco has approximately [REDACTED] share of sales of CV oils, while Wesson has approximately [REDACTED].

48. In a market for the sale of branded CV oils to retailers in the United States, Crisco and Wesson, combined, would account for at least 70% of the market, with Crisco accounting for more than [REDACTED] and Wesson accounting for more than [REDACTED].

49. The 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (the "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.

50. The Acquisition would result in a post-acquisition HHI exceeding 4,000, with an increase of more than 700, in a market for the sale of CV oils to retailers in the United States.

51. The Acquisition would result in a post-acquisition HHI exceeding 6,000, with an increase of approximately 3,000, in a market for the sale of branded CV oils to retailers in the United States.

52. The Acquisition would result in market shares and concentration levels beyond what is necessary to establish a presumption of competitive harm.

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53. Evidence showing that the Acquisition would substantially lessen competition and result in significant anticompetitive effects bolsters the presumption of competitive harm.

54. The Acquisition is presumptively illegal under relevant case law.

**VI.****ANTICOMPETITIVE EFFECTS**

55. The Acquisition would eliminate substantial direct competition between Crisco and Wesson, resulting in increased prices for retailers and end consumers. In fact, that is Smucker's intent and rationale for the Acquisition.

***The Acquisition Would Eliminate Vigorous Competition and Result in Higher Prices for Retailers and End Consumers***

56. The Acquisition would end the pro-consumer and pro-competitive environment that exists today and has allowed retailers to pit Crisco and Wesson against each other to get lower prices. With all pricing, strategy, and competition brought under one roof and one management, Crisco would be able to "take out" Wesson and its pricing strategies that have undermined Crisco's attempts to increase prices. Thus, after the Acquisition closes, Smucker would have the power and incentive to increase prices on Crisco and Wesson CV oils. In fact, Smucker's analysis of the Acquisition and its go-forward plans for Wesson and Crisco show that Smucker recognizes that it will have the power to profitably increase prices.

57. Respondents have internally complained about the other brand's competitive behavior that has led to lower prices and the need to provide more trade funding to stay competitive with each other:

- a. In [REDACTED], Smucker's Region Sales Manager for [REDACTED] described a Wesson advertisement for [REDACTED] gallons of canola, vegetable, and corn oil as "downright irresponsible trade spending by our friends

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at Con Agra.” ██████████, Smucker’s Director of ██████████, responded, “that’s clearly irresponsible trade spending,” and stated, “if you feel some of the recent Wesson tactics are going to materially impact your fiscal year projections, we’ll want to talk about it sooner than later. Again, we’re hopeful that our tactical spending and innovation will help offset any of Wesson’s targeted tactics.”

- b. In ██████████, Smucker described Wesson’s \$████████ and \$████████ retail price points for ██████████ bottles as “plain irresponsible” because Smucker would prefer avoiding having to offer additional trade funds to compete with Wesson.
- c. In August 2016, Conagra’s recaps from a meeting about the Wesson brand included: “Crisco is running deeper price points at major retailers (i.e. ██████████); Crisco’s pricing strategy is irrational; Crisco did not follow [Wesson’s list] price increase; [and] Tom is asking to grow share having lost volume [by] pulling out trade [funding].”

58. Crisco believes that price competition with Wesson amounts to a “race to the bottom” and results in low retail prices for end consumers that “unnecessarily tak[e] dollars out of the category.”

59. Over the last several years, Conagra and Smucker have each increased list prices on their CV oils. In each instance, whenever one increased its list prices on CV oils, the other opted against following the increase, forcing the price-increasing brand, in effect, to walk back much of its list price increase by offering more trade funding to retailers.

60. In spring 2016, Conagra announced a list price increase on Wesson, but after the new list prices became effective, “Wesson lost more volume than expected” because “Crisco decreased price as Wesson increased, creating significant [price] gaps on [the] shelf.” As a result of the Wesson list price increase, “[s]ome retailers responded by awarding Wesson promotion events to

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Crisco.” To reverse the sales decline, Conagra offered more trade funding to key retailers, including, among others, [REDACTED]. For example, Conagra approved additional trade funding, so that [REDACTED] could reduce retail prices on one-gallon bottles by \$0.70, “Wesson is 10.69 versus Crisco’s 9.99; I’ve attached a [planning scenario] to see what it would take to get to 9.99 for parity.” Following its 2016 list price increase and the resulting loss in sales to Crisco, Wesson internal documents state that Wesson’s profit-maximizing price is to [REDACTED].

61. Similarly, Smucker was forced to increase the amount of trade funding it offered to retailers when Conagra did not follow the Crisco list price increase Smucker announced in January 2017. [REDACTED], Smucker’s Director of [REDACTED] for Crisco, anticipated this action, “if Wesson doesn’t move [on list prices] or it’s not to the extent that Crisco moved, we will be in a position to execute our [REDACTED] promotions.”

62. If the Acquisition is consummated, Crisco and Wesson will no longer undermine each other’s attempts to raise prices. Indeed, Smucker seeks to acquire Wesson precisely because it believes that the Acquisition will allow it to increase list prices, and reduce trade fund spending, on both Crisco’s and Wesson’s CV oils.

63. Smucker decided to acquire Wesson—for which it paid \$285 million, beating the second-place bidder by nearly [REDACTED]—after determining that the Acquisition would allow it to profitably raise prices on both Crisco and Wesson oils.

64. One of Smucker’s four “strategic rationales” for the Acquisition is that it “[t]akes [a] competitor out of the marketplace and allows [Smucker] to more effectively manage pricing/trade.” Smucker’s [REDACTED] President of [REDACTED] admitted that this particular rationale referred to “remov[ing] Conagra from the oil business.”



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65. In another document analyzing the Acquisition, Smucker listed “[i]nherent trade synergies [from] removing non-productive ‘head-to-head’ spending” as one of the Acquisition’s “benefits,” showing that Smucker expected it would save money because Crisco and Wesson would no longer be “beating each other up” on price.

66. In March 2017, Smucker executives created a financial model to show the effects of a 6% post-acquisition list price increase on Wesson, followed by a 7% increase on Crisco. That model also included Smucker reducing Wesson trade funding. [REDACTED], Vice President of [REDACTED], concluded that these price hikes would result in a massive *reduction* in Crisco’s and Wesson’s annual sales volume, as measured in pounds, but an *increase* in gross profits of nearly [REDACTED] million per year.

67. Smucker considered this modeling in its post-acquisition planning for Wesson and Crisco. Knowing that the two list price increases would be profitable, [REDACTED] told the [REDACTED], “[o]nce we close the deal, our plan would be to execute a price increase on Wesson consistent with our latest pricing action.” Additionally, while planning the capital expenditures that Smucker would make to enable the production of Wesson oil at the Cincinnati plant, [REDACTED] told the [REDACTED] that there was no need to spend money on certain equipment to increase processing capacity because the planned price increases “could cause a volume loss on Wesson of approx. [REDACTED], or [REDACTED] lbs” in the first year, and “a volume decline on both brands of approx. another [REDACTED] lbs” in the second year. Smucker’s analysis and post-acquisition plans reflect Smucker’s understanding that it will have the power and incentive to increase prices on Wesson and Crisco as a result of the Acquisition.

68. Smucker’s strategy of pursuing higher prices and lower output is not new. In September 2016, [REDACTED] recalled that Smucker stopped trying to get [REDACTED] to include Crisco instead of [REDACTED] private label in [REDACTED] display because “it required significant investment spending to secure the space.” Instead of competing with private label,

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█████ remarked, “We’re better off making money and selling less units[.]”

**Crisco and Wesson Are Close Competitors on Price**

69. The Acquisition would eliminate close price competition between Crisco and Wesson. Respondents’ close price competition is reflected by their continuous monitoring of each other’s everyday retail prices, promotional prices, and list prices for CV oils. The following are but a few recent examples of Respondents’ continuous monitoring of each other’s everyday retail and promotional prices:

- a. In August 2016, Smucker’s distributor reported that “Wesson has given ██████████ ██████████ deals through the end of the year on 48 oz and they are below \$█████ unit every day. . . . [I]f they are ██████ \$█████, we will not get any ads at ██████████ with our current program even with the additional ad pull that we have been giving them (which puts us at \$█████ unit).” As this news was reported up the chain at Smucker, Smucker employees commented, “[w]e continue to see the hard court press from Wesson in ██████████” and “Wesson is putting some serious pressure on us.”
- b. In September 2016, Conagra reported that there was a 20 million “CSU [Conagra Sales Unit]” decline at ██████████, noting “Crisco investing to lower everyday price to \$2.69. Wesson 48oz. up +\$0.20 vs. [Year Ago] driving wider gap to Crisco.”
- c. On December 13, 2016, Smucker saw that Wesson had invested in everyday pricing at ██████████ “to reduce their everyday pricing on ██████████ and ██████ oz. items to be in-line with our current Crisco pricing (i.e. \$█████ on ██████, \$█████ on ██████ oz.)” Upon seeing Wesson’s new pricing, Smucker immediately delayed by several weeks the list price increase it had planned to

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announce the next day, so that it could “evaluate the scope of Wesson’s investment (is it beyond [REDACTED]), and ultimately, understand the volume implications if Wesson doesn’t follow our [list price] increase.”

- d. In May 2017, a Conagra spreadsheet prepared for the employees who would be assuming responsibility for the oil and sprays business instructed, for all Wesson customers, “Let teams know to keep you in the loop on what they hear about any competitors but Crisco most of all – June/July/Aug are holiday planning months and we should know quickly if we are competitive or getting beat.”

70. Conagra’s current pricing strategy for Wesson demonstrates the closeness of Respondents’ price competition.



71. Respondents also closely track each other’s list prices. Unlike retail prices, list prices are not publicly available and change infrequently. Nevertheless, Respondents’ ordinary course documents show that they monitor each other’s list prices because doing so provides important competitive information about the other’s cost structure and (by comparing the list price to the shelf price) the amount of trade funding offered to retailers. Respondents adjust their own pricing strategy in response. For example:

- a. In July 2016, Smucker learned that Wesson had recently increased its list prices, which a Smucker analyst conveyed to Smucker’s [REDACTED]: “Wesson Pricing Action [REDACTED] [REDACTED] List Price increased to same level

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as before Price Decline ( [REDACTED] ) which Crisco never followed.”

- b. Conagra obtained a copy of Smucker’s January 2017 list price increase on Crisco within days of the announcement to customers. When Conagra’s broker for Wesson recirculated this information a month later, the broker wrote, “Attached is a Crisco Oil price list with new pricing; definitely compare to your Wesson Lists and see where we fall!” and “[l]everage where we can.”

**Head-to-Head Competition Between Crisco and Wesson Leads to Increased Trade Funding, and, Thereby, Lower Prices, Offered to Retailers**

72. Vigorous head-to-head competition between Respondents has led to increased trade funding offered to retailers. The following examples show that Respondents have provided additional trade funding to retailers as a competitive response to one another:

- a. Conagra approved an additional \$ [REDACTED] in trade funding for [REDACTED] in July 2016 “to help [Wesson] through the Holiday season considering our price to Crisco will be ~\$1.50 higher.”
- b. In October 2016, Conagra’s team handling the [REDACTED] account submitted a request for \$ [REDACTED] in trade funding, noting that “Crisco rarely sits at retail at full list/white tag [price] so [Conagra’s] [REDACTED] team prepared the incremental plan based on the best situation after Holiday and current Crisco promotions.” [REDACTED], Conagra’s Manager of Customer Strategy Planning, approved the requested trade funding and stated, “[w]e are making these select changes as part of a strategic decision to become more competitive with competing brands.”



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retailers. The following table is reproduced from an internal ordinary course Conagra document and shows the amount by which Wesson's retail price would decrease as a result of this initiative:

Summary of Changes ( )		
Customer	From	To
	Gallon: \$7.74	Gallon: \$6.98
	Gallon: 1wk @ \$4.99	Gallon: 2wks @ \$5.99
	Gallon: \$10.39	Gallon: \$9.99
	48oz.: \$4.19	48oz.: \$3.99
	48oz.: \$2.79	48oz.: \$2.50

- b. In a March 2017 email, [REDACTED], Smucker's Director of National Accounts for [REDACTED], reported, "[a]t the same time we announced the [list price increase], Wesson had come back in and increased their investments with [REDACTED] to gain a [price] Lead position. The projected impact was a [REDACTED] [equivalent unit] volume loss or [REDACTED]% of base oil business." To maintain its price lead position, Smucker effectively refunded [REDACTED] of its Crisco list price at [REDACTED]. [REDACTED] "We are spending back [REDACTED] of [the list price increase] on [REDACTED] oz. and Gallons."
- c. In August 2017, Smucker reduced a "[REDACTED]" \$1 retail price gap to Wesson on [REDACTED]-ounce and [REDACTED]-sized bottles at [REDACTED] by providing [REDACTED] with \$[REDACTED] in trade funds. Smucker noted that this investment in retail pricing would "eliminate the gap and get our baselines back to healthy."

75. Retailers often use increased trade funding that results from head-to-head competition between Respondents to reduce their everyday shelf prices.

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**Retailers Use Trade Funds To Offer Deeper and More Frequent Promotional Discounts**

76. Competition between Respondents has led to deeper and more frequent promotional discounts on CV oils. The following examples from Respondents' ordinary course documents are just some of the numerous instances where head-to-head competition led to deeper and more frequent promotional discounts:

- a. In June 2016, a Conagra employee who manages the [REDACTED] account reported that [REDACTED] "called me and told me that [Wesson's] program is now at risk of being pull [sic] because Crisco is offering \$1.97." To save the program, which was a one-week promotional price on 48-ounce canola and vegetable oils, Conagra reduced its unit price to [REDACTED] from \$2.13 to \$2.07. Conagra lowered [REDACTED] unit price because it recognized that "we need to put our best offer on the table now with Crisco's offer being \$1.97."
- b. In August 2016, Conagra observed that Crisco's shelf price for 48-ounce was \$2.69 at [REDACTED] while the price for Wesson was \$3.99. To be more competitive, Wesson "approved a \$1 mega and 2/\$5" promotion.
- c. In October 2016, Conagra approved more than \$240,000 in incremental trade funding for various promotions at [REDACTED] [REDACTED] to compete with Crisco. For example, Conagra approved over \$ [REDACTED] in incremental trade funding for [REDACTED] to "Secure Holiday event instead of Crisco." [REDACTED] received about \$ [REDACTED] in trade funding to "Defend Wesson versus Crisco." And [REDACTED] received over \$ [REDACTED] in trade funding because Conagra wanted to "Steal Crisco business."

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- d. In June 2017, Smucker approved incremental trade funding to run a four-week promotion on 128-ounce bottles of canola and vegetable oils at [REDACTED] to respond to Wesson's pricing. Wesson canola oil was priced at \$[REDACTED], while vegetable oil was priced at \$[REDACTED]. Smucker's promotion temporarily reduced pricing on Crisco canola oil from \$10.98 to \$8.48 and on vegetable oil from \$10.48 to \$7.98, or \$[REDACTED] better than Wesson's shelf prices.

77. Retailers often use increased trade funding resulting from head-to-head competition between Respondents to offer larger and more frequent promotional discounts that result in lower prices for end consumers.

**Retailers Use Trade Funds To Offer More In-Store Displays and Advertisements**

78. Head-to-head competition between Respondents has led to more in-store displays and advertisements. In-store displays benefit retailers because they allow them to use their shelf and floor space effectively. Retailers benefit from advertisements because they help attract additional end consumers. End consumers benefit from in-store displays and advertisements because they provide greater convenience and product and price awareness. The following are some examples from Respondents' ordinary course documents showing that competition between Crisco and Wesson can result in more prominent and convenient product placement inside of retailers' stores, as well as more frequent promotional advertisements:

- a. In [REDACTED], Smucker's National Account Manager for the [REDACTED] account reported that "[REDACTED] has requested a [Crisco] [REDACTED]oz BOGO ['buy-one-get-one-free'] ad on [REDACTED]," but noted that one of his "concerns" was "Does the company NEED any volume for F[REDACTED] or should I simply reject the request and stay with my plan to run the [REDACTED] event? However, rejecting this request would mean that



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Wesson would get the BOGO. Also, my [REDACTED] BOGO could be at risk.”

- b. In May 2017, Wesson pursued an “[o]ppportunity to kick out crisco [sic] in [REDACTED] if we can deliver a display ready pallet to them.”

79. Retailers often use increased trade funding resulting from head-to-head competition between Respondents to provide more in-store displays and advertisements of Respondents’ CV oils.

**Competition from Other Brands or Private Label Will Not Replace the Competition Eliminated by the Acquisition**

80. Competition from other branded CV oils sold in the United States would not replace the competition eliminated by the Acquisition. Although there are other branded CV oils available in the United States, their presence would not prevent a price increase post-acquisition, as they have far lower market shares and brand recognition in CV oils than Respondents. For example, despite its more than 100-year history, Mazola’s national market share of CV oils is significantly below [REDACTED] even in a market that includes only branded CV oils. Other brands, including LouAna, have an even smaller share of the CV oils market than Mazola. These low sales figures reflect the fact that end consumers do not see the other brands as equivalent to Crisco and Wesson and that, therefore, they provide limited leverage to retailers in their price negotiations with Crisco and Wesson.

81. Competition from private label CV oils would not replace the competition eliminated by the Acquisition. For many retailers, a substantial portion of their end consumers demand branded CV oils, especially Crisco or Wesson. Many of these end consumers perceive branded CV oils to be superior in quality to private label, while others prefer branded CV oils because of the brands’ tradition and familiarity. Accordingly, many retailers offer branded CV oils because, if they did not, end consumers would shop elsewhere for branded CV oils, especially Crisco and Wesson, and likely other products at another store.

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82. Traditional grocers, as opposed to club stores or discount retailers, have an especially strong need to offer branded CV oils. Traditional grocers' business model is to offer a wide selection of products that includes well-known brands in each product category, including cooking oils. Dropping brands is not a viable option for these retailers, as they need to meet their end consumers' demands.

83. In recent years, retailers that have attempted to switch from a strategy of offering branded and private label CV oils to a strategy of offering only private label CV oils have restored their brand offerings. For example, [REDACTED] reverted to offering branded CV oils during the holiday baking season after its decision to eliminate branded CV oils resulted in significant sales declines. In March 2017, Smucker's [REDACTED] reported that, "the Base Oils business at [REDACTED] seems to be trending very low since they made the decision to take branded oil out of the category. . . . [REDACTED]

[REDACTED] After seeing its private label strategy fall short of expectations, [REDACTED] solicited bids from Smucker and Conagra because it wanted to offer Crisco or Wesson during the 2017 holiday season. Smucker and Conagra submitted bids, and Conagra won after offering a lower price on Wesson than Smucker offered on Crisco.

**VII.****LACK OF COUNTERVAILING FACTORS**

84. Respondents cannot demonstrate that new entry or expansion by existing firms would be timely, likely, and sufficient to offset the anticompetitive effects of the Acquisition. Entry by another private label supplier would be insufficient to replace the competition lost between the branded products offered by Respondents.

85. Brand equity is the most significant barrier to entry. Brand equity is the premium that a company generates from a product's recognizable name compared to a generic equivalent.

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Crisco's and Wesson's brand equity permit a price premium over private label of approximately 10% to 20%. A new entrant seeking to supply CV oils to retailers, or an existing firm seeking to expand its sales of CV oils to retailers, would face significant challenges in convincing retailers to purchase its CV oils because retailers want to offer consumers the strongest brands. Building sufficient brand equity would require substantial investment and take at least several years.

86. A firm seeking to enter or expand would face significant difficulty getting its products placed on store shelves. Post-acquisition, retailers would have minimal shelf space to offer another brand for two reasons: first, retailers prefer offering their customers only the strongest brands of CV oils, which are Crisco and Wesson; and second, Smucker plans to maintain both Crisco and Wesson on store shelves after the acquisition closes.

87. Facing these and other impediments to entry, existing suppliers of CV oils are unlikely to expand in the CV oils market to replace the competitive significance of Wesson today.

88. Respondents cannot demonstrate cognizable and merger-specific efficiencies that rebut the strong presumption and evidence that the Acquisition likely would substantially lessen competition in the relevant market.

## VIII.

### VIOLATION

#### COUNT I—ILLEGAL AGREEMENT

89. The allegations of Paragraphs 1 through 88 above are incorporated by reference as though fully set forth.

90. The Acquisition constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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**COUNT II—ILLEGAL ACQUISITION**

91. The allegations of Paragraphs 1 through 88 above are incorporated by reference as though fully set forth.

92. The Acquisition, if consummated, may substantially lessen competition in the relevant market 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 seventh day of August, 2018, 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 this administrative proceeding shall be conducted as though the Commission, in an ancillary proceeding, has also filed a complaint in a United States District Court, seeking relief pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), as provided by Commission Rule 3.11(b)(4), 16 CFR 3.11(b)(4). You are also 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

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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 Acquisition 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:

## Complaint

1. If the Acquisition 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 Smucker and Conagra were offering and planning to offer prior to the Acquisition.
2. A prohibition against any transaction between Smucker and Conagra 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, Smucker and Conagra 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 market.
4. A requirement to file periodic compliance reports with the Commission.
5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Conagra as viable, independent competitor 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 fifth day of March, 2018.

By the Commission.

Final Order

**ORDER DISMISSING COMPLAINT**

On March 5, 2018, the Commission issued an Administrative Complaint alleging that Respondents The J.M. Smucker Company and Conagra Brands, Inc. had executed an Asset Purchase Agreement – pursuant to which Smucker would acquire the Wesson brand, including intellectual property, inventory, and some manufacturing equipment, from Conagra – that violated Section 5 of the FTC Act, 15 U.S.C. § 45, and that if the acquisition were consummated, it would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act. Complaint Counsel and Respondents have now filed a Joint Motion to dismiss the Complaint, on the grounds that the Respondents have terminated their Asset Purchase Agreement, and have withdrawn the Hart-Scott-Rodino Notification and Report Forms that they filed for the proposed acquisition.<sup>1</sup>

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, and 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.<sup>2</sup>

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<sup>1</sup> See [Joint Motion to Dismiss Complaint](#) (filed March 7, 2018).

<sup>2</sup> See, e.g., *In the Matter of DraftKings, Inc. and FanDuel Limited*, Docket No. 9375, [Order Dismissing Complaint](#) (July 14, 2017); *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).

## Final Order

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

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

By the Commission.



## Complaint

## IN THE MATTER OF

**SEVEN & I HOLDINGS CO., LTD.,  
7-ELEVEN, INC.,  
AND  
SUNOCO LP**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-4641; File No. 171 0126  
Complaint, January 18, 2018 – Decision, March 26, 2018*

This consent order addresses the \$3.3 billion acquisition by Seven & i Holdings Co., Ltd., through its wholly owned subsidiaries, 7-Eleven, Inc. and SEI Fuel Services, Inc., of certain assets of Sunoco LP. The complaint alleges that the acquisition would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by substantially lessening competition for the retail sale of gasoline and the retail sale of diesel in 76 local markets across 20 metropolitan statistical areas. The consent order requires 7-Eleven to sell retail fuel outlets in some local markets to Sunoco and reject Sunoco retail fuel outlets in other local markets.

*Participants*

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

For the *Respondents: Deona Kalala and Corey Roush, Akin Gump Strauss Hauer & Feld LLP; David Smith and William Vigdor, Vinson & Elkins 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 Seven & i Holdings Co., Ltd. has entered into an agreement through its wholly owned subsidiaries, including Respondent 7-Eleven, Inc., to acquire certain retail fuel assets from Respondent Sunoco LP, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as

## Complaint

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**

1. Respondent Seven & i Holdings Co., Ltd. (“Seven & i”) is a corporation organized, existing, and doing business under, and by virtue of, the laws of Tokyo, Japan, with its office and principal place of business located at 8-8 Nibancho, Chiyoda-Ku, Tokyo, Japan 102-8452, and the address of its United States subsidiary, 7-Eleven, Inc., 3200 Hackberry Road, Irving, Texas 75063.

2. Respondent 7-Eleven, Inc. (“7-Eleven”) is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Texas with its office and principal place of business located at 3200 Hackberry Road, Irving, Texas. 7-Eleven is a wholly owned subsidiary of Seven & i. Respondent 7-Eleven 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 Sunoco LP (“Sunoco”) is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 8111 Westchester Drive, Suite 600, Dallas, Texas. Respondent Sunoco 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.

4. Each Respondent, either directly or through its subsidiaries, 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 Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

## Complaint

**II. THE PROPOSED ACQUISITION**

5. Pursuant to an Asset Purchase Agreement dated April 6, 2017, Seven & i, through its wholly owned subsidiaries 7-Eleven and SEI Fuel Services, Inc., proposes to acquire approximately 1,100 convenience stores and retail fuel outlets and related assets, for approximately \$3.3 billion (the “Acquisition”). SEI Fuel Services, Inc. will enter into a fuel supply agreement with Sunoco, LLC as a part of the Acquisition.

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

**III. THE RELEVANT MARKET**

7. 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.

8. Relevant geographic markets in which to analyze the effects of the Acquisition include 76 local markets within the following metropolitan statistical areas: Boston, Massachusetts; Brownsville, Texas; Buffalo, New York; Fort Myers, Florida; Corpus Christi, Texas; Daytona Beach, Florida; Killeen, Texas; Laredo, Texas; Mission, Texas; Miami, Florida; Gettysburg, Pennsylvania; Titusville, Florida; Pittsburgh, Pennsylvania; Richmond, Virginia; San Antonio, Texas; Venice, Florida; Tampa, Florida; Roma, Texas; Victoria, Texas; and Washington, DC.

9. The relevant geographic markets for retail gasoline and retail diesel are highly localized, ranging up to a few miles, depending on local circumstances. Each relevant market is distinct and fact-dependent, reflecting the commuting patterns, traffic flows, and outlet characteristics unique to each market.

## Complaint

Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes.

**IV. MARKET STRUCTURE**

10. The Acquisition, if consummated, would create a monopoly in 18 local markets. In 39 local markets, the Acquisition, if consummated, would reduce the number of independent market participants from three to two. In 19 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 76 markets.

**V. BARRIERS TO ENTRY**

11. 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**

12. 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 7-Eleven would unilaterally exercise market power in the relevant markets; and/or
- b. increasing the likelihood of collusive or coordinated interaction between any remaining competitors in the relevant markets.

## Order to Maintain Assets

**VII. VIOLATIONS CHARGED**

13. 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.

14. The Asset Purchase Agreement entered into by Respondents 7-Eleven and Sunoco 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 eighteenth day of January, 2018, issues its Complaint against Respondents.

By the Commission.

**ORDER TO MAINTAIN ASSETS  
[Public Record Version]**

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Seven & i Holdings Co., Ltd., through its wholly owned subsidiaries, Respondent 7-Eleven, Inc. and SEI Fuel Services, Inc., (collectively “7-Eleven”), of retail fuel outlets, convenience stores, and related assets of Respondent Sunoco LP, through its wholly owned subsidiaries, Susser Petroleum Property Company LLC, Sunoco Retail LLC, Stripes LLC, Town & Country Food Stores, Inc., and MACS Retail LLC, (collectively “Sunoco”), and Respondents 7-Eleven and Sunoco 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

## Order to Maintain Assets

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 Seven & i Holdings Co., Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of Japan, with its headquarters and principal place of business located at 8-8 Nibancho, Chiyoda-Ku, Tokyo, Japan 102-8452, 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: Senior Counsel (as of the date of execution of the ACCO, Dawud Crooms) 7-Eleven, Inc., 3200 Hackberry Road, Irving, Texas 75063.
2. Respondent 7-Eleven, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its headquarters and principal place of business located at 3200 Hackberry Road, Irving, Texas 75063. 7-Eleven, Inc. is a wholly owned subsidiary of Seven & i Holdings Co., Ltd.

## Order to Maintain Assets

3. Respondent Sunoco LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 8111 Westchester Drive, Suite 600, Dallas, Texas 75225.
4. 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, Schedule B, Schedule C, confidential Schedule D, and non-public Appendix A, which are attached to the Decision and Order and identify the 7-Eleven Assets and the Sunoco Retained Assets, are incorporated herein by reference and made a part hereof, shall apply:

- A. “7-Eleven” means Respondent Seven & i Holdings Co., Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Seven & i Holdings Co., Ltd., including, but not limited to, Respondent 7-Eleven, Inc. and SEI Fuel Services, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each, and the respective joint ventures, subsidiaries, divisions, groups, and affiliates controlled by each.
- B. “Sunoco” means Sunoco LP, its partners, directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, partnerships, subsidiaries, divisions, groups, and affiliates, in each case controlled by Sunoco LP, including, but not limited to, Susser Petroleum

## Order to Maintain Assets

Property Company LLC, Sunoco Retail LLC, Stripes LLC, Town & Country Food Stores, Inc., MACS Retail LLC, Sunoco Finance Corp., and Sunoco LLC, and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. “Respondents” means 7-Eleven and Sunoco, individually and collectively.
- D. “7-Eleven Confidential Wholesale Information” means any confidential information that Respondent Sunoco obtains as a wholesaler of Fuel Products to 7-Eleven, including wholesale price and wholesale volume information, and any discounts or rebates applied to Sunoco’s provision of Fuel Products to 7-Eleven, including, but not limited to, information obtained directly or indirectly from the Fuel Supply Agreement.
- E. “Closing Date” means the closing date for the Acquisition.
- F. “Confidential Business Information” means any information not in the public domain, including, but not limited to, all Books and Records and all fuel volume, pricing and cost information; *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.
- G. “Commission Agent” means a Person who enters into an agreement with Sunoco to operate a Retail Fuel Outlet Business at any Retail Fuel Location identified on Schedule A (or any of the corresponding Substitute



## Order to Maintain Assets

Retail Fuel Locations identified in Schedule C) or Schedule B.

- H. “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.
- I. “Divestiture Date(s)” means the dates on which Respondents or a Divestiture Trustee close on the divestiture of the 7-Eleven Assets as required by Paragraph II. or Paragraph VI. of the Decision and Order.
- J. “Firewalled Employees” means any Sunoco employee(s) that are designated by Sunoco to be officially and directly responsible for establishing, setting, or changing the retail prices of Fuel Products at the Retail Fuel Locations identified in Schedules A, B and, as applicable, C during the term of the Fuel Supply Agreement. Firewalled Employees shall not be involved in any way, directly or indirectly, in the implementation or execution of the Fuel Supply Agreement, and shall have no duties and responsibilities that relate, directly or indirectly, to the implementation or execution of the Fuel Supply Agreement.
- K. “Inventory(ies)” means all inventories of every kind and nature for retail sale at the 7-Eleven Assets including: (1) all gasoline, diesel fuel, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public; and (2) all usable, non-damaged and non-out of date products and items held

## Order to Maintain Assets

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.

- L. “Monitor” means any Person appointed by the Commission to serve as a Monitor pursuant to Paragraph V. of the Decision and Order and Paragraph V. of this Order to Maintain Assets.
- M. “Orders” means the Decision and Order in this matter and this Order to Maintain Assets.
- N. “Proposed Acquirer” means any proposed acquirer of the 7-Eleven Assets that Respondents or the Divestiture Trustee intend to submit or have submitted to the Commission for its approval under this Order. “Proposed Acquirer” includes Sunoco and its designees, including any Commission Agents.
- O. “Transfer Date” means the date on which the operation of the Retail Fuel Outlet Business at each Retail Fuel Location is transferred to Sunoco or a Commission Agent. The Transfer Date may be after the Divestiture Date.

**II.**

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

- A. Respondent 7-Eleven shall maintain the viability, marketability, and competitiveness of the 7-Eleven Assets, and shall not cause the wasting or deterioration of any of the 7-Eleven Assets. Respondent 7-Eleven shall not cause the 7-Eleven Assets to be operated in a manner inconsistent with applicable laws, nor shall it sell, transfer, encumber, or otherwise impair the viability, marketability, or competitiveness of the 7-Eleven Assets.

## Order to Maintain Assets

- B. Respondent 7-Eleven shall conduct the business of the 7-Eleven Assets in the regular and ordinary course of business, in accordance with past practice (including regular repair and maintenance efforts), and otherwise direct and ensure this result, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the 7-Eleven Assets in the regular and ordinary course of business, in accordance with past practice.
- C. Respondent 7-Eleven shall not terminate the operation of any of the 7-Eleven Assets, and shall continue to maintain the Inventory of each of the 7-Eleven Assets at levels and selections in the regular and ordinary course of business, in accordance with past practice.
- D. Respondent 7-Eleven shall maintain the organization and properties of each of the 7-Eleven Assets, 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 7-Eleven Assets. Among other actions as may be necessary to comply with these obligations, Respondent 7-Eleven shall, without limitation:
  - 1. Maintain all operations at each of the 7-Eleven Assets 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 7-Eleven Assets; 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 7-Eleven Assets;

## Order to Maintain Assets

3. Provide each employee of the 7-Eleven Assets 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 7-Eleven Assets;
4. Not transfer Inventory from any 7-Eleven Asset, other than in the ordinary course of business, in accordance with past practice;
5. Make all payments required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with each of the 7-Eleven Assets, in each case in a manner in accordance with past practice;
6. Maintain the Books and Records of each of the 7-Eleven Assets;
7. Not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that Respondent 7-Eleven is moving its operations at any 7-Eleven Asset to another location, or that indicates a 7-Eleven Asset will close;
8. Not conduct any “going out of business,” “close-out,” “liquidation,” or similar sales or promotions at or relating to any 7-Eleven Asset;
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 7-Eleven Assets, other than changes or modifications in the regular and ordinary course of business, in accordance with past practices and business strategy;

## Order to Maintain Assets

10. Provide each of the 7-Eleven Assets 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 7-Eleven Assets;
  11. Continue, at least at their scheduled pace, any additional expenditures for each of the 7-Eleven Assets 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 7-Eleven Assets;
  13. Make available for use by each of the 7-Eleven Assets 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 7-Eleven Assets;
  14. Provide support services to each of the 7-Eleven Assets at least at the level as were being provided to such 7-Eleven Assets by Respondent 7-Eleven as of the date the Consent Agreement was signed by Respondent 7-Eleven; and
  15. Maintain, and not terminate or permit the lapse of, any Governmental Permits necessary for the operation of any 7-Eleven Asset.
- E. The purpose of this Order to Maintain Assets is to: (1) maintain and preserve the 7-Eleven Assets as viable, marketable, competitive, and ongoing businesses until the divestiture required by the Decision and Order is achieved; (2) ensure that Respondent 7-Eleven obtains no Confidential Business Information relating to the 7-

## Order to Maintain Assets

Eleven Assets, except in accordance with the provisions of the Orders; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) remedy any anticompetitive effects of the Acquisition.

**III.**

**IT IS FURTHER ORDERED** that from the date the Divestiture Agreement is executed until one (1) year after the Divestiture Date applicable to each Retail Fuel Location included in the 7-Eleven Assets, Respondent 7-Eleven shall provide the Proposed Acquirer and the respective Commission Agents, when applicable, with the opportunity to recruit and employ any employee of the 7-Eleven Assets in conformance with the following:

- A. No later than seven (7) days after a request from the Proposed Acquirer (including any request made on behalf of any Commission Agent), or from Commission staff, Respondent 7-Eleven shall provide the Proposed Acquirer or the Commission Agent with the following information for each employee of the 7-Eleven Assets, 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. Base salary or current wages;
  4. Most recent bonus paid, aggregate annual compensation for Respondent 7-Eleven's 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);

## Order to Maintain Assets

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 seven (7) days after a request from the Proposed Acquirer (including any request made on behalf of any Commission Agent), Respondent 7-Eleven shall provide to the Proposed Acquirer or any Commission Agent an opportunity to meet personally and outside the presence or hearing of any employee or agent of Respondent 7-Eleven, with any one, or all, of the employees of the 7-Eleven Assets, and to make offers of employment to any one, or more, of the employees of the 7-Eleven Assets.
- C. Respondent 7-Eleven shall not interfere, directly or indirectly, with the hiring or employing by the Proposed Acquirer or any Commission Agent of any employee of the 7-Eleven Assets, not offer any incentive to such employees to decline employment with the Proposed Acquirer or any Commission Agent, and not otherwise interfere with the recruitment or employment of any employee by the Proposed Acquirer or Commission Agent.
- D. Respondent 7-Eleven shall remove any impediments within the control of Respondent 7-Eleven that may deter employees of the 7-Eleven Assets from accepting employment with the Proposed Acquirer or Commission Agent, including, but not limited to, removal of any non-compete or confidentiality provisions of employment, or other contracts with Respondent 7-Eleven that may affect the ability or incentive of those individuals to be employed by the Proposed Acquirer or Commission Agent, and not make any counteroffer to an employee who has an

## Order to Maintain Assets

outstanding offer of employment from the Proposed Acquirer or Commission Agent, or has accepted an offer of employment from the Proposed Acquirer or Commission Agent.

- E. Respondent 7-Eleven shall 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 Respondent 7-Eleven.
- F. Respondent 7-Eleven shall not, directly or indirectly, solicit, or otherwise attempt to induce any of the employees who have accepted offers of employment with the Acquirer or with a Commission Agent to terminate his or her employment with the Acquirer or a Commission Agent; *provided, however*, that Respondent 7-Eleven 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 7-Eleven Assets; or
  2. Hire employees of the 7-Eleven Assets who apply for employment with Respondent 7-Eleven, as long as such employees were not solicited by Respondent 7-Eleven in violation of this Paragraph; *provided further, however*, that this Paragraph shall not prohibit Respondent 7-Eleven from making offers of employment to, or employing, any such employees if the Acquirer (or a Commission Agent operating or planning to operate the relevant Retail Fuel Location) has



## Order to Maintain Assets

notified Respondent 7-Eleven in writing that the Acquirer or such Commission Agent 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 or such Commission Agent.

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

- A. Respondent 7-Eleven shall:
1. Take all actions as are necessary and appropriate to prevent access to or the disclosure or use of any Confidential Business Information of Respondent Sunoco or of any Commission Agent that may be transmitted to or received by Respondent 7-Eleven in connection with the divestiture of the 7-Eleven Assets, the provision of Transition Services, or otherwise by any Persons (including, but not limited, to 7-Eleven's employees) except as is expressly permitted or required by the Orders or necessary to comply with the terms or obligations of the Remedial Agreement; *provided, however*, that Respondent 7-Eleven may disclose or use such Confidential Business Information in the course of: (a) performing its Order obligations or as otherwise permitted under the Orders 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 7-Eleven Assets, or as required by law;
  2. Enforce the terms of Paragraph IV.A. of this Order to Maintain Assets 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

## Order to Maintain Assets

to comply with the terms of Paragraph IV.A., including implementation of access and data controls, training of its employees, and all other actions that Respondent 7-Eleven would take to protect its own confidential and proprietary information;

3. If disclosure or use of any Confidential Business Information of Respondent Sunoco or of any Commission Agent is permitted to Respondent 7-Eleven's employees or to any other Person pursuant to Paragraph IV.A. of this Order to Maintain Assets, Respondent 7-Eleven shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.
4. As part of the procedures and requirements described in Paragraph IV.A. of this Order to Maintain Assets, Respondent 7-Eleven shall:
  - a. No later than the Closing Date or otherwise prior to allowing any of its employees or other Persons to have access to the Confidential Business Information of Respondent Sunoco or of any Commission Agent, require all such employees and other Persons to sign an appropriate non-disclosure agreement agreeing to comply with the prohibitions and confidentiality requirements of the Orders;
  - b. Require compliance with this Order to Maintain Assets and take appropriate action in the event of non-compliant access, use, or disclosure of Confidential Business Information in violation of the Orders;

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- c. Distribute guidance and provide training regarding the procedures to all relevant employees, at least annually, until such time as all Transition Services have been provided; and
  - d. Institute all necessary information technology procedures, authorizations, protocols, and any other controls necessary to comply with the Orders' prohibitions and requirements.
- B. No later than the Closing Date, Respondent Sunoco shall:
1. Institute all measures and take all actions as are necessary and appropriate to prevent the direct or indirect access to or disclosure or use of any 7-Eleven Confidential Wholesale Information by any Firewalled Employees except as is expressly permitted or required by the Orders or by the Remedial Agreement, where such measures shall include, but not be limited to, prohibiting any of its Firewalled Employees from receiving, having access to, using, or continuing to use or disclose any 7-Eleven Confidential Wholesale Information;
  2. As part of the procedures and requirements described in Paragraph IV.B.1. of this Order to Maintain Assets, Respondent Sunoco shall:
    - a. No later than the Closing Date, require the Firewalled Employees to sign an appropriate non-disclosure agreement agreeing to comply with the prohibitions and confidentiality requirements of the Orders;
    - b. Require compliance with this Order and take appropriate action in the event of non-compliant access, use, or disclosure of 7-Eleven Confidential Wholesale Information in violation of this Order;

## Order to Maintain Assets

- c. Distribute guidance and provide training regarding the procedures to all relevant employees referenced in Paragraph IV.B.1. of this Order to Maintain, at least annually; and
  - d. Institute all necessary information technology procedures, authorizations, protocols, and any other controls necessary to comply with the Orders' prohibitions and requirements.
3. To the extent that Respondent Sunoco must access, disclose, or use any Confidential Business Information of Respondent 7-Eleven other than 7-Eleven Confidential Wholesale Information in connection with the Acquisition, Sunoco Retained Assets, or the divestiture of the 7-Eleven Assets for the purposes of complying with its obligations under the Orders or the Remedial Agreements, then Respondent Sunoco shall limit such access, disclosure, or use (i) only to those Persons who require such information for the purposes permitted under Paragraph IV.B., (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; and
  4. Enforce the terms of this Paragraph IV.B. as to any Person and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph IV.B, including training of Respondent Sunoco's employees and all other actions that Respondent Sunoco would take to protect its own trade secrets and proprietary information.

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

- A. Robert E. Ogle shall serve as Monitor separately to each Respondent to assure that each Respondent expeditiously complies with all of their respective obligations and performs all of their responsibilities as required by the Orders and the Remedial Agreements, including, Respondents' respective obligations pursuant to Paragraphs II., III., and IV. of this Order to Maintain Assets, Respondents' respective obligations pursuant to Paragraphs II., III., and IV., of the Decision and Order, and any Transition Services Agreement approved by the Commission.
  
- B. Respondents shall enter into Monitor Agreements with the Monitor that is attached as non-public Appendix A to this Order to Maintain Assets. The Monitor Agreements shall become effective on the date this Order To Maintain Assets is issued. Respondents shall transfer to, and confer upon, the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities pursuant to this Order to Maintain Assets in a manner consistent with the purposes of the Orders, and in consultation with Commission staff, and shall require that the Monitor act in a fiduciary capacity for the benefit of the Commission. Respondents shall assure that, and the Monitor Agreements shall provide that:
  - 1. The Monitor shall have the responsibility for monitoring the operations and transfer of the 7-Eleven Assets; overseeing the maintenance of the 7-Eleven Assets; overseeing the supervision of Transition Services by Respondent 7-Eleven's employees, agents, and representatives pursuant to the Transition Services Agreement; ensuring that the 7-Eleven Assets receive continued and adequate funding by Respondent 7-Eleven, as provided for in this Order; and monitoring

## Order to Maintain Assets

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. The Monitor shall have full and complete access to all of Respondents' facilities, personnel, books, documents, and records relating to the 7-Eleven Assets and the Sunoco Retained Assets, 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 the relevant Respondent, 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 the relevant Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
7. 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 with respect to each relevant Respondent, including all reasonable fees of counsel, and other reasonable expenses incurred, in

## Order to Maintain Assets

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

## Order to Maintain Assets

to the consent of each relevant Respondent, which consent shall not be unreasonably withheld, as follows:

1. If the relevant Respondent has not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor within five (5) days after notice by the staff of the Commission to the relevant Respondent of the identity of the proposed substitute Monitor, then relevant Respondent shall be deemed to have consented to the selection of the proposed substitute Monitor; and
  2. Each relevant Respondent shall, no later than five (5) days after the Commission appoints a substitute Monitor, enter into agreements with the substitute Monitor that, subject to the prior approval of the Commission, confers on the substitute Monitor all of the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities on the same terms and conditions as provided in this Paragraph IV. of the Order to Maintain Assets.
- F. The Monitor shall serve for the terms of the Orders; *provided, however*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
- 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 these Orders or the Remedial Agreement.
- H. 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.



## Order to Maintain Assets

**VI.**

**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 report 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.

**VII.**

**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 Seven & i Holdings Co., Ltd., 7-Eleven, Inc., or Sunoco LP; 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 Orders.

**VIII.**

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon

## Order to Maintain Assets

written request with reasonable notice to Respondents, with respect to any matter contained in this Order to Maintain Assets, 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.

**IX.**

**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. With respect to each 7-Eleven Asset, the day after Respondent 7-Eleven or a Divestiture Trustee completes the divestiture of each of the 7-Eleven Assets, 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 Respondent 7-Eleven to rescind any or all of the divestitures contemplated by any Divestiture Agreement, or Respondent 7-Eleven, pursuant to Paragraph II.C. of the Decision and Order, determines, in consultation with the Monitor and Commission

## Order to Maintain Assets

staff, to divest any Substitute Retail Fuel Location(s), then, upon such rescission or substitution, the requirements of this Order to Maintain Assets shall again be in effect with respect to the relevant 7-Eleven Assets until the day after Respondent 7-Eleven (or a Divestiture Trustee) completes the divestiture(s) of the relevant 7-Eleven Assets as described in and required by the Decision and Order;

- C. The day after Respondent 7-Eleven, with the concurrence of the Acquirer, certifies in writing to the Commission as to the completion of all Transition Services provided by Respondent 7-Eleven 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.

**NON-PUBLIC APPENDIX A****MONITOR AGREEMENTS**

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

Decision and Order

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

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Seven & i Holdings Co., Ltd., through its wholly owned subsidiaries, Respondent 7-Eleven, Inc. and SEI Fuel Services, Inc., (collectively “7-Eleven”), of retail fuel outlets, convenience stores, and related assets from Respondent Sunoco LP, through its wholly owned subsidiaries, Susser Petroleum Property Company LLC, Sunoco Retail LLC, Stripes LLC, Town & Country Food Stores, Inc., and MACS Retail LLC, (collectively “Sunoco”), and Respondents 7-Eleven and Sunoco 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

## Decision and Order

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 Seven & i Holdings Co., Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of Japan, with its headquarters and principal place of business located at 8-8 Nibancho, Chiyoda-Ku, Tokyo, Japan 102-8452, 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: Senior Counsel (as of the date of execution of the ACCO, Dawud Crooms) 7-Eleven, Inc., 3200 Hackberry Road, Irving, Texas 75063.
2. Respondent 7-Eleven, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its headquarters and principal place of business located at 3200 Hackberry Road, Irving, Texas 75063. 7-Eleven, Inc. is a wholly owned subsidiary of Seven & i Holdings Co., Ltd.
3. Respondent Sunoco LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 8111 Westchester Drive, Suite 600, Dallas, Texas 75225.
4. 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:

## Decision and Order

- A. “7-Eleven” means Respondent Seven & i Holdings Co., Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Seven & i Holdings Co., Ltd., including, but not limited to, Respondent 7-Eleven, Inc. and SEI Fuel Services, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each, and the respective joint ventures, subsidiaries, divisions, groups, and affiliates controlled by each.
- B. “Sunoco” means Sunoco LP, its partners, directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, partnerships, subsidiaries, divisions, groups, and affiliates, in each case controlled by Sunoco LP, including, but not limited to, Susser Petroleum Property Company LLC, Sunoco Retail LLC, Stripes LLC, Town & Country Food Stores, Inc., MACS Retail LLC, Sunoco Finance Corp., and Sunoco LLC, and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means 7-Eleven and Sunoco, individually and collectively.
- D. “7-Eleven Assets” means all of Respondent 7-Eleven’s 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 Retail Fuel Locations identified in (i) Schedule A, and (ii) Schedule C of this Order; *provided, however*, that 7-Eleven Assets shall not include any 7-Eleven Assets identified in Schedule A of this Order for which the corresponding Substitute Retail Fuel Location identified in Schedule C is divested. 7-Eleven Assets include:

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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 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. Telephone and fax numbers; and
7. Books and Records;

*Provided, however,* that in cases in which Books and Records included in the 7-Eleven Assets contain information: (a) that relates both to the 7-Eleven Assets and to other retained businesses of Respondent 7-Eleven and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the 7-Eleven Assets, or (b) where Respondent 7-Eleven has a legal obligation to retain the original copies, then Respondent 7-Eleven 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, Respondent 7-Eleven shall provide to such Acquirer access to original materials under

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circumstances where copies of materials are insufficient for regulatory or evidentiary purposes;

8. *Provided, however*, that the 7-Eleven Assets shall not include:
  - a. Any 7-Eleven Retail Fuel Locations listed on Schedule C for which the corresponding Substitute Retail Fuel Locations are instead divested;
  - b. Respondent 7-Eleven's Brands, except with respect to any purchased Inventory; *provided further, however*, that, at the Acquirer's option, Respondent 7-Eleven shall grant a worldwide, royalty-free, fully paid-up license to the Acquirer to use any of Respondent 7-Eleven's Brands as are applicable to the 7-Eleven Assets as part of any License Agreement that Respondent 7-Eleven 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 any locations 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 7-Eleven Assets immediately prior to the actual date and time that possession of the respective 7-Eleven Assets are conveyed to the Acquirer; or
  - e. If Respondent Sunoco is the Acquirer, Books and Records, Contracts, and Equipment that will not be conveyed to Respondent Sunoco pursuant to the Sunoco Divestiture Agreement.



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- E. “7-Eleven Confidential Wholesale Information” means any confidential information that Respondent Sunoco obtains as a wholesaler of Fuel Products to 7-Eleven, including wholesale price and wholesale volume information, and any discounts or rebates applied to Sunoco’s provision of Fuel Products to 7-Eleven, including, but not limited to, information obtained directly or indirectly from the Fuel Supply Agreement.
- F. “Acquirer” means Respondent Sunoco or any other Person approved by the Commission to acquire the 7-Eleven Assets pursuant to this Order.
- G. “Acquisition” means the proposed acquisition of certain Sunoco assets by Respondent 7-Eleven, Inc. and SEI Fuel Services, Inc. pursuant to the Acquisition Agreement.
- H. “Acquisition Agreement” means the Asset Purchase Agreement between 7-Eleven, Inc., and SEI Fuel Services, Inc., on the one hand, and Susser Petroleum Property Company LLC, Sunoco Retail LLC, Stripes LLC, Town & Country Food Stores, Inc., MACS Retail LLC, Sunoco Finance Corp., Sunoco LLC, and Sunoco LP, on the other hand, dated as of April 6, 2017, as amended, that was submitted by 7-Eleven and Sunoco to the Commission in this matter.
- I. “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, including, but not limited to, real estate files; environmental reports; environmental liability claims and

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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 operation of Retail Fuel Locations.

- J. “Closing Date” means the closing date for the Acquisition.
- K. “Commission Agent” means a Person who enters into an agreement with Sunoco to operate a Retail Fuel Outlet Business at any Retail Fuel Location identified on Schedule A (or any of the corresponding Substitute Retail Fuel Locations identified in Schedule C) or Schedule B.
- L. “Confidential Business Information” means any information not in the public domain, including, but not limited to, all Books and Records and all fuel volume, pricing and cost information; *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

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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. “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.
- N. “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.
- O. “Divestiture Agreement” means any agreement between Respondent 7-Eleven and an Acquirer (or between a Divestiture Trustee and an Acquirer), and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the 7-Eleven Assets that have been proposed for approval by the Commission or approved by the Commission to accomplish the requirements of this Order.
- P. “Divestiture Date(s)” means the dates on which Respondents or a Divestiture Trustee close on the divestiture of the 7-Eleven Assets as required by Paragraph II. or Paragraph VI. of this Order.
- Q. “Divestiture Trustee” means any Person appointed by the Commission to serve as a Divestiture Trustee pursuant to Paragraph VI. of this Order.
- R. “Equipment” means all tangible, nonproprietary personal property (other than Inventory(ies)) of every kind owned or leased by Respondent 7-Eleven in

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connection with the operation of the 7-Eleven Assets, including, but not limited to, all: fixtures, furniture, computer equipment, office equipment, telephone systems, security systems, registers, 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, dispenser pans or under-dispenser containers and overfill sumps, 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 7-Eleven Assets, 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, but excluding third-party software, inventory management system, credit card systems, credit card invoice printers and electronic point of sale devices, money order machines and money order stock.

- S. “Firewalled Employees” means any Sunoco employee(s) that are designated by Sunoco to be officially and directly responsible for establishing, setting, or changing the retail prices of Fuel Products at the Retail Fuel Locations identified in Schedules A, B, and, as applicable, C during the term of the Fuel Supply Agreement. Firewalled Employees shall not be involved in any way, directly or indirectly, in the implementation or execution of the Fuel Supply Agreement, and shall have no duties and responsibilities that relate, directly or indirectly to the implementation or execution of the Fuel Supply Agreement.

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- T. “Fuel Products” means refined petroleum gasoline and diesel products.
- U. “Fuel Supply Agreement” means the Fuel Supply Agreement by and among SEI Fuel Services, Inc. and Sunoco LLC, which will be executed on the Closing Date as required by the terms of the Acquisition Agreement and which was submitted by 7-Eleven and Sunoco to the Commission in this matter.
- V. “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.
- W. “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 7-Eleven Assets to the Acquirer and for the Acquirer to operate any aspect of a Retail Fuel Outlet Business.
- X. “Inventory(ies)” means all inventories of every kind and nature held for retail sale and located at the Retail Fuel Location identified in Schedule A of this Order, including: (1) all gasoline, diesel fuel, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public; 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.
- Y. “Laredo Taco Intellectual Property” means all brands, trademarks, recipes and know-how owned by Sunoco, to the extent related primarily to the conduct of the Laredo Taco Company® business as conducted by Sunoco on or before the Closing Date, including in Stripes® Convenience Stores, as each of the relevant

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assets and terms are defined in the Acquisition Agreement.

- Z. “License Agreement” means the license agreement by and among 7-Eleven, Inc., Sunoco Retail LLC, and Sunmarks, LLC dated as of January 4, 2018, that was submitted by Respondents 7-Eleven and Sunoco to the Commission in this matter.
- AA. “Monitor” means any Person appointed by the Commission to serve as a Monitor pursuant to Paragraph V. of this Order or Paragraph IV. of the Order to Maintain Assets.
- BB. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.
- CC. “Orders” means this Decision and Order and the related Order to Maintain Assets.
- 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 7-Eleven Assets that Respondents or the Divestiture Trustee intend to submit or have submitted to the Commission for its approval under this Order. “Proposed Acquirer” includes Sunoco, and its designees, including any Commission Agents.
- FF. “Relevant Notice Outlets” means the Retail Fuel Outlet Businesses identified on Non-Public Schedule D of this Order.
- GG. “Remedial Agreement” means the Sunoco Divestiture Agreement if approved by the Commission, or

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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 7-Eleven Assets, that have been approved by the Commission to accomplish the requirements of this Order.
- HH. “Respondent 7-Eleven’s Brands” means all of Respondent 7-Eleven’s trademarks, trade dress, logos, service marks, trade names, brand names, and all associated intellectual property rights, including rights to the names and marks 7-Eleven®, A Good ID is a Good Idea®, ID Zone®, Oh Thank Heaven®, and Oh Thank Heaven for 7-Eleven®.
- II. “Retail Fuel Location” means: (1) any existing retail facility engaged in the activities of a Retail Fuel Outlet Business; and (2) any property site where the repair, restoration, or remodel 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

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businesses and services associated with the business operated at each Retail Fuel Location.

- KK. “SEI Fuel Services, Inc.” means SEI Fuel Services, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its headquarters and principal place of business located at 3200 Hackberry Road, Irving, Texas 75063. SEI Fuel Services, Inc. is an indirect wholly-owned subsidiary of 7-Eleven.
- LL. “Specified State” means Florida, Texas, or Virginia.
- MM. “Stripes” means Stripes LLC, a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 8020 Park Lane, Suite 200, Dallas, Texas 75231. Stripes is a wholly owned subsidiary of Sunoco LP.
- NN. “Stripes Intellectual Property” means the brands, trademarks, service marks and logos and other indicia or source owned by Sunoco, to the extent related solely to the conduct of the business of Stripes® as conducted by Sunoco on or before the Closing Date.
- OO. “Substitute Retail Fuel Location” means all of the Sunoco Retail Fuel Locations that are identified in Schedule C, corresponding to each 7-Eleven Retail Fuel Location.
- PP. “Sunoco Divestiture Agreement” means the Asset Purchase Agreement between 7-Eleven, Inc., and SEI Fuel Services, Inc., on the one hand, and Sunoco Retail, LLC, Stripes LLC, MACS Retail LLC, and Sunoco LP, on the other hand, dated as of January 4, 2018; the Transition Services Agreement among Sunoco Retail, LLC, 7-Eleven, Inc., and SEI Fuel Services, Inc., dated as of January 4, 2018; and all amendments, exhibits, attachments, agreements, and



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schedules submitted to the Commission with the foregoing to accomplish the divestiture of the 7-Eleven Assets. The Sunoco Divestiture Agreement is attached to this Order as Non-Public Schedule E.

QQ. “Sunoco Retained Assets” means all of Respondent Sunoco’s 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 Retail Fuel Locations identified in Schedule B.

*Provided, however,* that the Sunoco Retained Assets shall not include:

1. Laredo Taco Intellectual Property or Stripes Intellectual Property, 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 Laredo Taco Intellectual Property or Stripes Intellectual Property as are applicable to the Sunoco Retained Assets 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); or
2. Assets used in the distribution of Inventories that are not located at the Retail Fuel Locations identified in Schedule B of this Order.

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

SS. “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 7-Eleven Assets to the Acquirer and

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for the Acquirer to operate any aspect of a Retail Fuel Outlet Business.

- TT. “Transition Services” means convenience store management, technical services, personnel, assistance, training, product supply, and other logistical, administrative, and transitional support as required by the Acquirer, or by the Acquirer’s Commission Agent, and approved by the Commission to facilitate the transfer of the 7-Eleven Assets from Respondent 7-Eleven to the Acquirer, or to the Acquirer’s Commission Agent, 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 (including point of sale systems and networks), credit card processing, asset protection, maintenance and repair of facilities and equipment, purchasing, quality control, research and development support, technology transfer, operating permits and licenses, regulatory compliance, sales and marketing, customer service, and supply chain management, customer transfer logistics, and the use of Respondent 7-Eleven’s Brands for transitional purposes, *provided, however*, if Respondent Sunoco is the Acquirer, use of Respondent 7-Eleven’s Brands shall be consistent with the License Agreement.
- UU. “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 7-Eleven Assets to the Acquirer and to operate the 7-Eleven Assets in a manner consistent with the purposes of this Order.

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

- A. With respect to the Sunoco Retained Assets:
1. Respondents shall, no later than the Closing Date, exercise their respective rights under Section 5.4(d) of the Acquisition Agreement to designate the Sunoco Retained Assets as “Rejected Properties” as defined in the Acquisition Agreement, and exclude the Sunoco Retained Assets from the Acquisition; and
  2. Respondent 7-Eleven shall not acquire the Sunoco Retained Assets from Respondent Sunoco, except as provided in Paragraph VII.A. of this Order.
- B. No later than ninety (90) days after the Closing Date, Respondent 7-Eleven shall divest the 7-Eleven Assets, absolutely and in good faith, as ongoing Retail Fuel Outlet Businesses, to Respondent Sunoco pursuant to and in accordance with the Sunoco Divestiture Agreement.
- C. *Provided, however,* that if Respondent 7-Eleven has divested the 7-Eleven Assets to Respondent Sunoco pursuant to Paragraph II.A. of this Order prior to the date this Order becomes final, and if at the time the Commission determines to make this Order final, the Commission notifies Respondent 7-Eleven and Respondent Sunoco that:
1. Respondent Sunoco is not an acceptable Acquirer, then Respondent 7-Eleven shall, within fifteen (15) days of notification by the Commission, rescind such transaction with Respondent Sunoco and shall divest the 7-Eleven Assets 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,

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within ninety (90) days of the date the Commission notifies Respondent 7-Eleven that Respondent Sunoco 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 VI. of this Order, to effect such modifications to the manner of divesting the 7-Eleven Assets to Respondent Sunoco (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.

D. Respondent 7-Eleven shall:

1. Prior to the Divestiture Date, obtain, at its sole expense, all required Third Party Consents relating to the divestiture of all 7-Eleven Assets;

*Provided, however, that:*

- a. for each of the Retail Fuel Locations identified in Schedule A that require landlord consent or franchisee consent in order to effectuate the required divestiture, in the event that Respondent 7-Eleven is unable to obtain the necessary landlord consent or franchisee consent for divestiture of any one or more of such 7-Eleven Retail Fuel Locations, Respondents may, in consultation with the Monitor and Commission staff, substitute the corresponding Substitute Retail Fuel Location; *provided, however,* that the divestiture of any Substitute Retail Fuel Location(s) shall not include the Stripes Intellectual Property or the Laredo Taco Intellectual Property; *provided further,* that Respondents shall divest such Substitute Retail Fuel Location(s) to the

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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. Respondent 7-Eleven 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 7-Eleven Assets that are not transferable, allow the Acquirer or the Commission Agent to operate the 7-Eleven Assets under Respondent 7-Eleven's Governmental Permits pending the Acquirer's or the Commission Agent's receipt of its own Governmental Permits, and provide such assistance as the Acquirer or the Commission Agent may reasonably request in connection with its efforts to obtain such Governmental Permits.

E. Respondent 7-Eleven shall:

1. At the option of the Acquirer, and subject to the prior approval of the Commission, provide Transition Services to the Acquirer or in the case of Sunoco, to Sunoco and Commission Agents, pursuant to a Transition Services Agreement for six (6) months following the Divestiture Date, with an opportunity to extend for up to twelve (12) months at the option of the Acquirer. Such Transition Services Agreement shall provide that: (1) the Acquirer may terminate the Transition Services Agreement at any time upon commercially reasonable notice to Respondent 7-Eleven, and without cost or penalty to the Acquirer; and (2) at the Acquirer's request, Respondent 7-Eleven shall agree to extend the term of any Transition Service(s) for an additional

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period of up to twelve (12) months (*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); and

2. The Transition Services provided pursuant to the Transition Services Agreement shall be provided at no more than Respondent 7-Eleven's Direct Costs and shall enable the Acquirer or the Commission Agent to operate Retail Fuel Outlet Businesses at least at the same level of quality and service as they were operated prior to the divestiture.
- F. The purpose of the divestiture is to ensure the continuation of the 7-Eleven Assets and the Sunoco Retained Assets 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 from the date the Divestiture Agreement is executed until one (1) year after the Divestiture Date applicable to each Retail Fuel Location included in the 7-Eleven Assets, Respondent 7-Eleven shall provide the Proposed Acquirer and the respective Commission Agents, when applicable, with the opportunity to recruit and employ any employee of the 7-Eleven Assets in conformance with the following:

- A. No later than seven (7) days after a request from the Proposed Acquirer (including any request made on behalf of any Commission Agent), or from Commission staff, Respondent 7-Eleven shall provide the Proposed Acquirer or the Commission Agent with the following information for each employee of the 7-

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Eleven Assets, 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. Base salary or current wages;
  4. Most recent bonus paid, aggregate annual compensation for Respondent 7-Eleven's 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 seven (7) days after a request from the Proposed Acquirer (including any request made on behalf of any Commission Agent), Respondent 7-Eleven shall provide to the Proposed Acquirer or any Commission Agent an opportunity to meet personally and outside the presence or hearing of any employee or agent of Respondent 7-Eleven, with any one, or all, of the employees of the 7-Eleven Assets, and to make offers of employment to any one, or more, of the employees of the 7-Eleven Assets.
- C. Respondent 7-Eleven shall not interfere, directly or indirectly, with the hiring or employing by the

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Proposed Acquirer or any Commission Agent of any employee of the 7-Eleven Assets, not offer any incentive to such employees to decline employment with the Proposed Acquirer or any Commission Agent, and not otherwise interfere with the recruitment or employment of any employee by the Proposed Acquirer or Commission Agent.

- D. Respondent 7-Eleven shall remove any impediments within the control of Respondent 7-Eleven that may deter employees of the 7-Eleven Assets from accepting employment with the Proposed Acquirer or Commission Agent, including, but not limited to, removal of any non-compete or confidentiality provisions of employment, or other contracts with Respondent 7-Eleven that may affect the ability or incentive of those individuals to be employed by the Proposed Acquirer or Commission Agent, and not make any counteroffer to an employee who has an outstanding offer of employment from the Proposed Acquirer or Commission Agent, or has accepted an offer of employment from the Proposed Acquirer or Commission Agent.
- E. Respondent 7-Eleven shall 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 Respondent 7-Eleven.
- F. Respondent 7-Eleven shall not, directly or indirectly, solicit, or otherwise attempt to induce any of the employees who have accepted offers of employment with the Acquirer or with a Commission Agent to terminate his or her employment with the Acquirer or



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a Commission Agent; *provided, however*, that Respondent 7-Eleven 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 7-Eleven Assets; or
2. Hire employees of the 7-Eleven Assets who apply for employment with Respondent 7-Eleven, as long as such employees were not solicited by Respondent 7-Eleven in violation of this Paragraph; *provided further, however*, that this Paragraph shall not prohibit Respondent 7-Eleven from making offers of employment to, or employing, any such employees if the Acquirer (or a Commission Agent operating or planning to operate the relevant Retail Fuel Location) has notified Respondent 7-Eleven in writing that the Acquirer or such Commission Agent 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 or such Commission Agent.

**IV.**

**IT IS FURTHER ORDERED** that:

- A. Respondent 7-Eleven shall:
  1. Take all actions as are necessary and appropriate to prevent access to or the disclosure or use of any Confidential Business Information of Respondent Sunoco or of any Commission Agent that may be transmitted to or received by Respondent 7-Eleven in connection with the divestiture of the 7-Eleven Assets, the provision of Transition Services, or otherwise by any Persons (including, but not

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limited, to 7-Eleven's employees) except as is expressly permitted or required by the Orders or necessary to comply with the terms or obligations of the Remedial Agreement; *provided, however*, that Respondent 7-Eleven may disclose or use such Confidential Business Information in the course of: (a) performing its 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 7-Eleven Assets, or as required by law;

2. Enforce the terms of Paragraph IV.A. 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 IV.A., including implementation of access and data controls, training of its employees, and all other actions that Respondent 7-Eleven would take to protect its own confidential and proprietary information;
3. If disclosure or use of any Confidential Business Information of Respondent Sunoco or of any Commission Agent is permitted to Respondent 7-Eleven's employees or to any other Person pursuant to Paragraph IV.A. of this Order, Respondent 7-Eleven shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

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4. As part of the procedures and requirements described in Paragraph IV.A. of this Order, Respondent 7-Eleven shall:
  - a. No later than the Closing Date or otherwise prior to allowing any of its employees or other Persons to have access to the Confidential Business Information of Respondent Sunoco or of any Commission Agent, require all such employees and other Persons to sign an appropriate non-disclosure agreement agreeing to comply with the prohibitions and confidentiality requirements of this Order;
  - b. Require compliance with this Order and take appropriate action in the event of non-compliant access, use, or disclosure of Confidential Business Information in violation of this Order;
  - c. Distribute guidance and provide training regarding the procedures to all relevant employees, at least annually, until such time as all Transition Services have been provided; and
  - d. Institute all necessary information technology procedures, authorizations, protocols, and any other controls necessary to comply with the Order's prohibitions and requirements.
- B. No later than the Closing Date, Respondent Sunoco shall:
  1. Institute all measures and take all actions as are necessary and appropriate to prevent the direct or indirect access to or disclosure or use of any 7-Eleven Confidential Wholesale Information by any Firewalled Employees except as is expressly permitted or required by the Orders or by the Remedial Agreement, where such measures shall include, but not be limited to, prohibiting any of its

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Firewalled Employees from receiving, having access to, using, or continuing to use or disclose any 7-Eleven Confidential Wholesale Information;

2. As part of the procedures and requirements described in Paragraph IV.B.1. of this Order, Respondent Sunoco shall:
  - a. No later than the Closing Date, require the Firewalled Employees to sign an appropriate non-disclosure agreement agreeing to comply with the prohibitions and confidentiality requirements of this Order;
  - b. Require compliance with this Order and take appropriate action in the event of non-compliant access, use, or disclosure of 7-Eleven Confidential Wholesale Information in violation of this Order;
  - c. Distribute guidance and provide training regarding the procedures to all relevant employees referenced in Paragraph IV.B.1. of this Order, at least annually; and
  - d. Institute all necessary information technology procedures, authorizations, protocols, and any other controls necessary to comply with the Order's prohibitions and requirements.
3. To the extent that Respondent Sunoco must access, disclose, or use any Confidential Business Information of Respondent 7-Eleven other than 7-Eleven Confidential Wholesale Information in connection with the Acquisition, Sunoco Retained Assets, or the divestiture of the 7-Eleven Assets for the purposes of complying with its obligations under the Orders or the Remedial Agreements, then Respondent Sunoco shall limit such access, disclosure, or use (i) only to those Persons who require such information for the purposes

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permitted under Paragraph IV.B., (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; and

4. Enforce the terms of this Paragraph IV.B. as to any Person and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph IV.B, including training of Respondent Sunoco's employees and all other actions that Respondent Sunoco would take to protect its own trade secrets and proprietary information.

## V.

**IT IS FURTHER ORDERED** that:

- A. Robert E. Ogle shall serve as Monitor separately to each Respondent to assure that each Respondent expeditiously complies with all of their respective obligations and performs all of their responsibilities as required by the Orders and the Remedial Agreements, including Respondent 7-Eleven's obligations pursuant to Paragraph II. of the Order to Maintain Assets, Respondents' respective obligations pursuant to Paragraph II., III., and IV. of the Decision and Order, and any Transition Services Agreement approved by the Commission.
- B. Respondents shall enter into the Monitor Agreements with the Monitor that are attached to the Order to Maintain Assets as Appendix A. The Monitor Agreements shall become effective on the date the Order To Maintain Assets is issued. Respondents shall transfer to, and confer upon, the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities pursuant to the Orders in a manner consistent with the purposes of

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the Orders, and in consultation with Commission staff, and shall require that the Monitor act in a fiduciary capacity for the benefit of the Commission. Respondents shall assure that, and the Monitor Agreements shall provide that:

1. The Monitor shall have the responsibility for monitoring the operations and transfer of the 7-Eleven Assets; overseeing the maintenance of the 7-Eleven Assets; overseeing the supervision of Transition Services by Respondent 7-Eleven's employees, agents, and representatives pursuant to the Transition Services Agreement; ensuring that the 7-Eleven Assets receive continued and adequate funding by Respondent 7-Eleven, as provided for in the Orders; and monitoring Respondents' compliance with their obligations pursuant to the Orders and the Remedial Agreements;
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission;
3. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with the Orders and the Remedial Agreements;
4. The Monitor shall have full and complete access to all of Respondents' facilities, personnel, books, documents, and records relating to the 7-Eleven Assets and the Sunoco Retained Assets, 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 the relevant Respondent,

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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 the relevant Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
  7. 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 with respect to each relevant Respondent, 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 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.
- C. The Commission may, among other things, require the Monitor, and each of the Monitor's consultants, accountants, attorneys, and other representatives and

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assistants, to sign a customary confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

- 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. If the Commission determines that the Monitor has ceased to act, or failed to act diligently, the Commission may appoint a substitute Monitor, subject to the consent of each relevant Respondent, which consent shall not be unreasonably withheld, as follows:
1. If the relevant Respondent has not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor within five (5) days after notice by the staff of the Commission to the relevant Respondent of the identity of the proposed substitute Monitor, then the relevant Respondent shall be deemed to have consented to the selection of the proposed substitute Monitor; and
  2. Each relevant Respondent shall no later than five (5) days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the prior approval of the Commission, confers on the substitute Monitor all of the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities on the same terms and conditions as provided in this Paragraph V. of this Order and Paragraph IV. of the Order to Maintain Assets.



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- F. The Monitor shall serve for the terms of the Orders; *provided, however*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
- G. The Commission may, on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders or the Remedial Agreement.
- H. 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.

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

- A. If Respondent 7-Eleven has not divested the 7-Eleven Assets in the time and manner required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the 7-Eleven 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. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under Paragraph VI. of this Order 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.

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- 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 fifteen (15) 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 fifteen (15) 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 VI.B.3. of this Order to accomplish the divestiture(s),

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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 Paragraph VI. of this Order 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 7-

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Eleven Assets, 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 Respondent 7-Eleven 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,

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

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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.

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

- A. For a period of ten (10) years from the date this Order is issued, Respondent 7-Eleven shall not, without the prior approval of the Commission, acquire directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in the 7-Eleven Assets or the Sunoco Retained Assets.
- B. For a period of ten (10) years from the date this Order is issued, Respondent 7-Eleven 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, *provided, however*, that prior notification shall not be required by Paragraph VII. of this Order 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. With respect to the notification:
  - 1. The prior notification (the "Notification") required by Paragraph VII.B. of this Order shall contain:
    - a. The Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended;

## Decision and Order

- b. A map showing all Retail Fuel Locations by ownership (*e.g.*, OPIS Corporate Brand) within five (5) driving miles of each Relevant Notice Outlet that 7-Eleven intends to acquire;
- c. For each retail fuel outlet owned by Respondent 7-Eleven within five (5) driving miles of the relevant Prior Notice Outlet, a list of the Retail Fuel Locations that Respondent 7-Eleven monitored at any time within the preceding twelve (12) month period (to the extent such information is available); and
- d. Respondent 7-Eleven's pricing strategy in relation to each monitored Retail Fuel Location identified in response to Paragraph VII.B. of this Order.

No filing fee will be required for any such Notification. Notification shall be filed with the Secretary of the Commission and notification need not be made to the United States Department of Justice. Notification is required only of Respondent 7-Eleven and not of any other party to the transaction.

2. Respondent 7-Eleven shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent 7-Eleven 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 Paragraph VII.B. of this Order may be requested

## Decision and Order

and, where appropriate, granted by letter from the Bureau of Competition.

4. If related to a geographic area located within a Specified State, Respondent 7-Eleven shall provide a copy of each Notification described in Paragraph VII.B. of this Order to the relevant Specified State at the same time that such Notification is transmitted to the Commission.

**VIII.****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



## Decision and Order

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.

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

- A. Within thirty (30) days after the date this Order is issued and every thirty (30) days thereafter until Respondent 7-Eleven has fully complied with the provisions of Paragraphs II. and III. of this Order, Respondent 7-Eleven shall submit to the Commission and the Monitor a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order, *provided, however*, if Respondent Sunoco is the Acquirer, Respondent 7-Eleven's obligations under IX.A. of this Order will not extend beyond (i) one year or (ii) its provision of Transition Services related to the 7-Eleven Assets, whichever is longer. Respondent 7-Eleven shall include in its report, among other things that are required from time to time, a full description of the efforts being made to comply with this Order;
- 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, Respondent 7-Eleven shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order;
- C. Within thirty (30) days after the date this Order is issued, Respondent Sunoco shall submit to the Commission and the Monitor a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent Sunoco shall include in its reports, among other things that are required from

## Decision and Order

time to time, a full description of the efforts being made to comply with this Order; and

- D. One (1) year from the date this Order is issued, annually for the next fourteen (14) years on the anniversary of the date this Order is issued, and at other times as the Commission may require, Respondent Sunoco shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

**X.**

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

- A. Any proposed dissolution of Seven & i Holdings Co., Ltd., 7-Eleven, Inc., or Sunoco LP;
- B. Any proposed acquisition, merger, or consolidation of Seven & i Holdings Co., Ltd., 7-Eleven, Inc., or Sunoco LP; or
- C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

**XI.**

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

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts,

## Decision and Order

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.

**XII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on March 26, 2033.

By the Commission.

**NONPUBLIC APPENDIX A****Monitor Agreement**

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

## Decision and Order

**Schedule A**

## Schedule A

## 7-Eleven Retail Fuel and Convenience Store Properties To Be Divested

7-Eleven Internal ID	Address	City	State	Zip
1218	4783 E HIGHWAY 83	ROMA	TX	78584
19929	10121 CHESTER RD	CHESTER	VA	23831
25151	11714 SUNSET HILLS RD	RESTON	VA	20190
33482	43974 PIPELINE PLZ	ASHBURN	VA	20147
36190	20021 ROUTE 19	CRANBERRY TOWNSHIP	PA	16066
36403	3957 SARATOGA BLVD	CORPUS CHRISTI	TX	78415
36517	11801 FM 1472	LAREDO	TX	78045
36518	4706 S EXPRESSWAY 83	HARLINGEN	TX	78552
36519	9811 BOB BULLOCK LOOP	LAREDO	TX	78041
36520	9101 MCPHERSON RD	LAREDO	TX	78045
36524	300 E EXPRESSWAY 83	MERCEDES	TX	78570
36528	2719 E SAUNDERS ST	LAREDO	TX	78041
36529	822 W US HIGHWAY 83	SAN JUAN	TX	78589
36531	6302 SARATOGA BLVD	CORPUS CHRISTI	TX	78414
36533	5602 S SPID DR	CORPUS CHRISTI	TX	78412
36534	3955 S SPID DR	CORPUS CHRISTI	TX	78415
36537	1201 WILDCAT DR	PORTLAND	TX	78374
36538	1600 N BICENTENNIAL BLVD	MCALLEN	TX	78501
36541	1758 BOCA CHICA BLVD	BROWNSVILLE	TX	78520
36542	745 W ELIZABETH ST	BROWNSVILLE	TX	78520
36545	865 N EXPRESSWAY	BROWNSVILLE	TX	78520
36547	6780 W EXPRESSWAY 83	HARLINGEN	TX	78552
36550	1725 INTERNATIONAL BLVD	BROWNSVILLE	TX	78520
36552	1900 N JACKSON RD	PHARR	TX	78577
36553	3105 SH-35 N	FULTON	TX	78358
36576	12121 FM 306	CANYON LAKE	TX	78133

## Decision and Order

**Schedule B**

## Schedule B

## Sunoco Retail Fuel and Convenience Store Properties To Be Retained

Sunoco Internal ID	Address	City	State	Zip
40	4710 WILLIAMSBURG ROAD	RICHMOND	VA	23231
45	7100 HULL STREET ROAD	RICHMOND	VA	23235
74	46373 BARTHOLOMEW FAIR DRIVE	STERLING	VA	20164
87	8384 COLESVILLE ROAD	SILVER SPRING	MD	20910
2144	601 SOUTH HIGHWAY 35	ROCKPORT	TX	78382
2192	4402 N. NAVARRO	VICTORIA	TX	77904
2429	190 E EAU GALLIE BLVD	INDIAN HARBOUR BEACH	FL	32937
2441	5001 S 31ST ST/WATERS DAIRY RD	TEMPLE	TX	76502
2524	2311 BUCKINGHAM ROAD	FORT MYERS	FL	33905
2587	6988 BENEVA ROAD	SARASOTA	FL	34238
2592	5100 34TH STREET SOUTH	ST PETERSBURG	FL	33711
2601	1390 GARDEN ST	TITUSVILLE	FL	32796
2607	1149 45TH ST.	WEST PALM BEACH	FL	33407
2709	1910 BALTIMORE PIKE	GETTYSBURG	PA	17325
2736	1200 S ATLANTIC AVE	DAYTONA BEACH	FL	32118
2738	2530 S ATLANTIC AVE	DAYTONA BEACH	FL	32118
5081	2502 E. UNIVERSITY DRIVE	EDINBURG	TX	78539
5138	2002 S. 23RD STREET	HARLINGEN	TX	78550
5139	4901 JOHN STOCKBAUER DRIVE	VICTORIA	TX	77904
7127	4849 LEOPARD STREET	CORPUS CHRISTI	TX	78408
7169	15 FAYETTE ST AT I-70	NORTH BELLE VERNON	PA	15012
7299	790 RIVER STREET	HAVERHILL	MA	01830
7348	302 N. NAVARRO STREET	VICTORIA	TX	77901
7351	2002 N. NAVARRO STREET	VICTORIA	TX	77901
7352	1901 SAM HOUSTON DRIVE	VICTORIA	TX	77901
7430	113 NOBLE AVENUE	CRAFTON	PA	15205
7459	1200 E. DEL MAR BOULEVARD	LAREDO	TX	78041
7562	2977 NIAGARA FALLS BLVD	AMHERST	NY	14228
7681	1 PIDGEON HILL DRIVE	STERLING	VA	20165
9125	1606 EAST RICHARDSON ROAD	EDINBURG	TX	78541
9438	4101 AGNES	CORPUS CHRISTI	TX	78405
9655	711 ED CAREY DRIVE	HARLINGEN	TX	78550
9682	1402 E. UNIVERSITY	EDINBURG	TX	78539

## Decision and Order

**Schedule C****Schedule C**  
**Substitute Retail Fuel Locations**

If third-party consent for any of the 7-Eleven Outlets listed below cannot be obtained, for each and every 7-Eleven for which consent has not been obtained, Respondents shall substitute the corresponding Sunoco Outlet(s) listed below, in consultation with the Monitor and staff of the Commission.

7-Eleven ID	Address (7-Eleven)	7-Eleven Consent Needed	Corresponding Sunoco ID	Address (Sunoco)
36190	20021 ROUTE 19 CRANBERRY TOWNSHIP, PA 16066	Lease Consent	7362	19090 PERRY HIGHWAY MARS, PA 16046
36517	11801 FM 1472 LAREDO, TX 78045	Lease Consent	2229	9219 FM 1472 (MINES ROAD) LAREDO, TX 78045
36517	11801 FM 1472 LAREDO, TX 78045	Lease Consent	2409	14118 FM 1472 LAREDO, TX 78405
36517	11801 FM 1472 LAREDO, TX 78045	Lease Consent	7462	9304 FM 1472 (MINES ROAD) LAREDO, TX 78045
36519	9811 BOB BULLOCK LOOP LAREDO, TX 78041	Lease Consent	2297	2519 JACAMAN ROAD LAREDO, TX 78041
36519	9811 BOB BULLOCK LOOP LAREDO, TX 78041	Lease Consent	5099	7120 BOB BULLOCK LOOP LAREDO, TX 78041
36520	9101 MCPHERSON RD LAREDO, TX 78045	Lease Consent	2187	2441 SAN ISIDRO PARKWAY LAREDO, TX 78045
36520	9101 MCPHERSON RD LAREDO, TX 78045	Lease Consent	7463	8612 MCPHERSON AVENUE LAREDO, TX 78045
36524	300 E EXPRESSWAY 83 MERCEDES, TX 78570	Lease Consent	2243	3939 EAST EXPRESSWAY 83 MERCEDES, TX 78570



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7-Eleven ID	Address (7-Eleven)	7-Eleven Consent Needed	Corresponding Sunoco ID	Address (Sunoco)
36528	2719 E SAUNDERS ST LAREDO, TX 78041	Lease Consent	2275	5002 SAUNDERS STREET LAREDO, TX 78041
36528	2719 E SAUNDERS ST LAREDO, TX 78041	Lease Consent	7461	3410 ARKANSAS LAREDO, TX 78043
36528	2719 E SAUNDERS ST LAREDO, TX 78041	Lease Consent	9668	1120 SAUNDERS LAREDO, TX 78041
36529	822 W US HIGHWAY 83 SAN JUAN, TX 78589	Lease Consent	2210	2201 SOUTH I ROAD SAN JUAN, TX 78589
36529	822 W US HIGHWAY 83 SAN JUAN, TX 78589	Lease Consent	5104	600 EAST BUSINESS 83 SAN JUAN, TX 78589
36529	822 W US HIGHWAY 83 SAN JUAN, TX 78589	Lease Consent	5134	328 E. U.S. HIGHWAY 83 PHARR, TX 78577
36531	6302 SARATOGA BLVD CORPUS CHRISTI, TX 78414	Lease Consent	2155	5614 SARATOGA BOULEVARD CORPUS CHRISTI, TX 78414
36531	6302 SARATOGA BLVD CORPUS CHRISTI, TX 78414	Lease Consent	2182	5529 SARATOGA BOULEVARD CORPUS CHRISTI, TX 78413
36533	5602 S SPID DR CORPUS CHRISTI, TX 78412	Lease Consent	2102	5301 S. STAPLES CORPUS CHRISTI, TX 78411
36533	5602 S SPID DR CORPUS CHRISTI, TX 78412	Lease Consent	2168	5939 SOUTH PADRE ISLAND DRIVE CORPUS CHRISTI, TX 78412
36533	5602 S SPID DR CORPUS CHRISTI, TX 78412	Lease Consent	9502	4202 S. STAPLES CORPUS CHRISTI, TX 78411

## Decision and Order

7-Eleven ID	Address (7-Eleven)	7-Eleven Consent Needed	Corresponding Sunoco ID	Address (Sunoco)
36534	3955 S SPID DR CORPUS CHRISTI, TX 78415	Lease Consent	2167	4754 SOUTH PADRE ISLAND DRIVE CORPUS CHRISTI, TX 78411
36537	1201 WILDCAT DR PORTLAND, TX 78374	Lease Consent	7055	1301 MOORE AVENUE PORTLAND, TX 78374
36537	1201 WILDCAT DR PORTLAND, TX 78374	Lease Consent	7115	1650 WILDCAT DRIVE PORTLAND, TX 78374
36547	6780 W EXPRESSWAY 83 HARLINGEN, TX 78552	Lease Consent	2211	1837 N. STUART PLACE HARLINGEN, TX 78552
36553	3105 SH-35 N FULTON, TX 78358	Lease Consent	2420	2902 HWY 35 NORTH ROCKPORT, TX 78382
36553	3105 SH-35 N FULTON, TX 78358	Lease Consent	9391	3306 N. HIGHWAY 35 FULTON, TX 78358
25151	11714 SUNSET HILLS RD RESTON, VA 20190	Franchisee	79	11854 SUNRISE VALLEY DRIVE RESTON, VA 20191
25151	11714 SUNSET HILLS RD RESTON, VA 20190	Franchisee	80	1818 WIEHLE AVE RESTON, VA 20190
25151	11714 SUNSET HILLS RD RESTON, VA 20190	Franchisee	7676	11190 SOUTH LAKES DR RESTON, VA 20191
33482	43974 PIPELINE PLZ ASHBURN, VA 20147	Franchisee	70	43971 FARMWELL HUNT PLAZA ASHBURN, VA 20147
33482	43974 PIPELINE PLZ ASHBURN, VA 20147	Franchisee	75	43305 JUNCTION PLAZA ASHBURN, VA 20147



## Decision and Order

7-Eleven ID	Address (7-Eleven)	7-Eleven Consent Needed	Corresponding Sunoco ID	Address (Sunoco)
33482	43974 PIPELINE PLZ ASHBURN, VA 20147	Franchisee	76	43740 PARKHURST PLAZA ASHBURN, VA 20147
33482	43974 PIPELINE PLZ ASHBURN, VA 20147	Franchisee	77	21880 RYAN CENTER PKWY ASHBURN, VA 20147
36576	12121 FM 306 CANYON LAKE, TX 78133	Franchisee	1543	14580 RIVER ROAD NEW BRAUNFELS, TX 78130
36576	12121 FM 306 CANYON LAKE, TX 78133	Franchisee	1546	9100 FM 306 NEW BRAUNFELS, TX 78130

**Schedule D****Prior Consent Retail Fuel Outlets**

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

Analysis to Aid Public Comment

**Schedule E****Acquisition Agreement and Remedial 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 for public comment, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Seven & i Holdings Co., Ltd. and 7-Eleven, Inc. (collectively, “7-Eleven”), and Sunoco LP (“Sunoco”) (collectively, the “Respondents”). The Consent Agreement is designed to remedy the anticompetitive effects that likely would result from 7-Eleven’s proposed acquisition of certain Sunoco retail fuel assets (the “Transaction”).

Absent a remedy, the Transaction would raise competitive concerns in 76 local markets in 20 metropolitan statistical areas (“MSAs”). Under the terms of the proposed Consent Agreement, 7-Eleven must sell retail fuel outlets in some local markets to Sunoco and reject Sunoco retail fuel outlets in other local markets pursuant to the Respondents’ asset purchase agreement (thereby allowing Sunoco to retain these assets). The divestitures must be completed no later than 90 days after the closing of 7-Eleven’s acquisition of Sunoco. The Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain each 7-Eleven divestiture outlet in the normal course of business through the date Sunoco acquires the outlet.

### Analysis to Aid Public Comment

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

## **II. The Respondents**

Respondent Seven & i Holdings Co., Ltd, a publicly traded company headquartered in Tokyo, Japan, operates convenience stores and retail fuel outlets throughout the United States and the world. 7-Eleven's U.S. network consists of approximately 8,500 stores located in 35 states. More than 1,000 locations are company-operated, making 7-Eleven one of the largest convenience store operators in terms of company-owned stores and the second-largest chain overall in the country. 7-Eleven convenience store locations operate under the 7-Eleven banner, while its retail fuel outlets operate under a variety of company and third-party brands.

Respondent Sunoco operates convenience stores and retail fuel outlets in the United States and Canada. With more than 1,300 convenience stores and retail fuel outlets in the United States, Sunoco is one of the largest chains in the country. Sunoco's U.S. convenience stores operate primarily under the APlus and Stripes banners, while its retail fuel outlets operate under a variety of company and third-party brands. Sunoco also has an extensive wholesale fuel business that supplies more than 6,800 third-party outlets.

## **III. The Proposed Acquisition**

On April 6, 2017, 7-Eleven, through its wholly owned subsidiaries 7-Eleven, Inc. and SEI Fuel Services, Inc. ("SEI Fuel Services"), entered into an agreement with Sunoco to acquire approximately 1,100 retail fuel outlets for approximately \$3.3 billion. Sunoco would continue to operate its wholesale business and approximately 200 retail fuel outlets following the

## Analysis to Aid Public Comment

Transaction. SEI Fuel Services would enter into a 15-year fuel supply agreement with Sunoco, LLC as a part of the Transaction.

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 that the asset purchase agreement constitutes a violation of 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 the retail sale of diesel in 76 local markets across 20 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. The retail sale of gasoline and the retail sale of diesel constitute separate relevant markets because the two are not interchangeable. 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 Commission's Complaint alleges the relevant geographic markets in which to assess the competitive effects of the Transaction are 76 local markets within the following MSAs: Boston-Cambridge-Quincy, MA-NH; Brownsville-Harlingen, TX; Buffalo-Niagara Falls, NY; Cape Coral-Fort Myers, FL; Corpus Christi, TX; Deltona-Daytona Beach-Ormond Beach, FL; Killeen-Temple-Fort Hood, TX; Laredo, TX; McAllen-Edinburg-Mission, TX; Miami-Fort Lauderdale-Pompano Beach, FL; Gettysburg, PA; Palm Bay-Melbourne-Titusville, FL; Pittsburgh, PA; Richmond, VA; San Antonio, TX; Sarasota-Bradenton-Venice, FL; Tampa-St. Petersburg-Clearwater, FL; Rio Grande City-Roma, TX; Victoria, TX; and Washington-Arlington-Alexandria, DC-VA-MD-WV. 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. Retail fuel markets are highly localized and can range up to a few miles in size.

#### Analysis to Aid Public Comment

The Transaction would substantially increase the market concentration in each of the 76 local markets, resulting in highly concentrated markets. In 18 local markets, the Transaction would result in a monopoly. In 39 local markets, the Transaction would reduce the number of independent market participants from three to two. In 19 local markets, the Transaction would reduce the number of independent market participants from four to three.

According to the Commission's Complaint, the Transaction would reduce the number of independent market participants in each market to three or fewer. The Transaction would thereby substantially lessen competition in these local markets by increasing the likelihood that 7-Eleven would unilaterally exercise market power and by increasing the likelihood of successful coordination among the remaining firms. Absent relief, the Transaction would likely result in higher prices in each of the 76 local markets.

Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Transaction. 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 7-Eleven to sell retail fuel outlets in some local markets to Sunoco and reject Sunoco retail fuel outlets in other local markets pursuant to the Respondents' asset purchase agreement (thereby allowing Sunoco to retain these assets). Sunoco intends to convert the acquired or retained stations from company-operated sites to commission agent sites. This remedy would preserve competition as it is today, ensure that the divestiture assets go to a viable, large-scale competitor, and reduce the risks and costs associated with asset integration.

The Commission is satisfied that allowing Sunoco to acquire or retain retail fuel stations and transition them to commission agent sites is an appropriate remedy. Most importantly, the

## Analysis to Aid Public Comment

proposed remedy preserves competition in each local market. Indeed, as Sunoco controls retail fuel pricing at both its company-operated stations and its commission agent stations, Sunoco and 7-Eleven would continue as independent retail fuel competitors in each local market. Moreover, Sunoco is a large, viable competitor capable of maintaining the competitive landscape in each local market. Finally, the proposed Consent Agreement reduces the uncertainty and costs relating to integration since Sunoco already is familiar with the majority of the stations at issue.

The proposed Consent Agreement also requires that for up to six months following the divestiture, with up to an additional twelve months at the buyer's option, 7-Eleven make available transitional services, as needed, to assist the buyer of each divestiture asset. The buyer may extend the period for an additional twelve months, but only with Commission approval.

In addition to requiring outlet divestitures, the proposed Consent Agreement also requires 7-Eleven to provide the Commission (and Florida, Texas, or Virginia, where applicable) notice before acquiring designated outlets in the 76 local areas for ten years. The prior notice provision is necessary because acquisitions of the designated outlets likely would raise competitive concerns and may fall below the HSR Act premerger notification thresholds.

The proposed Consent Agreement contains additional provisions designed to ensure the effectiveness of the proposed relief. For example, Respondents have agreed to an Order to Maintain Assets that will issue 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 Respondents' complete divestiture of the outlet, thereby maintaining the economic viability, marketability, and competitiveness of each divestiture asset. During this period, and until such time as the buyer (or buyers) no longer requires transitional assistance, the Order to Maintain Assets authorizes the Commission to appoint an independent third party as a

Analysis to Aid Public Comment

monitor to oversee the Respondents' compliance with the requirements of the proposed Consent Agreement.

The proposed Consent Agreement also requires Sunoco to take steps to ensure that its employees in charge of setting retail fuel prices at the acquired or retained retail fuel outlets do not have access to confidential information about Sunoco's post-Transaction wholesale supply of 7-Eleven's retail fuel stations. To ensure appropriate firewalls remain in place for the duration of the Respondents' fuel supply agreement, the proposed Consent Agreement has a term of fifteen years.

The purpose of this analysis is to facilitate public comment on the proposed Consent agreement, and 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

**CDK GLOBAL, INC.,  
CDK GLOBAL, LLC,  
AUTO/MATE, INC.,  
ROBERT EUSTACE,  
ELSA EUSTACE,  
G. LARRY COLSON, JR.,  
MICHAEL ESPOSITO,  
AND  
GLEN EUSTACE**COMPLAINT AND FINAL ORDER IN REGARD TO ALLEGED  
VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION  
ACT AND SECTION 7 OF THE CLAYTON ACT

*Docket No. 9382; File No. 171 0156  
Complaint, March 19, 2018 – Decision, March 26, 2018*

This case addresses the \$190 million acquisition by CDK Global, Inc. of certain assets of Auto/Mate, 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 restraining competition in the market for dealer management systems business software (“DMS”) to franchise automotive dealerships in the United States. The order dismisses the Complaint on the grounds that the Respondents terminated their Stock Purchase Agreement and withdrew the Hart-Scott-Rodino Notification and Report Forms which they filed for the acquisition.

*Participants*

For the *Commission*: James Abell, Stephen Antonio, Peggy Bayer Femenella, Michael Blevins, Alicia Burns-Wright, Maria Cirincione, Michael Franchak, Matthew Gessesse, and Janet Kim.

For the *Respondents*: Aidan Synnott, Paul, Weiss, Rifkind, Wharton & Garrison LLP; Lee Van Voorhis, Jenner & Block LLP.



## Complaint

**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 CDK Global, Inc. and CDK Global, LLC (collectively “CDK”) and Auto/Mate, Inc. (“Auto/Mate”), Robert Eustace, Elsa Eustace, G. Larry Colson, Jr., Michael Esposito, and Glen Eustace have executed an acquisition agreement in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

**I. NATURE OF THE CASE**

1. Respondents are providers of dealer management systems (“DMS”) for franchise (new car) dealerships. The DMS is mission-critical business software used by dealerships to manage nearly every aspect of their business, including accounting, payroll, parts and vehicle inventory, service repair scheduling, and vehicle financing. Franchise DMS providers must also obtain car manufacturer (“OEM”) certifications so that the DMS can share information between the franchise dealerships and OEMs, including information about new car sales, warranty services, parts, financial performance, and labor time.

2. CDK and Reynolds & Reynolds (“Reynolds”) are the two largest franchise DMS providers in the United States. They are also the highest priced, and have similar business models, which include long-term contracts and significant initial and monthly fees for third-party applications (app) vendors to integrate with their respective DMS.

3. Auto/Mate is an innovative, disruptive challenger to the two market leaders. It offers franchise dealerships a distinct value proposition, including strong functionality, low pricing, an

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agnostic platform for third-party applications, extensive OEM certifications, short contracts, free software upgrades and training, and a reputation for high-quality customer service. In recent years, Auto/Mate has grown as a competitive threat in the franchise DMS market, including by specifically targeting CDK customers. Auto/Mate has consistently expanded its customer base and revenues through both aggressive pricing and adapting its differentiated product to match the preferences of many franchise dealers, placing pressure on CDK's pricing and margins. It has also developed features attractive to larger franchise dealerships and as a result, became an increasing threat to take more customers from CDK. CDK identified Auto/Mate as a current and emerging threat and responded aggressively by discounting and offering more flexible and better terms to customers.

4. In the fall of 2016 when Auto/Mate placed itself up for sale, CDK concluded that it could eliminate a strong current competitor, which was threatening to become an even more disruptive rival, by simply purchasing the company. However, CDK's plan to rid itself of a significant and growing competitive threat hit a roadblock: during the bidding process, CDK suspected that other well-financed, credible bidders recognized Auto/Mate's competitive strengths and were seriously interested in buying the company. CDK recognized that if Auto/Mate fell into the hands of a well-financed buyer willing to invest additional resources, Auto/Mate would become an even more aggressive and effective competitor. CDK was so concerned about this possibility that it

After concluding that it could not allow Auto/Mate to fall into the hands of a larger, well-financed backer, CDK

CDK ultimately offered a price that was far in excess of its original standalone valuation of Auto/Mate

Indeed, the most credible explanation for CDK's

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6. CDK's post-merger plans for Auto/Mate provide substantial additional support for the conclusion that this Acquisition will reduce competition. Post-merger, CDK plans to substantially downgrade [REDACTED] features and service, raise [REDACTED] prices, and prevent CDK's larger customers from migrating [REDACTED].

7. Today, competition from Auto/Mate yields a myriad of substantial benefits to franchise dealers. Auto/Mate's presence in this market means lower prices, greater innovation, more flexible contract terms, and better service. If consummated, the Acquisition would eliminate the considerable and growing competition between CDK and Auto/Mate. It would also eliminate competition between Auto/Mate and other DMS providers, and thereby cause significant and pervasive harm to franchise dealers.

8. The Acquisition would entrench CDK's [REDACTED] share of the relevant market and would significantly increase market concentration. Post-Acquisition, CDK would control approximately 47% of the franchise DMS market. Reynolds would possess approximately [REDACTED] of the relevant market. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines"), a post-merger market-concentration level above 2500 points, as measured by the Herfindahl-Hirschman Index ("HHI"), and an increase in market concentration of more than 200 points renders a merger presumptively unlawful. Post-Acquisition market concentration would be more than 2500, and the Acquisition would increase HHIs in an already concentrated market by well over 200 points. Thus, the Acquisition is presumptively unlawful.

9. New entry or repositioning by existing producers would not be timely, likely, or sufficient to counteract the anticompetitive effects of the Acquisition. *De novo* entrants face considerable barriers including substantial and lengthy up-front investments in product development and OEM certification, with a high risk of failure. Similarly, existing DMS providers face substantial challenges in order to reposition to replace Auto/Mate's competitive significance, including but not limited

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to, a poor or non-existent reputation among customers, software with limited functionality, limited or non-existent OEM certifications, poor service levels, constrained capacity, and high prices. In brief, the remaining firms in this market are not likely to replace the unique, substantial, and growing competitive significance of Auto/Mate in a timely way, either collectively or individually.

10. Respondents cannot show cognizable efficiencies that would offset the likely and substantial competitive harm from the Acquisition.

## II. JURISDICTION

11. Respondents 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.

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

## III. RESPONDENTS

13. CDK is the largest provider of franchise DMS in the United States. CDK is a publicly traded company, headquartered in Hoffman Estates, Illinois. CDK had 2017 global revenues of over \$2 billion. In the United States, CDK has DMS customers with more than [REDACTED] franchise dealership locations (or “rooftops,” the industry’s preferred term).

14. Auto/Mate is one of the fastest-growing providers of franchise DMS in the United States. Auto/Mate is a privately held company based in Albany, New York, with 180 employees in the United States. [REDACTED]

[REDACTED] Auto/Mate had 2017 revenues of approximately [REDACTED]. In the United States, Auto/Mate has DMS customers with more than [REDACTED]

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franchise dealership rooftops. Since 2012, Auto/Mate has grown rapidly, significantly increasing its customer base year-over-year. Auto/Mate is now the fifth largest franchise DMS provider in the United States with approximately [REDACTED] market share.

#### **IV. THE ACQUISITION**

15. Pursuant to a Stock Purchase Agreement, dated April 28, 2017, CDK proposes to acquire 100% of the shares of Auto/Mate for approximately [REDACTED] in cash.

#### **V. MARKET PARTICIPANTS AND INDUSTRY DYNAMICS**

16. The United States franchise DMS market is highly concentrated with CDK and Reynolds controlling approximately 70% of the market. Dealertrack, Auto/Mate, and Autosoft round out the top five franchise DMS providers in the United States. Each of the remaining franchise DMS providers accounts for a much smaller share of the market.

17. CDK and Reynolds have similar business models — both offer a broad set of features and OEM certifications, but both also charge relatively high prices, and both regularly require their customers to sign long-term contracts. In addition to these issues, both companies tend to charge relatively high fees for integrating third party applications, and CDK has a reputation for relatively poor customer service. Despite such business practices that frustrate some of their customers, the two market leaders have maintained dominant positions in this market.

18. Customers frustrated with CDK's and Reynolds's business practices have faced significant challenges in switching DMS suppliers and, historically, a lack of good alternatives to the two market leaders. In order to change DMS suppliers, franchise dealers need to spend a significant number of hours training their staff, while dealing with losses in productivity that can lead to lower sales during the transition period. Because the DMS touches essentially every aspect of a dealer's business, there is considerable risk associated with switching to a DMS that does not perform adequately. This makes customers understandably

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wary of DMS suppliers without an established track record of success.

19. Auto/Mate is a low price, innovative company that has posted consistent, double-digit growth in recent years. A significant portion of Auto/Mate's wins in recent years have come at CDK's expense. Auto/Mate's value proposition includes but is not limited to, low prices, an ample and growing set of features, month-to-month contracts, the choice of on-site or cloud server deployment, a full roster of major OEM certifications, a low-cost agnostic platform for third-party applications, a strong reputation, and excellent customer service.

20. Today, no other DMS offers Auto/Mate's combination of low prices, high functionality, and strong customer service. These attributes position Auto/Mate well to effectively challenge the market leadership of CDK and Reynolds. According to its internal business documents, Auto/Mate plans to grow its market share both by continuing to aggressively court and win small franchise dealership customers as well as by continuing to expand on its recent successes in winning larger franchise dealership customers. In 2016, Auto/Mate stated it could grow [REDACTED]

21. Compared to Auto/Mate, each remaining DMS provider, including Dealertrack and Autosoft, lacks important features or value, including but not limited to, low pricing, important software functionalities, important OEM certifications, month-to-month contracts, or a strong reputation. Many of these DMS providers have failed to show significant growth or have stagnated or contracted in the last several years. Many of the remaining DMS providers have significant limitations on their capacity to add and support new customers.

## VI. RELEVANT MARKET

22. The relevant market is the sale of DMS for franchise dealers in the United States ("Relevant Market" or "U.S. Franchise DMS Market"). A hypothetical monopolist of the sale of all franchise DMS in the United States would find it profit-

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maximizing to impose at least a small but significant and non-transitory increase in price (“SSNIP”).

**A. Relevant Product Market**

23. The relevant product market in which to assess the effects of the proposed Acquisition is DMS for franchise dealers.

24. The DMS is a mission-critical business software that serves as the backbone of the dealer’s information technology systems. Within a dealership, the DMS is used to manage nearly every aspect of the business, including accounting, payroll, parts and vehicle inventory, service repair scheduling, and vehicle financing. Much of the technology needed to run a dealership, including internet connectivity, telephones, website management, inventory, service scheduling, finance and insurance, and accounting is run or connected through the DMS. The DMS is also necessary for sharing information between the dealerships and OEMs like Ford, Audi, or Honda. This enables the dealer and OEMs to share real-time information on sales, inventory, parts, service, and warranties.

25. There are no reasonably interchangeable substitutes for franchise DMS, and franchise dealerships could not realistically switch to other products in the face of a SSNIP for DMS for franchise dealers.

26. DMS for franchise dealers has distinct qualities that other DMS products, including independent (used car) DMS does not have. A DMS for franchise dealers must have OEM certifications for the dealer to communicate with OEMs to share new car sales and parts information, and perform warranty services. Independent DMS providers and general business software do not have OEM certifications.

27. In addition to OEM certification, franchise dealers generally require software features tailored to franchise car dealership business operations, which are lacking in other DMS. In particular, franchise dealers demand complex automobile repair and parts software modules that independent DMS providers do not offer. In addition, independent DMS providers often lack

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other software modules important to the franchise dealer, including accounting and payroll modules.

28. Franchise dealers do not use independent DMS providers as a competitive restraint in negotiations with franchise DMS providers. General business software programs are also not a constraint on franchise DMS providers, and franchise dealers do not use general business software as a competitive restraint in negotiations with franchise DMS providers.

29. Thus, DMS for franchise dealers is the relevant product market in which to analyze the Acquisition's likely effects.

**B. Relevant Geographic Market**

30. The relevant geographic market is the United States. Auto/Mate does not compete outside of the United States. OEM certifications are frequently limited to specific countries and many OEMs require a United States-specific certification. Because franchise DMS customers demand OEM certifications that work within their country, and those certifications are frequently nation-specific, the relevant geographic market is the United States.

**VII. MARKET STRUCTURE AND THE MERGER'S PRESUMPTIVE ILLEGALITY**

31. The U.S. Franchise DMS Market is highly concentrated, with CDK and Reynolds controlling roughly 70% of the market. CDK has approximately [REDACTED] market share and Auto/Mate has approximately [REDACTED] market share. Post-Acquisition, the Relevant Market would be even more highly concentrated; CDK would control nearly half the market.

32. The Merger Guidelines and courts often measure concentration using HHIs. HHIs are 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.



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33. Post-Acquisition, the Relevant Market would be substantially more highly concentrated than it is today. Post-Acquisition, CDK would control approximately 47% of this Relevant Market. Reynolds, the next largest competitor, would possess approximately [REDACTED] of the Relevant Market. The Acquisition would result in a post-Acquisition HHI of over 2,500, and would increase concentration by well over 200 points. Therefore, the Acquisition establishes a presumption of competitive harm.

34. In this matter, the HHIs based on current market shares materially understate Auto/Mate's competitive significance in the Relevant Market because they do not take into consideration Auto/Mate's likely growth trajectory. Prior to the merger announcement, Auto/Mate posted significant growth year-over-year, adding new functionalities to its DMS and gaining large dealership customers. Moreover, Auto/Mate's reputation was growing in the industry and it was poised for continuing and significant growth.

35. The Acquisition is, therefore, presumptively unlawful under relevant case law and the Merger Guidelines.

### **VIII. ANTICOMPETITIVE EFFECTS: THE ACQUISITION WOULD ELIMINATE VITAL COMPETITION BETWEEN AUTO/MATE AND OTHER DMS PROVIDERS**

36. The Acquisition is likely to substantially lessen competition in the Relevant Market. Auto/Mate competes aggressively against CDK today and would compete even more aggressively against CDK in the future but for the Acquisition. The merger would extinguish this competition, as well as competition between Auto/Mate and other DMS providers. The result would be higher prices, inferior service, and reduced quality and innovation.

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**A. Auto/Mate Competes Aggressively Against CDK Today**

37. To successfully challenge the large incumbent DMS providers, Auto/Mate deploys aggressive sales and marketing efforts. In attempts to win CDK customers, Auto/Mate has repeatedly emphasized CDK's price increases for both its core DMS and third-party integration, CDK's restrictive contracts, and CDK's business practices in marketing blasts it sent directly to CDK customers:

- “Pressure to increase margins has already caused prices to increase on third-party integration fees. This pressure will also cause increased prices on products for dealers directly if they have not seen it already.”
- “CDK is letting go of a substantial amount of account managers in addition to other employees” and “[t]his will surely result in decreased communications between CDK and its dealers.”
- “We believe that CDK dealers using an older web platform are being forced to migrate to a newer version and are required to pay for the cost of implementation.”
- “[I]f you are currently using an in-house server, you may be alarmed to find out that you will be forced to migrate to a cloud-based solution by January 1<sup>st</sup>, 2018.”
- “We are aware that these changes could drastically impact your bottom line. If you're tired of being locked down in an unsatisfactory contract and forced to pay for unnecessary updates, please feel free to contact me personally.”

38. Auto/Mate also focuses on the overall price difference between Auto/Mate and CDK and Reynolds, using its website to assure prospective customers that “dealers often find their Auto/Mate monthly support bills to be 65-75 percent less than

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what they're paying with Reynolds and Reynolds or CDK." Auto/Mate is successful in its attempts to target CDK and Reynolds customers. Auto/Mate touted that "[o]ver 82% of our customers are converted from CDK Global and Reynolds & Reynolds DMS systems."

39. Auto/Mate also continually improves its product in response to customer demand for feature innovations. [REDACTED]

[REDACTED] Auto/Mate almost always provides these enhancements to its entire customer base, and in most cases, does so free of charge.

40. Auto/Mate's aggressive competition drew considerable attention at CDK. In 2016, CDK recognized that Auto/Mate was winning an increasing share of opportunities and that CDK was "losing more clients to Automate (sic) in the [REDACTED] than we've ever lost before," that Auto/Mate had "shrunk the gap in functionality to our core DMS," that Auto/Mate was "moving up toward Tier 1," and that Auto/Mate was now successfully acquiring large dealership customers. Internally, CDK discussed that Auto/Mate was getting "more and more aggressive with pricing" and that Auto/Mate was "making too much headway" relative to other franchise DMS competitors.

41. To respond to competition from Auto/Mate, CDK regularly offers [REDACTED] concessions. Reynolds also provides [REDACTED] and other benefits in response to competition from Auto/Mate.

42. In 2016, CDK implemented a plan specifically designed to reduce the risk that some of its customers would switch to Auto/Mate. [REDACTED]

[REDACTED] all of which were beneficial to customers.

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43. Competition between CDK and Auto/Mate has substantially lowered prices for customers. The following are examples of this direct price competition:

- In a competition between CDK, Auto/Mate and Dealertrack, a franchise dealer's consultant produced a cost comparison showing that Auto/Mate's total price over 60 months was [REDACTED] less than Dealertrack and [REDACTED] less than CDK's DMS. In explaining his decision to leave CDK, the franchise dealer cited the price difference as "significant" and added that the decision to leave "wasn't a very hard call."
- A franchise dealer told CDK it was switching to Auto/Mate because "The price difference between R&R / CDK and a smaller DMS like Auto/Mate is a savings of [REDACTED] over 60 months. That is substantial and the main reason our owners wish to go this route."
- In competition with Auto/Mate, CDK was forced to provide a roughly [REDACTED] discount on monthly charges (an equivalent of approximately [REDACTED] over 60 months).

44. CDK also regularly responds to competition from Auto/Mate on non-price terms, including but not limited to,

[REDACTED]  
[REDACTED] For example, CDK typically offers a 60-month term contract, whereas Auto/Mate's contracts are month-to-month. Before the Acquisition's announcement, in response to Auto/Mate competition, [REDACTED] In another example, seeing Auto/Mate as the "real risk" to win one of its existing customers who expressed frustration with CDK's service, [REDACTED]  
[REDACTED]

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**B. Auto/Mate Is Positioned to Compete Even More Aggressively in the Future Against CDK, Especially for Larger Dealership Customers**

45. This Acquisition would lead to a real and significant loss of current competition. However, Auto/Mate's effect on the market is more significant than its current market share suggests, in part because of its compelling value proposition and history of continuous software innovations. These issues strongly indicate that, prior to the Acquisition, Auto/Mate was poised to become an even more aggressive and effective competitor in the Relevant Market.

46. For the past five years, Auto/Mate has been experiencing significant year-over-year rooftop growth. To drive this growth, Auto/Mate recently introduced several important functionality upgrades, including centralized accounting, which is a feature that dealerships with multiple rooftops value, and often strongly prefer. By adding centralized accounting to an already solid feature set at aggressive prices, Auto/Mate has attracted the attention of multi-rooftop dealers with very sophisticated DMS needs. Auto/Mate's introduction of centralized accounting was a [REDACTED] and amplified its competitive threat to CDK.

47. Prior to the Acquisition's announcement, Auto/Mate was on a clear growth path and believed it was well positioned to win larger DMS franchise customers. In 2016, Auto/Mate's Chairman made its growth plans clear: "We expect that as we continue to take larger groups from CDK/R&R, that we will eventually wake the sleeping giants. Right now, we're an annoyance, and they truly think that we are not a serious competitor at dealerships of a certain size. However, they are not really aware of some of the recent changes we have made to the software, and in the coming months we will begin installing a pilot store at a very large dealer group[] that, assuming we are successful, ought to shake up the industry, at least those who are paying attention."

48. As predicted, Auto/Mate had its best year yet in 2016, the last full year prior to the Acquisition's announcement, when it won several larger dealerships and successfully started [REDACTED]



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**C. The Acquisition Will Eliminate the Consumer Benefits of Head-to-Head Competition Between Auto/Mate and other DMS providers**

53. The Acquisition would eliminate the intense head-to-head price and quality competition between CDK and Auto/Mate occurring today. Consequently, CDK would not need to compete as aggressively on price to win franchise dealer customers, and would have the incentive and ability to raise prices and lower service quality. The Acquisition would also eliminate the competition between Auto/Mate and other DMS providers, reducing the need for those providers to compete as aggressively on price, service, and innovation.

54. After the Acquisition, CDK and other DMS providers would face less competition to retain and gain new customers and would have less incentive to offer shorter contracts, faster software enhancements, more third-party and less expensive app integration, additional training, and better customer service. CDK was aware that it would face less competition after acquiring Auto/Mate, internally touting: “We are so serious about acquiring new customers that we bought the DMS [Auto/Mate] that has been kicking our butts.”

55. Indeed, CDK was willing to pay top dollar to keep Auto/Mate out of the hands of an acquirer that would increase Auto/Mate’s already impressive growth trajectory. CDK predicted that, in the hands of a motivated and well-capitalized buyer, Auto/Mate would [REDACTED]

[REDACTED] To prevent this, CDK [REDACTED] over the next highest bidder to acquire Auto/Mate, and [REDACTED] CDK’s original valuation of Auto/Mate. The gap between CDK’s winning bid and its initial valuation substantially represents the defensive value to CDK of removing Auto/Mate as a competitor and preventing a well-financed alternative buyer from accelerating Auto/Mate’s growth further.

56. Post-Acquisition, CDK plans to severely handicap the [REDACTED] DMS platform and remove it as a competitive alternative to CDK’s other DMS products for large swaths of

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customers. [REDACTED]

[REDACTED] These are two Auto/Mate features its customers highly value. [REDACTED]

[REDACTED] Prior to the Acquisition announcement, Auto/Mate was successfully adding customers with three or more rooftops, often at the expense of CDK. [REDACTED] customers therefore would face degraded functionality and higher prices following the Acquisition, and [REDACTED] strong competitive attributes would be significantly dampened or withdrawn from the market. To the extent that Auto/Mate customers seek another franchise DMS provider, that provider would not be a close substitute to the unique value proposition they chose with Auto/Mate. Moreover, such alternatives may not be available given the significant installation and support capacity limitations of many other DMS providers.

## **IX. LACK OF COUNTERVAILING FACTORS**

### **A. Barriers to Entry and Expansion**

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

58. New entry or repositioning by existing producers would not be timely, likely, or sufficient to counteract the anticompetitive effects of the Acquisition. *De novo* entrants into this market would face considerable barriers in replicating the competition that will be eliminated by the Acquisition. Effective entry into this market would require substantial, costly up-front investments in product development and OEM certification, and the risk of failure would be high given the substantial product development and reputational barriers to commercial success in this market. Collectively, these challenges would take many years to overcome. Auto/Mate's current success has taken many years of slow, careful growth to achieve, and new entrants would face a similarly protracted, high-risk path to success.



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59. Similarly, existing DMS providers are unlikely to replace the competition that will be lost as a result of the Acquisition, because all of them lack important offerings Auto/Mate provides and that they are unlikely to develop in a timely manner if Auto/Mate is absorbed by CDK. While each firm's shortcomings are distinct, each faces real and significant challenges in becoming the next Auto/Mate. These challenges include, but are not limited to, a poor or non-existent reputation among customers, software with limited functionality, limited or non-existent OEM certifications, poor service levels, and constrained capacity. Moreover, other DMS providers are significantly higher priced than Auto/Mate and would not sufficiently replace Auto/Mate's aggressive pricing. The remaining firms in this market are not likely to replace the unique, substantial, and growing competitive significance of Auto/Mate in a timely way, either collectively or individually.

### **B. Efficiencies**

60. Respondents have not identified and cannot demonstrate cognizable efficiencies that would be sufficient to rebut the strong presumption and evidence that Acquisition likely would substantially lessen competition in the relevant market.

## **X. VIOLATION**

### **Count I – Illegal Agreement**

61. The allegations of Paragraphs 1 through 60 above are incorporated by reference as though fully set forth herein.

62. The Acquisition 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**

63. The allegations of Paragraphs 1 through 60 above are incorporated by reference as though fully set forth herein.

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64. The Acquisition, if consummated, may substantially lessen competition in the relevant market 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 August, 2018, 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.

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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 Acquisition 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 CDK and Auto/Mate were offering and planning to offer prior to the Acquisition.

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2. A prohibition against any transaction between CDK and Auto/Mate 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, CDK and Auto/Mate 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 Auto/Mate as a viable, independent competitor 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 March, 2018.

By the Commission.

**ORDER DISMISSING COMPLAINT**

On March 19, 2018, the Commission issued an Administrative Complaint alleging that Respondents CDK Global, Inc. and CDK Global, LLC (collectively “CDK”), and Respondents Auto/Mate, Inc. (“Auto/Mate”), Robert Eustace, Elsa Eustace, G. Larry Colson, Jr., Michael Esposito, and Glen Eustace had executed a Stock Purchase Agreement (“Agreement”) – pursuant to which CDK proposed to acquire 100% of the shares of Auto/Mate – in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that if the acquisition covered by the Agreement were

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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 have now filed a Joint Motion to dismiss the Complaint, on the grounds that the Respondents have terminated their Stock Purchase Agreement and have withdrawn the Hart-Scott-Rodino Notification and Report Forms which they filed for the proposed acquisition.<sup>1</sup>

The Commission has determined to dismiss the Complaint without prejudice, in light of Respondents' decision to abandon the proposed acquisition and their withdrawal of their respective Hart-Scott-Rodino Notification and Report Forms. Respondents would not be able to effectuate the proposed acquisition without filing new Hart-Scott-Rodino Notification and Report Forms, and 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.<sup>2</sup>

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

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

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<sup>1</sup> See Joint Motion To Dismiss Complaint (filed March 20, 2018).

<sup>2</sup> See, e.g., *In the Matter of The J.M. Smucker Company and Conagra Brands, Inc.*, Docket No. 9381, [Order Dismissing Complaint](#) (March 8, 2018); *In the Matter of DraftKings, Inc. and FanDuel Limited*, Docket No. 9375, [Order Dismissing Complaint](#) (July 14, 2017); *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).

Final Order

By the Commission.

## Complaint

## IN THE MATTER OF

**BOLLMAN HAT COMPANY  
AND  
SAVEANAMERICANJOB, LLC  
JOINTLY D/B/A  
AMERICAN MADE MATTERS**

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

*Docket No. C-4643; File No. 172 3197  
Complaint, April 12, 2018 – Decision, April 12, 2018*

This consent order addresses Bollman Hat Company’s marketing, sale, and distribution of hats with claims that the products are of U.S.-origin, and memberships in their “American Made Matters” (“AMM”) program to companies wishing to make U.S.-origin claims for their products. The complaint alleges that respondents represented that their products are “Made in USA” when, in fact, many of the respondents’ hats are wholly imported, and others contain significant imported content. The complaint further alleges that the AMM seal represents by implication that respondents’ products have been endorsed or certified by an independent third party, but AMM is a fictitious name for respondents, who created the AMM seal and use it in connection with the sale of their own products. The consent order prohibits respondents from making U.S.-origin claims for their products unless either: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; or (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing.

*Participants*

For the *Commission: Julia Solomon Ensor.*

For the *Respondents: Ken Vorrasi, Drinker Biddle & Reath, LLP.*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Bollman Hat Company, a company, and SaveAnAmericanJob,

## Complaint

LLC, a limited liability company, jointly d/b/a American Made Matters (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 Bollman Hat Company is a Pennsylvania company with its principal office or place of business at 110 East Main Street, Adamstown, Pennsylvania 19501.

2. Respondent SaveAnAmericanJob, LLC is a Pennsylvania limited liability company with its principal office or place of business at 110 East Main Street, Adamstown, Pennsylvania 19501. SaveAnAmericanJob, LLC is a wholly owned subsidiary of Bollman Hat Company, and Bollman Hat Company is SaveAnAmericanJob, LLC’s sole member.

3. Bollman Hat Company and SaveAnAmericanJob, LLC jointly do business as American Made Matters, a Pennsylvania fictitious name. Respondents have operated as a common enterprise while engaging in the unlawful acts and practices alleged below. Because Respondents have operated as a common enterprise, each of them is jointly and severally liable for the acts and practices alleged below.

4. Respondents have advertised, labeled, offered for sale, sold, and distributed products to consumers, including, but not limited to, hats sold under the Bollman, Bailey Western, Betmar, Country Gentleman, Eddy Bros., Helen Kaminski, Jacaru, Kaminski XY, Kangol, Karen Kane, Pantropic, and private label brand names. Respondents advertise these products online, including, but not limited to, on their website, hats.com, and in stores. Respondents offer for sale, sell, and distribute their products throughout the United States.

5. Respondents have advertised, offered for sale, sold, and distributed memberships in their “American Made Matters” program to companies wishing to make U.S.-origin claims for their products. Respondents primarily advertise their “American Made Matters” program to businesses online including, but not limited to, on their website americanmadematters.com, and





## Complaint

9. In fact, more than 70% of the hat styles Respondents sell are wholly imported as finished products. Of the remaining styles, many contain significant imported content.

10. Therefore, Respondents' express or implied representations that all of their products are made in the United States are false.

**American Made Matters Program**

11. In 2010, Respondents introduced a U.S.-origin seal for marketers to use to boost the credibility of "Made in USA" claims. The seal, depicted below, is associated with "American Made Matters," which is a fictitious name registered to Respondents ("AMM"):



12. In numerous instances, including, but not limited to, the promotional materials shown in Exhibits A-E, Respondents have prominently displayed the American Made Matters seal in their promotional materials. This seal represents by implication that Respondents' hats have been endorsed or certified by an independent third party.

13. In fact, AMM is a fictitious name owned by Respondents, and Respondents' hats have not been endorsed or certified by an independent third party.

14. In addition to featuring the seal in their own marketing materials, Respondents license use of the seal to other companies wishing to make "Made in USA" claims for their products.

15. Companies that wish to use the AMM seal must apply for program membership through Respondents' website at [www.americanmadematters.com](http://www.americanmadematters.com). Respondents grant AMM membership to any company, product, or entity that self-certifies

## Complaint

it meets Respondents' membership standard, pays the \$99 annual licensing fee, and self-identifies either a United States-based manufacturing factory, or at least one product with a U.S.-origin label.

16. AMM membership includes a license to use Respondents' seal on products and in marketing materials, a member page on Respondents' website, and Respondents' commitment to advertise the member's products as "Made in USA" through their websites and social media channels.

17. To meet Respondents' standard, AMM members must certify that at least 50% of the cost of at least one of their products was incurred in the United States, with final assembly or transformation in the United States. Respondents do not rely on an independent or objective evaluation to confirm that members meet their standard.

18. Respondents have disseminated, or have caused to be disseminated, advertisements and promotional materials for AMM, as well as materials for members to use to promote their products as made in the United States including, but not necessarily limited to, the attached Exhibits F-L. These materials contain the following statements, among others:

- a. With an American Made Matters Membership/Sponsorship, "You will increase sales to consumers and businesses who are actively looking to buy American Made Products" (Exhibit F, American Made Matters Website);
- b. "Does your business produce or sell #MadeinUSA products? Increase your reach with us." (Exhibit G, American Made Matters Twitter page);
- c. "American Made Matters® is an organization made of over 375 member and sponsor companies. Our members are manufacturers who represent various industries from apparel and toys to steel fabrication and cleaning supplies. Sponsors include American made retailers, patriotic organizations and local

## Complaint

businesses who understand that American made truly matters.” (Exhibit H, American Made Matters website);

- d. “Shop as a consumer . . . for consumers looking to shop for American made products directly from our members and sponsors.” (Exhibit I, American Made Matters website);
- e. “American Made Directories” (Exhibit J, American Made Matters website);
- f. “#MadeinUSA”; “Buy American”; “Made in USA”; “Start your American Made product search with American Made Matters”; “Choose #AmericanMade whenever possible. Start your search for #madeinUSA products with us.” (Exhibit K, American Made Matters Facebook page);
- g. “Support the #AmericanDream. How? By buying #AmericanMade products! AmericanMadeMatters.com” (Exhibit L, American Made Matters Twitter page).

19. In numerous instances, including, but not limited to, the promotional materials shown in Exhibits F-L, Respondents have represented by implication that entities and products using AMM marketing materials or featured on the AMM website have been independently and objectively evaluated for compliance with Respondents’ membership standard.

20. In fact, entities and products using Respondents’ AMM logo or marketing materials have not been independently and objectively evaluated for compliance with any standard.

21. In numerous instances, including, but not limited to, the promotional materials shown in Exhibits F-L, Respondents have represented that products sold by American Made Matters members are all or virtually all made in the United States. For example, Respondents promote a directory of members on their AMM website as a list of manufacturers selling U.S.-origin

## Complaint

products, and regularly highlight members on their social media channels as selling U.S.-origin products.

22. In fact, Respondents do not possess a reasonable basis substantiating claims that products sold by American Made Matters members are all or virtually all made in the United States.

23. In numerous instances, including, but not limited, to the promotional materials shown in Exhibits G-L, Respondents have distributed promotional materials to third-party marketers for use in the marketing and sale of those third parties' products.

24. In so doing, Respondents have provided third-party marketers with the means and instrumentalities to deceive consumers. For example, several of Respondents' members have used Respondents' AMM logo or other materials to promote products that contain significant imported content.

**COUNT I****(False or Unsubstantiated Representation – Respondents' Products)**

25. In connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of their products, Respondents have represented, directly or indirectly, expressly or by implication, that all of their products, including, but not limited to, all hats, are all or virtually all made in the United States.

26. In fact, in many instances, Respondents' products are wholly imported. In other instances, Respondents source significant inputs to their products from overseas. Therefore, the representation set forth in Paragraph 25 is false or misleading, or was not substantiated at the time the representation was made.

**COUNT II****(False or Misleading Representation – Independence of AMM)**

27. In connection with the labeling, advertising, promotion, offering for sale, or sale of their hats, such as through the use of

## Complaint

their American Made Matters seal, Respondents have represented, directly or indirectly, expressly or by implication, through the use of the American Made Matters seal that an independent organization has reviewed and endorsed their products as Made in the United States.

28. In truth and in fact, American Made Matters is not an independent organization reviewing and endorsing Respondents' products as Made in the United States. Respondents created the "American Made Matters" seal, and use it in connection with the labeling, advertising, promotion, offering for sale, and sale of their own products. Therefore, the representation set forth in Paragraph 27 is false or misleading.

**COUNT III****(False or Misleading Representation – AMM)**

29. In connection with the advertising, promotion, offering for sale, or sale of membership to the American Made Matters program, Respondents have represented by implication, directly or indirectly, that each entity or product licensed to use their logos or marketing materials has been independently and objectively evaluated for compliance with Respondents' membership standard.

30. In fact, products and entities using Respondents' membership logo have not been independently and objectively evaluated for compliance with Respondents' membership standard. Therefore, the representation set forth in Paragraph 29 is false or misleading.

**COUNT IV****(False or Unsubstantiated Representation – Third Party Products)**

31. Respondents have represented on their websites and social media, directly or indirectly, expressly or by implication, that all AMM members sell products that are all or virtually all made in the United States.

## Complaint

32. In truth and in fact, in numerous instances, the representation in Paragraph 31 was false or misleading, or was not substantiated at the time the representation was made.

**COUNT V**  
**(Means and Instrumentalities)**

33. Respondents have distributed the promotional materials described in Paragraph 18 to third-party marketers for use in the marketing and sale of those third parties' products. In so doing, Respondents have provided the means and instrumentalities to these third-party marketers for the commission of deceptive acts or practices.

**VIOLATION OF SECTION 5**

34. 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 twelfth day of April, 2018, has issued this Complaint against Respondents.

By the Commission.

Complaint

**Exhibit A**



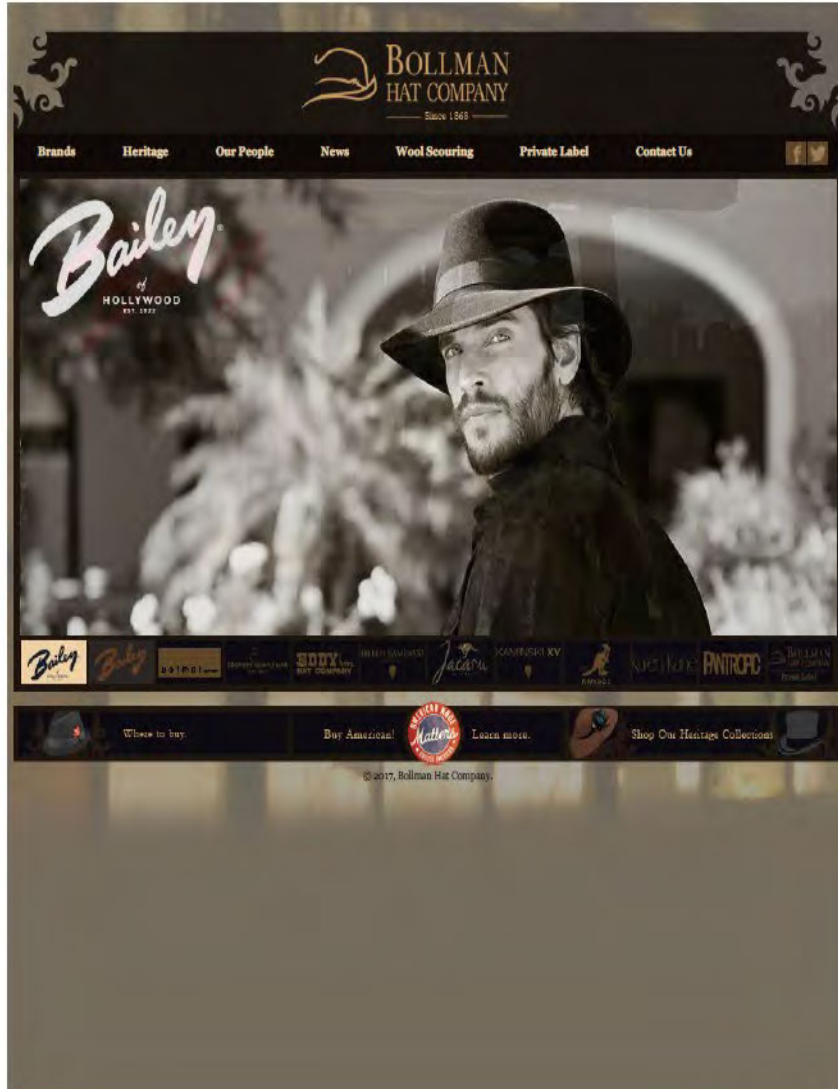
Exhibit A



Complaint

**Exhibit B**

Bollman Hat Company - America's Oldest Hat Maker



**Exhibit B**

<http://www.bollmanhats.com> [1/10/2017 12:50:27 PM]

## Complaint

## Exhibit C

Bollman Hat Company - America's Oldest Hat Maker

**BOLLMAN HAT COMPANY**  
Since 1868

Brands Heritage Our People News Wool Scouring Private Label Contact Us

*Our History* **Our History**

*From Our President*

*Our Mission*

*Our Values*

*Our Photo Galleries*

*Our Videos*

Founded in 1868, The Bollman Hat Company is America's oldest hat maker. We are a world leading designer, manufacturer and distributor of men's, women's, and children's headwear and accessories. Today, Bollman has 300 employees located on four continents and distributes products in seventy seven countries. This long and proud heritage carries on today as a testimony to the vision, perseverance, and hard work of generations who dedicated themselves to our organization.

The Bollman Group provides the world with the headwear industry's top brands that include Bailey, Betmar, Borsalino, Country Gentleman, Eddy Bros., Helen Kaminski, Jacaru, KANGOL, Karen Kane, and PAN TROPIC headwear. We also provide private label products to leading retailers and apparel brands globally.

Our employee-owners manufacture wool felt, fur felt, and straw hats and caps in our factory located in Adamstown, Pennsylvania, USA. With world headquarters also in Adamstown, Bollman today maintains sales and design offices and showrooms in: Denver, Colorado; New York City; London, England; and Sydney, Australia. In San Angelo, Texas, we scour wool for the world's finest woolen mills.

Bollman products can be found worldwide in specialty stores, department stores, major and regional chain stores, and prominent catalog and e-commerce retailers. In addition, we are a primary supplier of private label headwear to the world's leading brands and retailers covering fashion, outdoor apparel, and uniform, formal wear, and sports markets. We have proudly provided headwear to the United States Olympic team for six Olympic games.

Our hats have covered many Hollywood actors from Humphrey Bogart to Fred Astaire and from Samuel L. Jackson to Nicole Kidman; musicians from Run DMC to Eminem and from Pete Townsend to Ne-Yo; athletes from Michael Jordan to Donovan McNabb and from Chi Chi Rodriguez to Jimmy Rollins.

The history of Bollman Hat Company is long and distinguished. Our people are proud to cover the world with unparalleled products that provide protection, comfort and style to millions throughout the world. We continue to support many fine local and international causes including youth programs, world hunger, and skin cancer prevention.

We look to the future purposefully and enthusiastically!

Brands Heritage Our People News Wool Scouring Private Label Contact Us

© 2017 Bollman Hat Company

Exhibit C

<http://www.bollmanhats.com/heritage/history.html>[1/10/2017 12:55:52 PM]

Complaint

Exhibit D

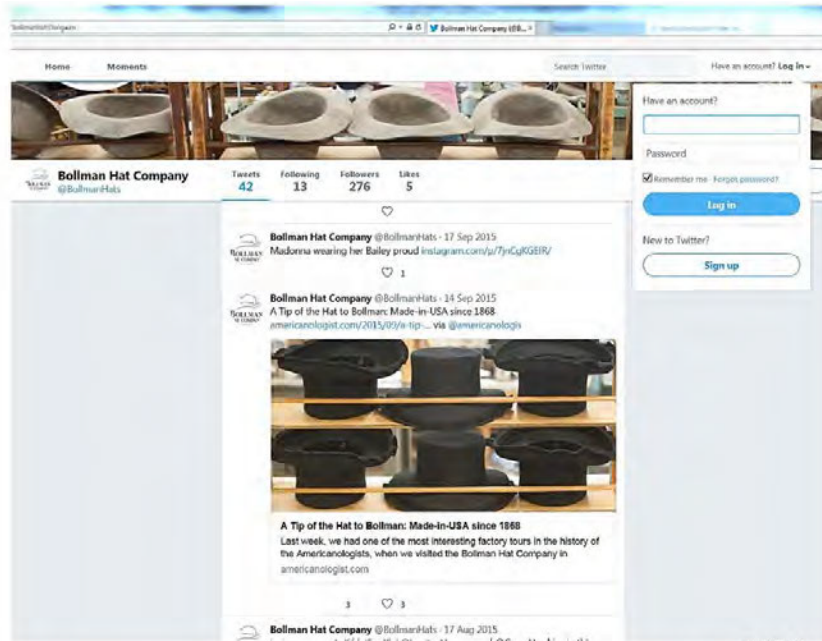


Exhibit D  
p. 1 of 3

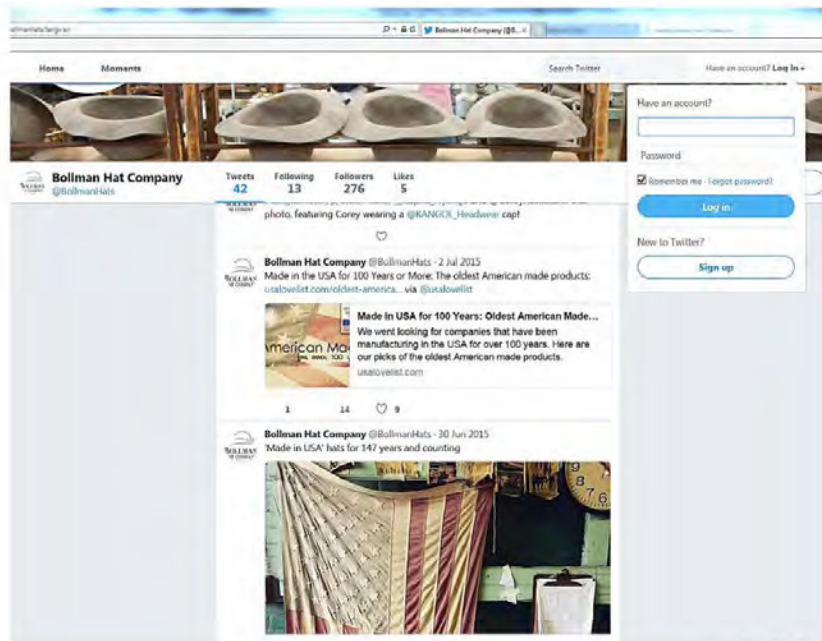


Exhibit D  
p. 2 of 3

Complaint

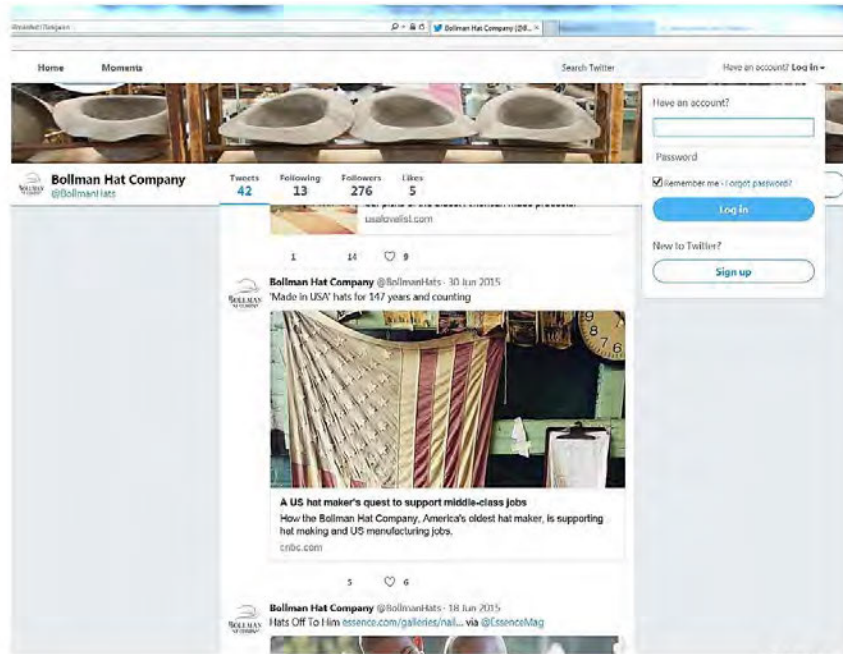


Exhibit D  
p. 3 of 3

Complaint

Exhibit E

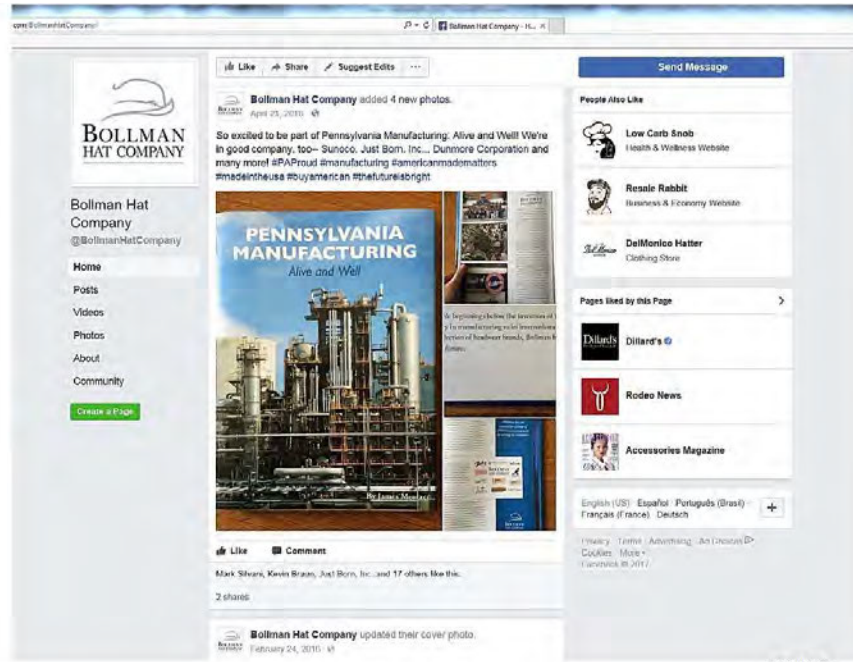


Exhibit E



Complaint

Exhibit F

The screenshot displays the 'AMERICAN MADE MATTERS' website. At the top, there is a navigation bar with links for HOME, VIEW LISTINGS, ABOUT, AMM GEAR, BLOG, CONTACT US, and JOIN US. Below the navigation bar, the main heading reads 'JOIN AMERICAN MADE MATTERS | BUSINESS'. The page is divided into two columns: 'YOU ARE A MEMBER IF...' and 'YOU ARE A SPONSOR IF...'. Under the membership section, it lists criteria for manufacturing and provides a list of benefits such as a customized member page, logo license, networking opportunities, and social media features. A price of '\$99 per year' is mentioned. The sponsorship section lists criteria for service businesses and provides a three-step registration process. A 'STEP ONE: AMERICAN MADE MATTERS APPLICATION' section features a large red graphic with a white box containing the 'AMM Application' form instructions. At the bottom, there is an 'FAQ'S ABOUT MEMBERSHIP/SPONSORSHIP' section with a question about networking.

**★ AMERICAN MADE MATTERS ★**

HOME VIEW LISTINGS ABOUT AMM GEAR BLOG CONTACT US JOIN US

JOIN AMERICAN MADE MATTERS | BUSINESS

**YOU ARE A MEMBER IF...**

You manufacture at least one product where at least 50% of the cost (labor, materials and overhead) is incurred in the United States and the final assembly or transformation takes place in the United States.

**YOU ARE A SPONSOR IF...**

You are a service business, retailer, patriotic organization or local business who understands that American made matters.

**What You Will Receive:**

- Your own customize member page on the American Made Matters website
- A license to use our approved logos, extended for the duration of your membership
- Ability to network with other members
- A welcome package of American Made Matters gear
- Your company is featured on our ever growing social media channels

Everything for one low price:  
**only \$99**  
per year.

**Registration is Easy:**

1. Fill out the application below. The process takes between 15-30 minutes.
2. Applications are reviewed daily and you will hear back from an American Made Matters representative within two business days.
3. As soon as payment is received for your membership/sponsorship, we will build your page in the AMM Directory, which will take up to five business days.

Any questions? Email us anytime at [contact@americanmatters.com](mailto:contact@americanmatters.com)

**STEP ONE: AMERICAN MADE MATTERS APPLICATION**

**AMM Application**

Thank you for your commitment to US manufacturing. As a first step in getting your company to our attention we need to know more about you and your company.

This application will ask for information about your business. The information collected will also be used to construct your company profile page in our AMM Directory.

We receive applications daily and will be in contact with you within the next few days.

Memberships is limited to one per year. Payment to be received through method of payment shown on application process.

The application process takes approximately 10-15 minutes. Please visit [amm.com](http://amm.com) for details.

**Next**

**FAQ'S ABOUT MEMBERSHIP/SPONSORSHIP**

**What about networking with other members?**

Yes, American Made Matters® is a community of like-minded, passionate people and businesses who are all working together to strengthen the American dream. Everyone who joins our growing organization will have the ability to network with the other members and sponsors of the organization.

Exhibit F  
p. 1 of 2

### Complaint

**1 Do I get a listing on the American Made Matters® website?**

Yes. You will increase sales to consumers and businesses who are actively looking to buy American-made products. You will receive a listing on our website with your own individualized member or sponsor page which will contain your contact information, information about your company, social media links, video, picture, and featured products.

**2 Do you have periodic promotions that can help my brand?**

Yes. This will increase awareness of your US-made products through participation in promotions that will connect American-made businesses with consumers and other businesses seeking American-made products.

**3 Does joining this organization help the USA?**

Yes. Joining American Made Matters® will increase US-brand identity through the use of American Made Matters® logo on all products that meet American Made Matters® qualifications. The logo can also be used on related marketing materials and websites for the duration of membership. Additionally, joining our community helps you promote your US-made product(s) to consumers actively trying to buy American-made products. All members and sponsors who join American Made Matters® are helping to strengthen the mission of our organization, which is to educate consumers that buying US-made products strengthens the American dream.

**4 Will joining American Made Matters® get my business more exposure?**

Yes. Your business will be featured on our website. Additionally, joining American Made Matters® increases exposure to your business by getting your business featured in our ever-growing Social Media channels.

JOIN THE CONVERSATION

---

**★ AMERICAN MADE MATTERS ★**

America's Made Matters® is an independent, not-for-profit, 501(c)(3) organization dedicated to celebrating consumers on the countless opportunities of buying Made in USA products.

**RECENT POSTS**

- ▶ [10 Changes we Can't wait to see in 2018](#)
- ▶ [The Rise of "Made in USA" Products](#)
- ▶ [Supporting the American Flag](#)
- ▶ [HOW TO Buy "Made in USA" Products](#)

**CONTACT US**

We love hearing from you. Please reach out to us here. [Click here to contact us.](#)

**1.866.888.1111**

Custom Member and Sponsor Logos for your business. [Click here to learn more.](#)

©2017 American Made Matters. All rights reserved. [Privacy Policy](#) | [Terms and Conditions](#) | [Contact](#)

Complaint

**Exhibit G**

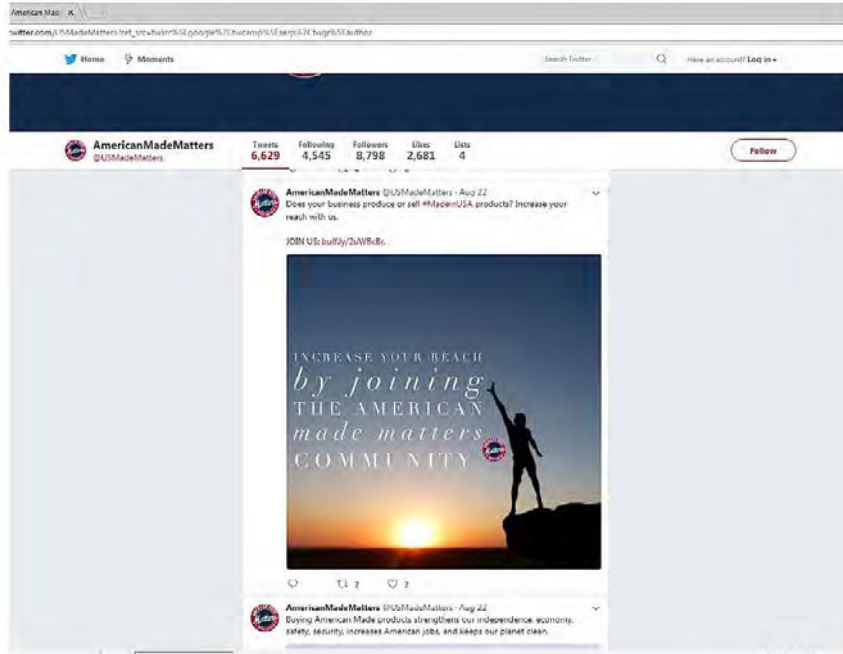


Exhibit G



Complaint

**Exhibit H**

**SHOP OUR MEMBERS AND SPONSORS**

**ABOUT AMERICAN MADE MATTERS®**

American Made Matters® is an organization made of over 375 member and sponsor companies. Our members are manufacturers who represent various industries from apparel and toys to steel fabrication and cleaning supplies. Sponsors include American made retailers, patriotic organizations and local businesses who understand that American made truly matters. Please join our growing community today.

**JOIN TODAY**

**Exhibit H**

Complaint

Exhibit I

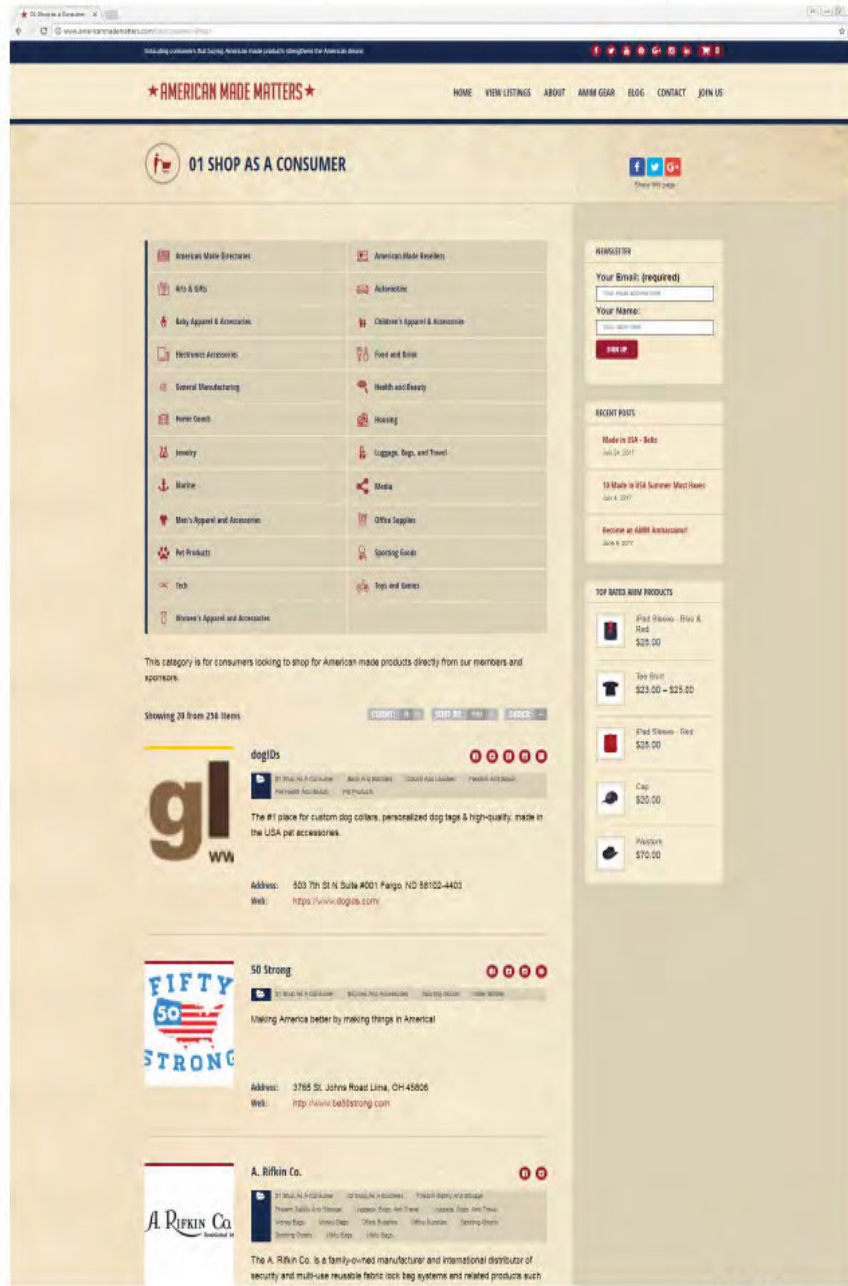


Exhibit I  
p. 1 of 5

Complaint

as locking night deposit bags, courier bags, cash / money bags as well as other...

Address: 1402 Sans Souci Parkway (Hixson-Barne, PA 15708)  
Web: <http://www.biffyn.com/>

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**Adam's Premium Car Care**



Adam's Polishing & Shrinkwrap will keep your boat, truck, plane, or automobile looking like new!

Address: 887 South Taylor Ave Louisville CO 80027  
Web: <http://adamspolish.com/home.php>

---

**Adea**



Every woman needs a good wardrobe foundation as the building blocks for her own unique style

Address: 197 Prospect St Shrewsbury, MA 01545  
Web: <http://www.myadea.com/>

---

**At's Attire**



Hand-made Men's and Women's clothing, shoes, hats, and accessories. Based in the heart of San Francisco's North Beach district.

Address: 1300 Grant Ave San Francisco, CA 94133  
Web: <http://atstire.com/>

---

**All American Clothing**



Our mission is to support USA families and jobs by producing high-quality clothing in the USA at an affordable price.

Address: 1 Pop Rite Dr Arcanum, OH 43004  
Web: <http://www.allamericanclothing.com/>

---

**All USA Clothing**



All USA Clothing has been committed to American-Made products and manufacturing for over 42 years. Based in Michigan, we know first-hand the powerful impact that buying (or not buying) American can have on the US economy.


Exhibit I  
p. 2 of 5

Complaint

Address: 3303 Bloomfield Dr. West Bloomfield, MI 48323  
 Web: <http://www.afusaeclothing.com/>

---


**Alltham** ○○○○

 Alltham  
 Quality American gear and gifts. Our suppliers certify that each product has its principal assembly in the United States from more than 50% U.S. content.

Address: 175 Stratford Ave Suite 1 Wayne, PA, 19387  
 Web: <http://www.alltham.com/>

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**American Adorn** ○○○○○

 American Adorn  
 American made children's clothing, sizes 0 to Six.

Web: <http://www.americanadorn.com/>

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**American Bench Craft** ○○○○○○○

 American Bench Craft  
 Two Brothers. One Team. An American-Made Lifestyle Brand.

Address: 2 Linden Street Reading, MA 01867  
 Web: <http://AmericanBenchCraft.com>

---


**American Crush** ○○○

 American Crush  
 American Crush is an online media marketplace that provides rich content, inspiring photographs of beautiful products that are designed, developed and manufactured in the USA.

Web: <http://AmericanCrush.co/>

---


**American Distinction** ○○○

 American Distinction  
 Something for everyone, made in the U.S.A.

Web: <http://www.americandistinction.com>

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**American Field** ○○○○○○○

 American Field  
 American Field is a pop-up market and exhibition featuring the best in U.S. Made clothing, accessories, goods, furniture, and the people who make them.

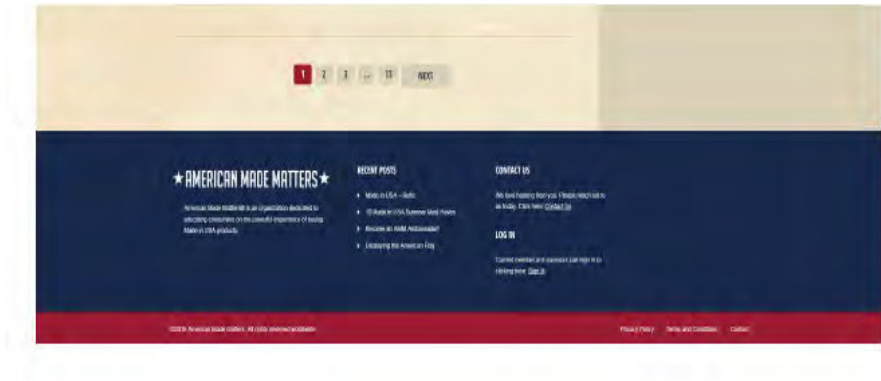
Address: 144-B Newbury St Boston, MA 02116  
 Web: <http://americanfield.us/>

Complaint



Exhibit I  
p. 4 of 5

Complaint





Complaint

Exhibit J

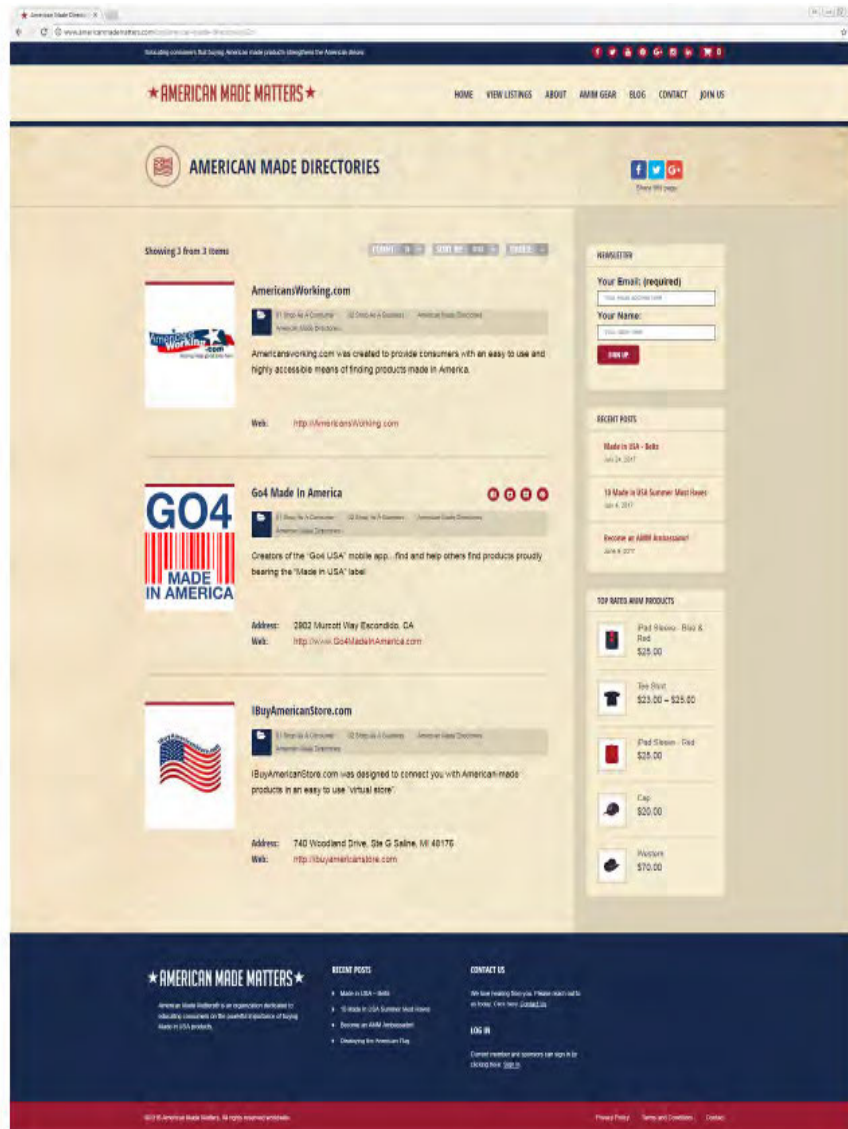


Exhibit J

Complaint

Exhibit K

American Made Matters - Home | Facebook

The screenshot displays the Facebook profile for American Made Matters. At the top, there are fields for 'Email or Phone' and 'Password' with 'Log In' and 'Sign Up' buttons. The profile picture is the 'AMERICAN MADE Matters' logo. The cover photo features the slogan 'A MOVEMENT TO STRENGTHEN THE AMERICAN DREAM ONE PURCHASE AT A TIME'. The left sidebar lists navigation options: Home, About, Posts, Photos, Videos, Consumer Sign Up, Notes, YouTube, Instagram feed, Events, and Community. The main content area shows a post from 12 hours ago asking 'Are you willing to pay more for #MadeInUSA products?' with a graphic that reads '60% OF CONSUMERS ARE WILLING TO PAY 10% MORE FOR AN AMERICAN MADE PRODUCT.' Below the post, it shows 3 shares and 1 comment. To the right, there is a community profile for 'Community Organization in Adamsown, Pennsylvania' with 34,716 likes and a post from August 12th at 3:03pm asking 'What's up with the multiple expletives? What do you guys think? The answer is not as ordinary for you guys to send these.'

<https://www.facebook.com/AmericanMadeMatters/>

8/29/2017  
Exhibit K  
p. 1 of 6



Complaint

American Made Matters - Home | Facebook

USING ONLY A GIF IN THE COMMENTS, TELL US HOW YOU FEEL WHEN YOU FIND A #MADEINUSA PRODUCT.

Like Comment **The Made in America store** Shoppers & Retail

Sheryl Delp, Joy Nohelfer Kaufmann, Yorna Ochoa and 3 others · Top Comments · Like this

View all 5 comments **Clothing Store**

Markets in Adamstown, Pennsylvania

Videos **Pages liked by this Page**

American Made Matters - Pa **Ratio Clothing**

**PA State Rep. Kate Harger**

**Kayla Michele**

Places **Adamstown, Pennsylvania** Community Organization **American Made Matters**

See All

Posts

**American Made Matters**  
August 27 at 5:06pm

We are proud to have KNEK as a member of our #MadeInUSA community!  
LEARN MORE: <http://bit.ly/2uKX8G4>

<https://www.facebook.com/AmericanMadeMatters/>

8/29/2017  
Exhibit K  
p. 2 of 6

Complaint

American Made Matters - Home | Facebook

The screenshot displays three posts from the 'American Made Matters' Facebook page. The top post features a photograph of a person's legs wearing dark pants, with a large, colorful, multi-colored K'NEX structure attached to the back. The K'NEX logo is visible in the bottom left corner of the image. Below the image, the post shows '808 Views', 'Like', 'Comment', and 'Share' buttons, and a list of users who liked the post, including 'RodenGroup RQ, Lisa Ward Eilers, Sheryl Delp and 34 others like this.' A single share is attributed to 'Joe Portz Tyler Givens' on August 27 at 8:17pm.

The middle post is a text-based announcement from 'American Made Matters' dated August 27 at 8:46am. It reads: 'Join our American Made movement!' followed by social media icons for Facebook, Twitter, and LinkedIn, and the website 'AmericanMadeMatters.com'. Below the text is a large graphic with a dark blue background. At the top of the graphic is the 'AMERICAN MADE Matters' logo, which consists of a red circle with 'AMERICAN MADE' in white and 'Matters' in a white script font. Below the logo, the text 'JOIN THE MOVEMENT!' is written in white capital letters.

The bottom post is another text-based announcement from 'American Made Matters' dated August 26 at 8:31pm. It reads: 'Keep our jobs here. Choose to buy #madeinUSA. Discover #AmericanMade products with us.' followed by social media icons and the website 'AmericanMadeMatters.com'.

<https://www.facebook.com/AmericanMadeMatters/>

8/29/2017  
**Exhibit K**  
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Complaint

American Made Matters - Home | Facebook

The screenshot shows three posts from the 'American Made Matters' Facebook page. The top post features a graphic with the text 'Jobs shipped abroad almost never return. Buy American' over a background of shipping containers. The middle post is a promotional message for '#MadeInUSA toys and games' with a link and a photo of a smiling child next to a 'Made in USA Toys & Games' sign. The bottom post is a short message encouraging users to 'Treat yourself to a #MadeInUSA gift.' Each post includes 'Like' and 'Comment' buttons and a list of users who interacted with the content.

<https://www.facebook.com/AmericanMadeMatters/>

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Complaint

American Made Matters - Home | Facebook

**Made in USA - Belts - American Made Matters**  
 Discover the perfect, quality, made in USA belt from our American Made Matters members. Shop American. Buy American. Keep America strong.  
 AMERICANMADEMATTERS.COM

Like Comment Share

Al Waters, Yoma Ochiai, Difter Japan and 5 others like this.

---

**American Made Matters**  
 August 24 at 8:31pm

Looking for #MadeinUSA? Start your search with #AmericanMadeMatters!  
<http://bit.ly/2z4q38n>



Like Comment

Sheryl Delp, Lori Hainey, Wayne Whitford and 5 others like this.

Share

---

**American Made Matters**  
 August 26 at 8:46am

Head back to school with these #madeinUSA must haves.



10 Back to School Made in USA Must Haves - American Made Matters

<https://www.facebook.com/AmericanMadeMatters/>

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Complaint

American Made Matters - Home | Facebook

Head back to school made in USA style. Shop our 10 made in USA back to school picks now and be the envy of all the seniors.

Like Comment Share

Leslie Modeln and Isabelle Benoit like this

**American Made Matters**  
August 23 at 8:31pm

Choose #AmericanMade whenever possible. Start your search for #madeinUSA products with [uk bit.ly/2w6sRU](http://bit.ly/2w6sRU).



**Why Buying American Strengthens our Independence**  
American Made Matters

Do not hesitate to ask whether a product is American Made. Try not to show caring on price, as local product earnings return back to our economy.

AMERICANMADEMATTERS.COM


Like Comment Share

Brad Seale, Linda Weidenschmidt Tolan, Glenn Farmer and 19 others like this.

3 shares

**American Made Matters**  
August 23 at 8:46am

Spend 5% more on #MadeInUSA products and we can create 1,000,000 jobs! #ChecktheTas #AmericanJobs



Like Comment

<https://www.facebook.com/AmericanMadeMatters/>

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## Decision and Order

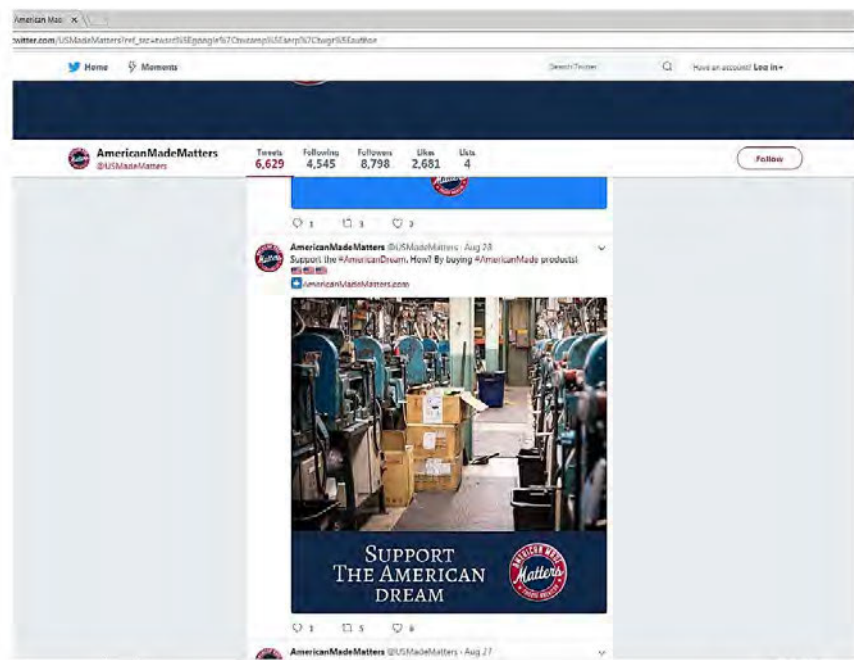
**Exhibit L**

Exhibit L

**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) a statement by Respondents that they neither admit nor deny any of the allegations in the Complaint,

## Decision and Order

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 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 Respondents are:
  - a. Respondent Bollman Hat Company is a Pennsylvania company with its principal office or place of business at 110 East Main Street, Adamstown, Pennsylvania 19501.
  - b. Respondent SaveAnAmericanJob, LLC is a Pennsylvania limited liability company with its principal office or place of business at 110 East Main Street, Adamstown, Pennsylvania 19501. SaveAnAmericanJob, LLC is a wholly owned subsidiary of Bollman Hat Company.
  - c. Bollman Hat Company and SaveAnAmericanJob, LLC jointly do business as American Made Matters, a Pennsylvania fictitious name.
2. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

## Decision and Order

**ORDER****Definitions**

For purposes of this Order, the following definitions apply:

- A. “Certification Standard” means any independently-developed and objectively-applied criteria Respondents set for products or services to meet in order to use Respondents’ Certification or other marketing or promotional material, including Respondents’ “American Made Matters” materials, which substantiate the claim being made.
- B. “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.
- C. “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.



## Decision and Order

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.
- D. “Made in the United States” means any representation, express or implied, that a product or service, or a component thereof, is of U.S.-origin, including, but not limited to, a representation that such product or service is “made,” “manufactured,” “built,” or “produced” in the United States, or any other U.S.-origin claim.
- E. “Material Connection” shall mean any relationship that materially affects the weight or credibility of Respondents’ Certification, and that would not be

## Decision and Order

reasonably expected by consumers, provided that a reasonable certification fee shall not constitute a Material Connection.

- F. “Respondents” means Bollman Hat Company, also d/b/a American Made Matters, SaveAnAmericanJob, LLC, also d/b/a American Made Matters, and their successors and assigns, individually, collectively, or in any combination.

**Provisions****I.****PROHIBITED MISREPRESENTATIONS REGARDING  
U.S. ORIGIN CLAIMS**

**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 hat, or any other product or service, must not make any representation, expressly or by implication, that a product or service is Made in the United States unless:

- A. The final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; or
- B. A Clear and Conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing.

## Decision and Order

**II.**  
**DISCLOSURE OF MATERIAL CONNECTION**

**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 labeling, advertising, promotion, offering for sale, or sale of any product, package, certification, service, practice, or program, must not make any representation, in any manner, expressly or by implication, about any user or endorser of such product, package, Certification, service, practice, or program unless Respondents disclose, Clearly and Conspicuously, and in close proximity to the representation, any Material Connection, when one exists, between such user or endorser and (1) Respondents or (2) any other individual or entity affiliated with the product or service.

**III.**  
**PROHIBITED MISREPRESENTATIONS REGARDING  
CERTIFICATIONS**

**IT IS FURTHER ORDERED** that Respondents, Respondents' officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with marketing, promoting, offering for sale, or selling any product, good, or service, are permanently restrained and enjoined from representing, expressly or by implication, that a product or service meets Respondents' Certification Standard, unless:

- A. An entity with no Material Connection to Respondents or any company, group, or other association that Respondents authorize to use any "American Made Matters" Certification or other marketing or promotional material has conducted an independent and objective evaluation, audit, or verification check to confirm that the product or service meets the Certification Standard; or

## Decision and Order

- B. Respondents' Certification or any other promotional materials clearly and prominently disclose(s) that products or services may meet Respondents' Certification Standard through self-certification.

**IV.  
SUBSTANTIATION**

**IT IS FURTHER ORDERED** that Respondents, Respondents' officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any product or service, shall not make any representation, in any manner, expressly or by implication, regarding the country of origin of any product or service unless:

- A. The representation is true, not misleading, and at the time it is made, Respondents possess and rely upon a reasonable basis for the representation; or
- B. For representations made through use of Respondents' Certification or other "American Made Matters" materials, the Certification and related promotional materials clearly and prominently disclose that products or services may meet Respondents' Certification Standard through self-certification, and Respondents neither know nor should know that the self-certification is misleading.

**V.  
MEANS AND INSTRUMENTALITIES**

**IT IS FURTHER ORDERED** that Respondents, Respondents' officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any product, good, or service, shall not provide to others the means and instrumentalities with which to make any representation prohibited by Parts I, III, or IV above. For the

## Decision and Order

purposes of this Part, “means and instrumentalities” means any information, including, but not necessarily limited to, any Certification, advertising, labeling, promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any product or service.

**VI.****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 20 years after the issuance date of this Order, each 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.

**VII.****COMPLIANCE REPORT AND NOTICES**

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

## Decision and Order

- A. One year after the issuance date of this Order, each Respondent must submit a compliance report, sworn under penalty of perjury, in which 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; (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.
- B. Each 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 any 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. 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,

## Decision and Order

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 Bollman Hat Company, Docket No. C-4643.

**VIII.**  
**RECORDKEEPING**

**IT IS FURTHER ORDERED** that Respondents 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, each Respondent must create and retain the following records:

- A. Accounting records showing the revenues from all goods or services sold;
- B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person’s: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;
- C. Copies or records of all consumer complaints and refund requests concerning the subject matter of the Order, whether received directly or indirectly, such as through a third party, and any response;

## Decision and Order

- D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;
- E. A copy of each unique advertisement or other marketing material making a representation subject to this Order; and
- F. For 5 years from the date of the last dissemination of any representation covered by this Order:
  - 1. All materials that were relied upon in making the representation; and
  - 2. All evidence in Respondent's possession, custody, or control that contradicts, qualifies, or otherwise calls into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

**IX.**  
**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



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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.

**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 April 12, 2038, 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

## Analysis to Aid Public Comment

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 Bollman Hat Company and SaveAnAmericanJob, LLC, jointly d/b/a American Made Matters (“respondents”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (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 respondents’ marketing, sale, and distribution of hats with claims that the products are of U.S.-origin, and respondents’ marketing, sale, and distribution of memberships in their “American Made Matters” (“AMM”) program to companies wishing to make U.S.-origin claims for their products.

According to the FTC’s complaint, respondents represented that their products are “Made in USA.” In fact, many of the respondents’ hats are wholly imported, and others contain significant imported content. Therefore, this representation was false or misleading.

## Analysis to Aid Public Comment

The complaint further alleges that the AMM seal represents by implication that respondents' products have been endorsed or certified by an independent third party. AMM, however, is a fictitious name for respondents, who created the AMM seal and use it in connection with the sale of their own products. Therefore, these representations were false or misleading.

The complaint next alleges that respondents made implied claims that products and entities using their AMM seal were independently and objectively evaluated for compliance with respondents' certification standard. These claims were false or misleading.

Finally, the complaint alleges that respondents claimed that all AMM members sell products that are all or virtually all made in the United States. Because respondents awarded the AMM certification to any company that self-certified that at least 50% of the cost of one of their products was incurred in the United States, with final assembly or transformation in the United States, this claim was false or misleading, or unsubstantiated at the time it was made.

Based on the foregoing, the complaint alleges that respondents engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future. Consistent with the FTC's Enforcement Policy Statement on U.S. Origin Claims, Part I prohibits respondents from making U.S.-origin claims for their products unless either: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; or (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing.

## Analysis to Aid Public Comment

Part II prohibits respondents from making any representation about any user or endorser of any product, package, certification, service, practice, or program, unless respondents disclose clearly and conspicuously any material connection between a user or endorser and (1) respondents or (2) any other individual or entity affiliated with the product or service.

Part III prohibits respondents from representing, expressly or by implication, that a product or service meets respondents' certification standard, unless: (1) an entity with no material connection to that covered entity conducted an independent and objective evaluation to confirm that the certification standard was met; or (2) respondents' certification and marketing materials disclose clearly and conspicuously that the certification standard may be met through self-certification.

Part IV prohibits respondents from making any country-of-origin claim about a product or service unless the claim is true, not misleading, and respondents have a reasonable basis substantiating the representation. In the alternative, for country-of-origin representations made through AMM marketing materials, respondents may make such claims if (1) they neither know or have reason to know that the self-certification is misleading, and (2) disclose clearly and prominently that products or services meet the certification standard through self-certification.

Part V prohibits respondents from providing third parties with the means and instrumentalities to make the claims prohibited in Parts I, III, or IV.

Parts VI through IX are reporting and compliance provisions. Part VI requires respondents to acknowledge receipt of the order, to provide a copy of the order to certain current and future principals, officers, directors, and employees, and to obtain an acknowledgement from each such person that they have received a copy of the order. Part VII requires the filing of compliance reports within one year after the order becomes final and within 14 days of any change that would affect compliance with the order. Part VIII requires respondents to maintain certain records, including records necessary to demonstrate compliance with the

*Analysis to Aid Public Comment*

order. Part IX requires respondents to submit additional compliance reports when requested by the Commission and to permit the Commission or its representatives to interview respondents' personnel.

Finally, Part X is a "sunset" provision, terminating the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

Complaint

IN THE MATTER OF

**TELOMERASE ACTIVATION SCIENCES, INC.  
AND  
NOEL THOMAS PATTON**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SECTIONS 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4644; File No. 142 3101  
Complaint, April 18, 2018 – Decision, April 18, 2018*

This consent order addresses Telomerase Activation Sciences, Inc.'s advertising for TA-65MD, a product that comes in capsule and powder forms, and TA-65 for Skin, a topical cream product. The complaint alleges that respondents violated Sections 5(a) and 12 of the FTC Act by making false or unsubstantiated health or performance claims regarding TA-65MD and TA-65 for Skin. The complaint further alleges that respondents represented that a 2012 paid-for segment on *The Suzanne Show* featuring TA-65MD was independent, educational programming and not paid commercial advertising and that consumers appearing in advertisements were independent users of TA-65MD, expressing their impartial views of satisfaction. The consent order prohibits any representation that a covered product reverses human aging; prevents or repairs DNA damage; restores aging immune systems; increases bone density; reverses the effects of aging, including improving skin elasticity, increasing energy and endurance, and improving vision; decreases recovery time of the skin after medical procedures; prevents or reduces the risk of cancer; or cures, mitigates, or treats any disease unless the representation is non-misleading and respondents possess and rely upon competent and reliable scientific evidence that substantiates that the representation is true.

*Participants*

For the *Commission*: Devin W. Domond, David P. Frankel, Mary Johnson, and Andrew Wone.

For the *Respondents*: Leonard L. Gordon, Michelle C. Jackson, Kristen Klesh, Claudia A. Lewis, and Brian M. Likins, Venable, LLP.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Telomerase Activation Sciences, Inc. ("TAS"), a corporation, and Noel Thomas Patton, individually and as an officer of TAS

### Complaint

(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 Telomerase Activation Sciences, Inc. is a Delaware corporation with its principal place of business at 420 Lexington Avenue, Suite 2900, New York, NY 10170.

2. Respondent Noel Thomas Patton (“Patton”) is the founder, Chairman, CEO, and majority owner of TAS. Individually or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices alleged in this complaint. His principal office or place of business is the same as that of TAS.

3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed products to consumers, including TA-65MD and TA-65 for Skin (“TA-65 Skin”) (collectively “the TA-65 products”). TA-65MD is either a food and/or drug within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. TA-65 Skin is either a drug and/or cosmetic within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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.

### **Respondents’ Business Activities**

5. TA-65MD is a product that comes in both capsule and powder form. Respondents have manufactured, advertised, labeled, offered for sale, distributed, and sold TA-65MD since 2007.

6. TA-65 Skin is a topical cream product. Respondents have manufactured, advertised, labeled, offered for sale, distributed, and sold TA-65 Skin since 2013.

7. The active ingredient in the TA-65 products is a proprietary extract derived from the roots of the *Astragalus*

## Complaint

*membranacious* plant. The extract is chemically known as cycloastragenol.

8. Respondents claim that the active ingredient in the TA-65 products activates an enzyme known as telomerase, which is dormant in most human cells. According to Respondents, activating telomerase lengthens telomeres. Telomeres form the ends of human chromosomes in cells. Sometimes likened to the hard plastic tips at the end of shoelaces that prevent them from fraying, telomeres protect human cells during cell division. Each time a cell divides, its telomeres shorten. When telomeres reach a critically short level, a cell ceases to divide – known as cell senescence. Respondents claim that the TA-65 products activate telomerase, lengthen short telomeres, and, thereby, extend the cellular lifespan of normal cells.

9. Respondents have advertised and marketed TA-65MD through a television infomercial, a paid appearance on *The Suzanne Show*, magazine advertisements, health professional conferences and seminars, trade conferences and shows, TAS-hosted meetings and workshops, online advertisements and websites, email blasts, product packaging, and other promotional materials to consumers, including trade customers for use in other finished products marketed to consumers.

10. Respondents have represented that TA-65MD, among other things, is clinically proven to reverse aging, repair DNA damage, restore aging immune systems, and increase bone density.

11. Respondents have sold TA-65MD through licensees, infomercial call centers, and online retailers (including, but not limited to, Amazon.com, Vita-Stream.com, RevGenetics.com, ChosenMeds.com, and ebay.com).

12. Respondents also have sold TA-65MD powder to their trade customers directly.

13. According to the TAS website ([www.tasciences.com](http://www.tasciences.com)), the retail price of one TA-65MD 90-capsule (250-unit dosage per capsule) bottle is \$600 and of one 30-capsule (100-unit dosage per



### Complaint

capsule) bottle is \$100. According to earlier versions of the website, TA-65MD capsules retailed for the following approximate amounts: \$600 for a three-month supply at a low dose level (one 250-unit capsule daily); \$1,200 for a three-month supply at a mid-dose level (two 250-unit capsules daily); and \$2,200 for a three-month supply at a high-dose level (four 250-unit capsules daily).

14. Respondents have advertised and marketed TA-65 Skin through health professional conferences and seminars, trade conferences and shows, TAS-hosted meetings and workshops, online advertisements and websites, product packaging, and other promotional materials.

15. Respondents have represented that TA-65 Skin, among other things, reverses aging, including through improving skin elasticity, and decreases recovery time of the skin after medical procedures.

16. Respondents have sold TA-65 Skin through licensees and online retailers (including, but not limited to, Amazon.com, myHealthMarket.com, and ebay.com).

17. The retail cost for TA-65 Skin is approximately \$500 for a one fluid ounce bottle and \$1,000 for a four fluid ounce tube.

18. Respondent TAS grossed at least \$56 million in sales for the TA-65 products from 2010 to filing of this Complaint, and sales have been ongoing. TA-65MD accounts for most of these sales.

#### **A. Respondents' Promotion and Sale of the TA-65 Products Through Licensed Persons**

19. Respondents have distributed the TA-65 products through persons that TAS licenses to sell and distribute the products ("TAS Licensee" or "TAS Licensees"). The majority of sales for TA-65MD capsules and TA-65 Skin are through TAS Licensees.

20. Most TAS Licensees are health professionals, including licensed medical doctors.

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21. Respondents sell and distribute the TA-65 products to TAS Licensees at a discount, to then be resold and redistributed to consumers. According to Respondents' advertisements for their licensee program, product discounts for TAS Licensees range from 25 to 45 percent off the retail price.

22. TAS Licensees market, promote, offer for sale, and sell the TA-65 products to consumers through their own online websites and other online websites, including Amazon.com storefronts and ebay.com, and physical storefronts or offices.

23. For example, TAS Licensee Age Reverse, LLC (a New York limited liability company described by Respondents as one of their "biggest USA distributors"), markets and sells TA-65MD capsules and TA-65 Skin to consumers through its websites [www.ta65doctor.com](http://www.ta65doctor.com) and [www.ta-65direct.com](http://www.ta-65direct.com); through its Amazon storefronts ta65doctor, ta-65direct, and TA65DIRECT; and through [www.ebay.com](http://www.ebay.com).

24. Respondents promote the TA-65 products to prospective and actual TAS Licensees at health professional conferences and trade shows, through practitioner-oriented publications, and through other promotional materials. Respondents also have hosted meetings and workshops for health professionals, whose practices often involve aging or general health, to promote the TA-65 products and the TAS Licensee program as a source of ancillary revenue.

25. Respondents also have furnished prospective and actual TAS Licensees copies of their advertising and marketing materials for the TA-65 products and materials purporting to substantiate the products' efficacy.

**B. Respondents' Marketing and Promotion of the TA-65 Products to the General Public**

26. In 2012, Respondents paid \$89,900, in addition to in-kind compensation of approximately twelve TA-65MD 90-capsule bottles, for celebrity Suzanne Somers to promote TA-65MD on *The Suzanne Show*, which aired on Lifetime Television. Ms. Somers was the show's host and one of the show's producers.

## Complaint

27. Ms. Somers introduced the paid-for segment on *The Suzanne Show* featuring TA-65MD as an “ask the experts” segment, which was styled as an educational interview of Respondent Patton and Dr. Edward Park, a purported medical expert, who was also a TAS Licensee. During the interview, Respondent Patton and Dr. Park discussed purported health benefits of TA-65MD and directed consumers to the TAS website ([www.tasciences.com](http://www.tasciences.com)). There was no indication to viewers that this segment was a paid advertisement.

28. Respondents also provided free TA-65MD 90-capsule bottles, on a quarterly basis, to another producer of *The Suzanne Show* from 2012 until, at least, the end of 2013. The total value of monetary and in-kind compensation that Respondents paid the show’s producers until January 2014 was approximately \$113,900. Respondents also provided discounted TA-65 products to producers of *The Suzanne Show*.

29. In addition to the paid-for segment on *The Suzanne Show* promoting TA-65MD, TA-65MD was featured in website advertisements and other promotional materials promoting *The Suzanne Show* segment.

30. Respondents also marketed the TA-65 products in an infomercial, released in 2014, for TA-65MD (“TAS infomercial”).

31. The TAS infomercial included consumer endorsers discussing health benefits they purportedly experienced due to their use of TA-65MD. Video clips of and quoted language from these consumer endorsements have appeared on Respondents’ website. Respondents provided thousands of dollars of free TA-65MD products to the consumer endorsers appearing in the TAS infomercial and other promotional materials. For example, Respondents provided eight TA-65MD 90-capsule bottles, valued at approximately \$4,000 total, to each consumer endorser featured in the TAS infomercial.

32. Respondents did not disclose, or did not disclose adequately, in advertisements or other promotional materials featuring consumer endorsers, including the 2014 TAS

## Complaint

infomercial, that they provided thousands of dollars of TA-65MD to consumer endorsers at no cost.

33. The TAS infomercial featured endorsements by medical professionals or “experts” discussing health benefits purportedly experienced by TA-65MD users, such as the medical professionals’ patients and themselves. Video clips of and quoted language from the TAS infomercial also appeared on Respondents’ website.

**C. Respondents’ Promotion and Sale of TA-65MD Powder to Trade Customers for Use in Other Finished Products**

34. Respondents market, promote, and offer for sale TA-65MD powder to trade customers for use in the trade customers’ finished products.

35. Respondents have furnished prospective trade customers copies of their advertising and marketing materials for TA-65MD and materials purporting to substantiate TA-65MD’s efficacy, including materials targeting prospective TAS Licensees. One or more of Respondents’ trade customers have used these materials to market TA-65MD powder to consumers nationwide and abroad.

36. For example, Respondents’ trade customer Jeunesse, LLC (a Florida limited liability, multi-level marketing company) has used Respondents’ materials to produce promotional materials for its product Finiti™, a product sold in capsule form that contains TA-65MD powder as a purported active ingredient. Online advertising and product packaging for Finiti contains the mathematical symbol for infinity ( $\infty$ ) and the tag line “Aging Ends Here.”

37. Respondents also have provided other services to their trade customers to assist in marketing TA-65MD powder to consumers nationwide and abroad. For example, Respondents have provided technical, clinical, and marketing support to their trade customers, including making Respondent Patton or other TAS representatives available to speak at trade customers’ events.

### Complaint

In addition, Respondents have reviewed the formulation of and advertisements for their trade customers' products prior to dissemination to consumers.

#### **D. Individual Respondent**

38. Among other things, Respondent Patton has created, reviewed, edited, and approved advertisements, packaging, and promotional materials for the TA-65 products. He has been involved actively in developing and reviewing advertising claims for the TA-65 products, including the advertising claims set forth in this Complaint. In addition, Respondent Patton has marketed the TA-65 products at conferences and seminars, making presentations about the products' purported benefits. As part of a paid-for segment on *The Suzanne Show* promoting TA-65MD, Ms. Somers interviewed Respondent Patton. Respondent Patton also appeared in the TAS infomercial.

39. Respondent Patton has reviewed and approved advertisements, packaging, and promotional materials for products manufactured by Respondents' trade customers containing TA-65MD powder. Respondent Patton has promoted TA-65MD powder when marketing products manufactured by Respondents' trade customers at trade customers' events. Moreover, Respondent Patton has been responsible for reviewing the scientific materials that purportedly substantiate claims for the TA-65 products.

#### **E. Examples of Advertisements, Packaging, and Other Promotional Materials**

40. To induce prospective and actual TAS Licensees to purchase the TA-65 products for distribution, Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the TA-65 products and Respondents' Licensee program, including, but not necessarily limited to, those attached as Exhibits A through D. These advertisements contain the following statements and depictions:

## Complaint

a. **TA-65MD Health Professional's Brochure FTC-TAS0053507-18 (Exhibit A)****To Meet the Challenges of Aging****OUR MISSION IS YOUR MISSION:**

*Our mission is to minimize the decline associated with aging and maximize the potential for health and longevity through Telomerase Activation*

**TA<sup>65</sup>®**

- **Safe and efficacious with over 5 years of testing**
- **Only available through physicians trained and licensed by T.A. Sciences.**

**Short Telomeres are associated with unhealthy aging and a shorter lifespan**

...

Short Telomeres have been associated with maladies in these tissues:

- Immune cells – memory and naïve
- Heart – cardiomyocytes
- Hematopoietic stem cells
- Lung alveolar cells
- Skin – dermis, epidermis, vasculature
- Vascular intima (endothelium)
- Osteoblasts, MSCs
- Liver – hepatocytes
- Retinal pigmented tissue of eye
- Chondrocytes
- Skeletal muscle
- Kidney – cortex
- Neurons

...

**People currently taking TA-65 have seen the following results:\***

...

## Complaint

- **Improved Immune system:** In particular, the % and absolute number of senescent CD8+/28- cells has significantly decreased. This is a reversal of what normally happens with age.
- **Improved bone density**
- **Improved cardiovascular and hormonal biomarkers** that normally show decline with age.
- There are also anecdotal results, such as **improved energy and athletic performance**, but these effects are not universal and vary among individuals.

*\*Human trial results substantiating these claims to be published soon in a peer-reviewed scientific journal*

...

**How to become a T.A. Sciences licensee?**

1. The physician must sign the Licensee Agreement.
2. There is a one time \$1,000 Administrative Fee that covers licensee set up, marketing support and operations support.
3. The physician must study the Doctor's Manual and pass the Telomere, Telomerase and **TA<sup>65</sup>** basic knowledge exam.
  - Your practice will then have the ability to purchase the products – **TA<sup>65</sup>** and Support Packs, along with Telomere Length and Specialized Immunology tests at licensee discount rates.
  - **TA<sup>65</sup>** profit for the doctor is \$2000 per client per year.
  - Cash Flow positive for the licensee: No investment in **TA<sup>65</sup>** inventory is required. Patients pay for **TA<sup>65</sup>** before you have to pay TA Sciences.

## Complaint

- Set your practice apart by offering the only scientifically proven Telomerase Activator in the world to your patients, TA<sup>65</sup>

b. **Health Practitioner Magazine Advertisement FTC-TAS0043860 (Exhibit B)**



**Add Nobel Prize Technology**

to your Practice

TA<sup>65</sup><sub>MD</sub>

Cell Rejuvenation

**Through Telomerase Activation**

...

- Repairs DNA Damage
- Rejuvenates Aging Immune Systems
- Increases Bone Density
- Improves Biomarkers that Decline With Age

c. **TAS Licensee Program Advertisement FTC-TAS0065578 (Exhibit C)**

**T.A. SCIENCES**

**CELL REJUVENATION THROUGH  
TELOMERASE ACTIVATION**

**Right now is the best time to start providing the world's most unique anti-aging supplement.**

**It is now FREE and EASY to sign up and become a TA-65<sup>MD</sup> Licensee.**

TA-65<sup>MD</sup> is the world's only proven telomerase activator with in vivo studies to show efficacy and safety.



### Complaint

Telomerase activation is the most effective way to lengthen short telomeres and to combat age related dysfunctions.

In addition, TA-65<sup>®</sup>MD has proven to rejuvenate the immune system and increase bone density.

As a Licensee, you will receive discounts for each bottle. The savings range between 25% to almost 45%. Our Licensees value TA-65<sup>®</sup>MD not only for the health benefits to their patients, but for the significant increase of revenue for their practice.

Customers have reported several amazing **anecdotal benefits which include:**

- **increased energy and endurance**
- **better joint movements**
- **improved sleep**
- **more youthful skin** (age spots going away, dry patches disappearing, wrinkles smoothening)
- **improved strength and flexibility**
- **sharper memory**
- **sexual enhancement**

When you sign up to **become a Licensee**, you will receive the TA-65<sup>®</sup>MD Manual and Test to learn more about the product. To help with sales, you receive free marketing material to share with your staff and patients, a dedicated website for online orders and of course a discount on every bottle you order!

Call us today to learn how you can become a TA-65<sup>®</sup>MD Licensee and start generating more revenue for your practice!

Request a TA-65<sup>®</sup>MD Licensee Agreement by phone or email:

**212-588-8805 or sales@tasciences.com.**

## Complaint

d. **TA-65MD and TA-65 Skin physician conference  
flier FTC-TAS0059953 (Exhibit D)****Cellular Aging Stops Here**

**Inside every cell of your body, there is a powerful clock ticking away. It's telling your body to age, wrinkle, gray, and slow down.**

That clock is your telomeres, the caps at the end of each strand of DNA that protect it, like the plastic tips at the end of shoelaces.

**Telomeres shorten over time, leaving your DNA vulnerable to damage and causing your cells to age.** But now, there is a groundbreaking new way to help slow down, or possibly even reverse, age and lifestyle related telomere shortening.

**Based on Nobel Prize winning science,** TA-65<sup>®</sup> – a proprietary, all natural plant-based compound – can help maintain or rebuild telomeres.

TA-65<sup>®</sup> is available from T.A. Sciences<sup>®</sup> as TA-65MD<sup>®</sup> nutritional supplements, or in a new skin cream formulation.

41. To induce consumers to purchase the TA-65 products, including trade customers and TAS Licensees who distribute the TA-65 products to consumers, Respondents have disseminated or have caused to be disseminated advertisements, packaging, and promotional materials for the TA-65 products, including, but not necessarily limited to, those attached as Exhibits E through O. These advertisements contain the following statements and depictions:

## Complaint

- a. **Paid-for TA-65 segment on *The Suzanne Show*, DVD and transcript (Exhibits E and F, respectively)**

**ON SCREEN:** ask the experts

**SUZANNE SOMERS:** All right, I'm going to ask you a sensitive question. How old are you? Well, the fact is most of us don't really know because there are two answers. There's your calendar age - - that's the birthday you celebrate every year - and then there's the age of your body's individual cells. And your cells may be much younger or older than your actual years. The exciting new science of telomere biology is showing us how to not only determine our cellular age, but how to actually reverse - I say it again - reverse the aging process. My guests today are Noel Thomas Patton, founder of T.A. Sciences, and Dr. Ed Park, an expert in telomeres. Welcome, both of you.

**NOEL PATTON:** Glad to be here.

**SUZANNE SOMERS:** Well, you know, I know both of you very well because I interviewed you, Noel Patton, for my book, *Bombshell*, because I was so fascinated about telomeres. Is your product - it's a supplement called TA65 - is this the fountain of youth?

(4:4-24)

...

**ON SCREEN:** Dr. Ed Park, MD, MPH  
Telomere and Telomerase  
Expert

(6:10-11)

...

## Complaint

**SUZANNE SOMERS:** Inside the cell, these Nobel Prize winners discovered that there's an enzyme called?

**DR. ED PARK:** Right, telomerase.

**SUZANNE SOMERS:** Telomerase.

**DR. ED PARK:** So, it literally is the oldest trick in the book. . . . All plants and animals on earth require it to keep their stem cells young. So, this is always on and the thing that TA65 does is it just gives it better gasoline so it operates at higher efficiency. Now, the good news is you can do telomerase activation naturally by meditating, by going to the gym, by eating well, sleeping, but if you don't have time or the disposition, now we have a supplement that can safely turn up that healing.

(7:15 – 8:5)

...

**SUZANNE SOMERS:** But, well, does TA65 strengthen the immune system?

**NOEL PATTON:** It absolutely does. That's one of the key things that we do. As we get older, our immune system is deteriorating and everybody knows it intuitively.

**SUZANNE SOMERS:** Right.

**NOEL PATTON:** But you can measure that. There's a test – a blood test done at UCLA's immunology laboratory that shows how your immune system is aging. . . . And we measure that with people that have – they do a blood test. The same thing, as you're getting older, you have more and more cancer cells. . . . See, we all have cancer

## Complaint

cells, even when we're young. . . . But our immune system kills them. . . . So, if those two lines cross . . . we get cancer and we die, one third of us die. So, what we're doing is we rejuvenate the immune system, turn that curve -- that line down -- . . . -- put it back up hoping to keep it above the cancer line. And if it is kept above the cancer line, you won't -- you wouldn't get cancer, your immune system would kill the cancer cells before they kill you.

. . .

**NOEL PATTON:** Our website is [tasciences.com](http://tasciences.com).

**ON SCREEN:** [www.tasciences.com](http://www.tasciences.com)

**SUZANNE SOMERS:** Very interesting stuff. Thank you, Dr. Park. Thank you, Noel, for coming. . . .

(9:6 – 11:13)

b. **TA-65 infomercial, DVD and transcript (Exhibits G and H, respectively)**

**ON SCREEN:** ACTUAL TA65 CUSTOMERS

**BEFORE AND AFTER PHOTOS**

**MALE ANNOUNCER:** Some studies have shown how this amazing discovery could help support immune health and even reverse measurable, obvious effects of cellular aging. Too good to be true? Watch and decide for yourself. . . .

(7:22 - 8:3; *see also* 35:14-18; 43:22 – 44:1)

. . .

## Complaint

**MALE ANNOUNCER:** . . . Join investigative journalist and former CNN anchor . . . Kathleen Kennedy as she sits with the premier experts in anti-aging science and debunks the myths, discovers the truth and reveals the secrets you need to know. . . .

**KATHLEEN KENNEDY:** A growing new body of evidence is shattering long-held beliefs about aging and it's creating quite a controversy. Today we are going to talk to some of the world's leading edge scientists that work in the private sector developing the science that they say promises to change your life. . . .

**ON SCREEN:** Calvin B. Harley, Ph.D.  
PRESIDENT & CSO,  
TELOME HEALTH, INC.

**KATHLEEN KENNEDY:** My guests are Dr. Cal Harley, Ph.D. and expert on cellular regeneration and telomeres.

**ON SCREEN:** Dr. Joseph Raphaele [*sic*],  
M.D.  
CO-FOUNDER, PHYSIO-AGE  
MEDICAL GROUP

**KATHLEEN KENNEDY:** Dr. Joseph Raphaele [*sic*], a Princeton graduate and internal medicine expert with a leading anti-age practice, Physio-Age, right here in Manhattan.

**ON SCREEN:** Noel Patton  
CEO AND FOUNDER OF T.A.  
SCIENCES®

**KATHLEEN KENNEDY:** Noel Patton, CEO of T.A. Sciences and producer of TA65, a natural telomerase activating supplement.

## Complaint

**ON SCREEN:** Dr. Ed Park, MD, MPH  
AUTHOR: “TELOMERE  
TIMEBOMBS”

**KATHLEEN KENNEDY:** And longevity expert  
and private practicing anti-aging physician,  
Edward Park, from Orange County, California.

(8:3 – 10:3)

...

**ON SCREEN:** Bill Wismann, Age 58  
Taking TA65 for 4 months  
These results are atypical and  
other consumers may not  
achieve such results.

**BILL WISMANN:** I’ve noticed that not only am  
I healthier, but I’m not catching the cough that,  
you know, my wife or my son or others around me  
are getting. My condition is just a healthier one  
and I have more energy.

**ON SCREEN:** Carol Wayne, Age 74  
Taking TA65 for 1 year  
These results are atypical and  
other consumers may not  
achieve such results.

**CAROL WAYNE:** TA65 is such a great product.  
It makes your whole body healthier and stronger  
and more energetic.

(14:17 - 15:6)

...

**MALE ANNOUNCER:** But only TA65 has been  
shown to activate telomerase which starts life’s  
most important cellular anti-aging chain reaction. .

## Complaint

. . . Some studies have shown how this amazing discovery could help support immune health and even reverse measurable obvious effects of cellular aging. Why wait one more minute when the clock is ticking?

(23:9-19)

...

**ON SCREEN:** Carol Wayne, Age 74  
Taking TA65 for 1 year

**CAROL WAYNE:** At my age, at 74, I want to enjoy the time I have left, whatever that is. I want to have as much vitality and energy as I can possibly get. . . . And I find that with the TA65, I have the energy that I want and I need to do all the things I like to do. I like to travel. It helps with my quality of life.

(29:14-24)

...

**NOEL PATTON:** Well, I was looking for a solution to aging for myself and discovered TA65. We've been working on it for ten years. And it works for me, it's worked for my family, my friends, loved ones, and now for tens of thousands of people, and we've made it affordable and accessible to everyone, and I'm really proud to be at the beginning of this revolution in science.

(42:8-15)

c. **TA-65MD Product Packaging (30 capsules) FTC-TAS0007347 (Exhibit I)**

Front Panel:

Telomerase Activation works on



## Complaint

targeted cells in your body and  
can improve your quality of life!

**TA65<sup>®</sup>MD**  
**CELL**  
**REJUVENATION**  
THROUGH  
TELOMERASE  
ACTIVATION<sup>™</sup>

...

- **Helps Prevent DNA Damage**
- **Rejuvenates Aging Immune Systems**



**Nobel Prize Technology**

Side Panel:**ROOT CAUSE OF AGING**

- As we age our telomeres shorten
- Scientific studies have shown that short telomeres are associated with age related decline and dysfunction
- Evidence also clearly shows that people with long telomeres age healthier and live longer
- The only way to lengthen telomeres is through the activation of an enzyme called telomerase
- Currently the only way to activate telomerase is to take **TA-65<sup>®</sup>MD**

d. **TA-65 Patient Brochure FTC-TAS0043861-62**  
**(Exhibit J)**

...

**TA-65<sup>®</sup>MD is proven to:**

...

## Complaint

- ✓ **Restore an aging immune system**
- ✓ **Increase bone density**
- ✓ **Improve various biomarkers that usually decline with age**

**Our clients report anecdotal benefits such as:**

- ✓ **Increased energy**
- ✓ **Improved endurance**
- ✓ **Vision improvements**
- ✓ **Enhanced libido**
- ✓ **Better skin elasticity**
- ✓ **and more . . .**

e. **TA-65 Patient Poster FTC-TAS0005116  
(Exhibit K)**

**Can we age healthier and live longer?**

**What's the key to aging healthy and living longer?**

**Telomeres!**

. . .

**TA-65MD is proven to:**

. . .

Restore an aging immune system

Increase bone density

Improve various biomarkers that usually decline with age.

**Our clients report anecdotal benefits, such as:**

Increased energy

Improved endurance

Vision improvements

Enhanced libido

Better skin elasticity

and more . . . .

## Complaint

...

**Ask your physician if you can benefit from anti-aging therapy with TA-65.**

- f. **TA-65MD Coupon Advertisement FTC-TAS0053232 (Exhibit L)**



**TA-65<sup>®</sup> Is the first product to emerge from Nobel Prize winning science, focused on improving your health and quality of life.**

TA<sup>65</sup> is the world's only telomerase activator proven in published studies to safely lengthen critically short telomeres, prevent DNA damage, and restore an aging immune system. TA-65 has been shown to increase bone density and improve various biomarkers which usually decline with age.

...

Visit [www.tasciences.com](http://www.tasciences.com) or call us at 212-588-8805

- g. **TAS website excerpts, January 24, 2014 (Exhibit M)**

**TA-65 Dosing Guideline**

The statistics showing TA-65's efficacy in the ground breaking scientific paper published Sept. 8, 2010 in the peer-reviewed scientific journal *Rejuvenation Research* allows [*sic*] us to offer different dosing options. . .

1. **250 units (1 capsule daily)** is efficacious for healthy adults in their 40's or 50's. . . . Clients who took this dose were shown to have increased short telomere length and significantly improved

## Complaint

immune system function. There are also anecdotal reports of increased endurance and other benefits.

...

2. **500 units (2 capsules daily)** has been proven to lengthen short telomeres, restore the immune system, and improve other important bio markers [*sic*]. Anecdotal reports included increased energy, endurance, vision improvements, sexual enhancement, and more. . . .

3. **1000 units (4 capsules daily)**

...

It is expected that this dose will give an increased benefit over the lower doses (although not a proportional benefit). Study subjects experienced lengthened telomeres, restoration of weak immune systems, bone density improvements and other important bio marker [*sic*] improvements which usually decline with age. Anecdotal reports include energy increase, endurance, cognitive improvements, improved vision, sexual enhancement, and an overall feeling of well being [*sic*].

h. **TAS website excerpts, December 1, 2014  
(Exhibit N)**

**New Products**

T.A. Sciences® is dedicated exclusively to creating research-based, clinically tested wellness products that help address cellular aging through the science of Telomerase Activation. Built upon a foundation strongly grounded in scientific evidence, T.A. Sciences® is widely recognized as the leader in the field of Telomere Biology.

## Complaint

...

**TA-65<sup>®</sup> for Skin**

...

TA-65MD<sup>®</sup> nutritional supplements have been shown to improve skin elasticity and decrease the amount of time it takes skin to recover after a procedure. Due to the large number of requests from physicians and customers for a TA-65<sup>®</sup> product that can be applied directly to particular areas of the skin, the company added topical formulation development to its research plan. After conducting three-dimensional modeling, in-vitro, and in-vivo studies on a variety of formulations, T.A. Sciences<sup>®</sup> developed its first topical product, TA-65<sup>®</sup> for Skin.

TA-65<sup>®</sup> for Skin is available now. . . .

i. **TAS Facebook page excerpts, December 3, 2014 (Exhibit O)**

T.A. Sciences  
September 22[, 2014]

Did you know that human skin is the largest organ in the body? There are about 19 million skin cells in every inch of the body! TA-65<sup>®</sup> for Skin may improve skin elasticity and recovery time post-procedure!

For more info, call 888-360-8886 or email [info@tasciences.com](mailto:info@tasciences.com) today!

...

T.A. Sciences  
March 4, 2013

## Complaint

Another happy customer placed an order for TA-65 today. She said both her husband's and her hands have less wrinkles than they did when they started taking TA-65--only a month and a half ago!

...

T.A. Sciences  
February 25, 2013

It doesn't really matter what time of day you take your TA-65. Here are a few things our customers have reported to us:

Taking TA-65 in the morning: Customers have reported having more energy throughout the day, being more productive, and having more endurance. . . .

...

T.A. Sciences  
November 1, 2012

Your cells are on a timer - one that's running out. Learn how you can modify cells to literally reverse the aging process.

**Count I**  
**False or Unsubstantiated Efficacy Claims**

42. Through the means described in Paragraphs 40 and 41, Respondents have represented, directly or indirectly, expressly or by implication, that:

- a. TA-65 products reverse aging;
- b. TA-65MD prevents and repairs DNA damage;
- c. TA-65MD restores aging immune systems;

## Complaint

- d. TA-65MD increases bone density;
- e. TA-65MD reverses the effects of aging, including improving skin elasticity, increasing energy and endurance, and improving vision;
- f. TA-65MD prevents or reduces the risk of cancer;
- g. TA-65 Skin reverses the effects of aging, including improving skin elasticity; and
- h. TA-65 Skin decreases recovery time of the skin after medical procedures.

43. The representations set forth in Paragraph 42 are false or misleading, or were not substantiated at the time the representations were made.

**Count II**  
**False Establishment Claims**

44. Through the means described in Paragraphs 40 and 41, Respondents have represented, directly or indirectly, expressly or by implication, that TA-65MD is clinically or scientifically proven to:

- a. Reverse aging;
- b. Prevent and repair DNA damage;
- c. Restore aging immune systems; and
- d. Increase bone density.

45. In fact, TA-65MD is not clinically or scientifically proven to reverse aging; prevent and repair DNA damage; restore aging immune systems; and increase bone density. Therefore, the representations set forth in Paragraph 44 are false or misleading.

Complaint

**Count III**  
**Deceptive Format**

46. Through the means described in Paragraphs 26-29 and 41(a), Respondents have represented, directly or indirectly, expressly or by implication, that the 2012 paid-for segment on *The Suzanne Show* featuring TA-65MD was independent, educational programming and not paid commercial advertising.

47. In fact, the 2012 paid-for segment on *The Suzanne Show* featuring TA-65MD was not independent, educational programming and was paid commercial advertising. Therefore, the representation set forth in Paragraph 46 is false or misleading.

**Count IV**  
**Deceptive Failure to Disclose Material Connections with  
Consumer Endorsers**

48. Through the means described in Paragraphs 30-32 and 41, Respondents have represented, directly or indirectly, expressly or by implication, that consumers appearing in advertisements and promotional materials for TA-65MD, including the TAS infomercial, are satisfied users of TA-65MD expressing their views about the product.

49. In instances in which Respondents have made the representation set forth in Paragraph 48, Respondents have failed to disclose, or failed to disclose adequately, that certain of those individuals had material connections with Respondents. Respondents provided the consumer endorsers in-kind compensation, specifically, thousands of dollars of free TA-65MD. These facts would be material to consumers in their evaluation of the user reviews in connection with their purchase or use decisions regarding TA-65MD.

50. Respondents' failure to disclose, or disclose adequately, the material information described in Paragraph 49, in light of the representation described in Paragraph 48, is a deceptive act or practice.



## Complaint

**Count V  
False Independent Users Claims**

51. Through the means described in Paragraphs 30-32 and 41, Respondents have represented, directly or indirectly, expressly or by implication, that consumers appearing in advertisements and promotional materials for TA-65MD, including the TAS infomercial, are independent users of TA-65MD expressing their impartial views about the product.

52. In fact, customers appearing in advertisements and promotional materials for TA-65MD, including the TAS infomercial, are not independent users of TA-65MD expressing their impartial views about the product. Respondents provided the consumer endorsers in-kind compensation, specifically, thousands of dollars of free TA-65MD. Therefore, the representation set forth in Paragraph 51 is false or misleading.

**Count VI  
Means and Instrumentalities to Trade Customers**

53. Respondents have provided to their trade customers advertising, promotional, and purported substantiation materials and support referred to in Paragraphs 35-37, 40, and 41, containing, among other things, false and unsubstantiated representations, as described in Paragraphs 42 through 45 above.

54. By providing to their trade customers the advertising, promotional, and substantiation materials referred to in Paragraphs 35-37, 40, and 41, Respondents have provided their trade customers the means and instrumentalities for the commission of deceptive acts and practices.

55. Therefore, Respondents' practice as described in Paragraph 53 is a deceptive act or practice.

**Violations of Sections 5 and 12**

56. The acts and practices of Respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in

## Complaint

violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

**THEREFORE**, the Federal Trade Commission this eighteenth day of April, 2018, has issued this Complaint against Respondents.

By the Commission.

**Exhibit A**

The advertisement features the following elements:

- TA<sup>65</sup>** logo in green and red at the top center.
- The text *The world's only Telomerase Activator* in blue below the logo.
- A photograph of a man in a white lab coat with a stethoscope, smiling, in the center.
- A small image of a white pill bottle with the TA<sup>65</sup> logo on the bottom left.
- A small image of a glass dish containing pills and a green leaf on the top right.
- The **T.A. SCIENCES** logo at the bottom, with a stylized blue 'S' and the tagline "CELL REJUVENATION THROUGH TELOMERASE ACTIVATION".

## Complaint

**To Meet the Challenges of Aging****OUR MISSION IS YOUR MISSION:**

*Our mission is to minimize the decline associated with aging and maximize the potential for health and longevity through Telomerase Activation*

**TA<sup>65</sup>**

- The only scientifically-proven Telomerase Activator in the world available to the public
- A highly purified and naturally occurring single molecule from the astragalus plant
- It activates (transiently) the telomerase enzyme which can lengthen telomeres
- Safe and efficacious with over 5 years of testing
- Only available through physicians trained and licensed by T.A. Sciences

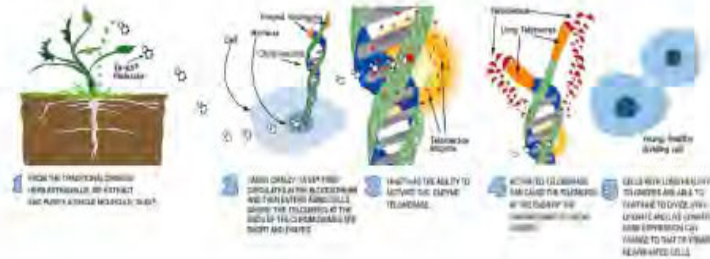
## Complaint

***We are committed to the science and the promise of  
Telomere Biology***

"...telomere shortening could be the reason for ageing, not only in the individual cells but also in the organism as a whole... These discoveries have added a new dimension to our understanding of the cell, shed light on disease mechanisms, and stimulated the development of potential new therapies."

(Nobel Prize Committee Press Release)

The first product to emerge from this new science is TA-65, a single small molecule that is derived from the root of the Astragalus plant. TA-65® is the only proven telomerase activator to rejuvenate telomeres in humans.

**Highly respected telomere biologist, Bill Andrews says:**

*"Control of telomere length may be the most important step in eliminating the 125-year limit on our lifespan and taking the first crucial steps toward allowing us to live young, healthy lives."*



The Nobel Prize in Physiology or Medicine 2009 was awarded jointly to Elizabeth H. Blackburn, Carol W. Greider and Jack W. Szostak, for the discovery of "how chromosomes are protected by telomeres and the enzyme telomerase". These three scientists have solved a major problem in biology: how the chromosomes can be copied in a complete way during cell divisions and how they are protected against degradation.

(Nobel Prize PRESS RELEASE 2009-10-05)

*TA-65 has been shown to activate telomerase and increase telomere length in humans. This has led to improvements in immune cell function, bone density, and a number of other important age related bio-marker improvements.*

**TA<sup>65</sup>**

## Complaint

**Short Telomeres are associated with unhealthy aging**  
**and a shorter lifespan**

*"Telomeres form the ends of human chromosomes. Telomeres shorten with each round of cell division and this mechanism limits proliferation of human cells to a finite number of cell divisions by inducing replicative senescence, differentiation, or apoptosis. Telomere shortening also limits stem cell function, regeneration, and organ maintenance during aging. Moreover, telomere shortening during aging and disease is associated with increasing cancer risk."*

Telomere shortening and aging (2007)  
 H. HONG, Z. LI, F. L. RUSSELL, Z. DAVENPORT, CHINESE 90.552-024



Short Telomeres have been associated with maladies in these tissues:

- Immune cells – memory and naïve
- Heart –cardiomyocytes
- Hematopoietic stem cells
- Lung alveolar cells
- Skin – dermis, epidermis, vasculature
- Vascular intima (endothelium)
- Osteoblasts, MSCs
- Liver – hepatocytes
- Retinal pigmented tissue of eye
- Chondrocytes
- Skeletal muscle
- Kidney – cortex
- Neurons

*Data published by us and others have indicated that cellular aging caused by shortening telomeres, occurring in numerous tissues throughout the human body, causes or contributes to chronic degenerative diseases and conditions including bone and marrow diseases, pulmonary fibrosis, HIV/AIDS, liver disease, macular degeneration, cardiovascular diseases and impaired wound healing. **Controlled activation of telomerase in normal cells can restore telomere length or slow the rate of loss, improve functional capacity and increase the proliferative lifespan of cells!*** (Geron 10K Report 26 Feb -01)

**TA<sup>65</sup>**



Complaint

**The only way to lengthen telomeres is to:**

## Activate Telomerase

**Telomerase Impacts Aging/Disease in Mice**

**Telomerase Null /short telomeres**

**Activated Telomerase/Long telomeres**

**Shortening telomeres**

- Gray and Thinning Hair
- Weakened Immune System
- Intestinal Atrophy
- Reduced Spleen Size
- Decreased Wound Healing
- Decreased Lifespan
- Infertility

• Healthy and Thriving

**These mice are the same age!**


### LONG TELOMERES ARE ASSOCIATED WITH HEALTHY AGING AND LONGEVITY

*"As we suspected, humans of exceptional longevity are better able to maintain the length of their telomeres," said Youxin Suh, Ph.D., associate professor of medicine and of genetics at Einstein and senior author of the paper. "And we found that they owe their longevity, at least in part, to advantageous variants of genes involved in telomere maintenance."*

Youxin Suh, Ph.D.  
Genetic Variation in Human Telomerase is Associated with Telomere Length in Adiposity, Centenarians,<sup>1</sup>


*More specifically, the researchers found that participants who have lived to a very old age have inherited mutant genes that make their telomerase-making system extra active and able to maintain telomere length more effectively. For the most part, these people were spared age-related diseases such as cardiovascular disease and diabetes, which cause most deaths among elderly people.*

Albert Einstein College of Medicine of Yeshiva University



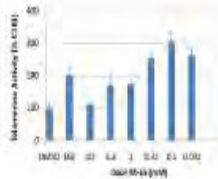


Complaint



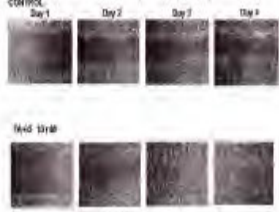
## *Has Been Proven To Activate Telomerase*

**TA-65 Activates Telomerase in Human Neonatal Keratinocytes**

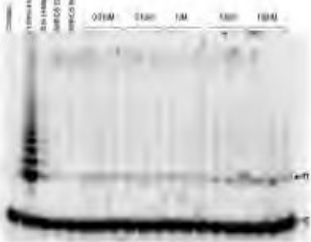


TRAP Assay Data by Ferret (Ferret Lab, Geron Corporation)

**TA-65 Accelerates Wound Healing in Mid-Passage Keratinocytes (HEKn-P, PD14)**



**TA-65 Activates Telomerase in Fetal Lung Fibroblasts**



(From Andrews Lab, Sierra Sciences)

TA-65 has been proven by two independent research laboratories to activate telomerase.


At leading biotech company Geron, Chief Researcher Calvin Harley demonstrated that TA-65 induced Telomerase Activity transiently in neonatal keratinocytes.

Bill Andrews and his lab at Sierra Sciences showed telomerase transiently activated by TA-65 in fetal lung fibroblasts.

These findings confirm the claims that TA-65 transiently activates telomerase. It is widely accepted in the scientific community that the only way to lengthen telomeres is through the activation of telomerase. It is also widely accepted that individuals with long telomeres are healthier and live longer.

*"Data from tissue culture studies showed that one such lead compound significantly activates telomerase and improves replicative capacity and function, including anti-viral activity in HIV-specific CD8+ T-cells from HIV/AIDS donors. The data were published in the Journal of Immunology in 2008."*

*(Geron 10k Report 26-Feb-10)*



## Complaint

**What is TA<sup>65</sup>?**

**TA<sup>65</sup>** is a single small molecule derived from the Chinese herb astragalus. In laboratory studies using human cell lines including fibroblast cells which normally do not express any telomerase, TA-65 was shown to unequivocally lengthen telomeres. TA-65 is the first and only commercially available telomerase activator that is safe for human consumption.

Each batch of TA-65 starts with 3 tons of astragalus root grown in a specific region of Inner Mongolia. Through a closely guarded proprietary process, a single molecule (TA-65) is extracted from the astragalus root and purified to a very high degree. There are no other similar preparations available on the market.

*The illustrations below show the above ground astragalus and the root. TA-65 is an ultra-purification of one of the 2000 bioactive compounds found in the astragalus root.*

T.A. Sciences Educational Manual



Astragalus plant



Astragalus root

"Our findings suggest that telomere length and variants of telomerase genes combine to help people live very long lives, perhaps by protecting them from the diseases of old age," says Dr. Suh. "We're now trying to understand the mechanism by which these genetic variants of telomerase maintain telomere length in centenarians. Ultimately, it may be possible to develop drugs that mimic the telomerase that our centenarians have been blessed with."

(Genetic Variation in Human Telomerase Is Associated with Telomere Length in Antioxidant Centenarians.)

Quoted from a study at the Albert Einstein College of Medicine of Yeshiva University

**TA<sup>65</sup>**



Complaint

### Pivotal Human Trials of 2005

#### Immune System Improvement Summary

The Y-axis represents the mean change from baseline in CD4 lymphocytes (x10<sup>6</sup>/mm<sup>3</sup>) for lymphocyte proliferation, and change in number of CD3+ lymphocytes (x10<sup>6</sup>/mm<sup>3</sup>) for natural killer cells. Error bars show the standard error of the mean of the control and treatment groups. \*Significance based on the end of treatment at 12 weeks.

FIGURE 1

#### Vision Improvement Summary

The Y-axis represents the mean change from baseline in vision (e.g. a change from 20/40 to 20/20 would be a +12 score). Error bars show the standard error of the mean of the control and treatment groups. \*Significance based on the end of treatment at 12 weeks.

FIGURE 2

#### Skin Improvement Summary

The Y-axis represents the mean change from baseline in skin scale (number of lesions x density). Error bars show the standard error of the mean of the control and treatment groups. \*Significance based on the end of treatment at 12 weeks.

FIGURE 3

#### Sex Improvement Summary

The Y-axis represents the mean change from baseline in sex-specific quality of life (sexual desire and satisfaction, with a +1.0 score). Error bars show the standard error of the mean of the control and treatment groups. \*Significance based on the end of treatment at 12 weeks.

FIGURE 4

**People currently taking TA-65 have seen the following results:\***

- Lengthening of the **Shortest Telomeres**. (These are the ones that really matter; it only takes one short telomere out of the 92 in every cell to send a cell into crisis.)
- **Improved Immune system**. In particular, the % and absolute number of senescent CD8+/28- cells has significantly decreased. This is a reversal of what normally happens with age.
- **Improved bone density**
- **Improved cardiovascular and hormonal biomarkers** that normally show decline with age.
- There are also anecdotal results, such as **improved energy and athletic performance**, but these effects are not universal and vary among individuals.

\*Human trial results substantiating these claims to be published soon in a peer-reviewed scientific journal

## Complaint

Who takes **TA<sup>65</sup>**?

- Knowledgeable professionals capable of determining risk/reward ratios
- About half of our clients are MD's or PHD's
- Several are well known Telomere Biologists

Who should take **TA<sup>65</sup>**?

- Anyone over 40 who wants to intervene in age related decline
- Those who have measured their telomeres and have found them to be short

Is **TA<sup>65</sup>** Safe?

- 5 years of development and safety testing before introducing **TA<sup>65</sup>**
- There are currently hundreds of clients taking **TA<sup>65</sup>**: Some for as long as 3 years
- **Not a single adverse reaction** reported by our licensed physicians
- **Not a single diagnosis of new cancer**
- **Not a single report of increased cancer load for clients who already had cancer**

**TA<sup>65</sup>**

## Complaint

**The Patton Protocol**

The Patton Protocol was named after Noel Thomas Patton in honor of his contributing to the science of staying young. Mr. Patton is the founder of T.A. Sciences and the first person on the planet to take purified TA-65<sup>®</sup> long term.

The Patton Protocol has gone through several iterations as a result of Mr. Patton's experience and the information garnered from testing and data from clients since T.A. Sciences<sup>®</sup> obtained the exclusive license from Geron in 2002.

Recommended daily dose for TA-65<sup>®</sup>: Generally people take half their daily dose in the morning and the other half in the evening. Out of personal preference, some clients take the entire dose in the morning and others take it all in the evening. We do not have evidence as to which routine is best, but we do recommend that people taking resveratrol, curcumin, or the other possible inhibitors, take the full dose in the morning/evening and the potential "inhibitors" 12 hours later.

**What clients are saying**

*After 9 months of taking TA-65, I am very pleased. Not one bad day and incredible feeling of well-being, darker and thicker hair, smoother and younger looking skin. I just feel younger and more energetic.  
At 69 I am passing for 55 or below.* **Bob W. 69, Seattle, WA**

*I'm more active physically than any time I can remember. At age 80 I feel like the "poster boy" for TA Sciences.* **Ralph A. 80, Los Angeles, CA**

*As a practicing MD, I am surprised at the improvement in my immune system after only 6 months.* **Dr. Fred Vignani, 70, New York, NY**

*My eye doctor says he's never seen the accumulative reverse increase in someone my age. It only goes down with time.* **Bill Turon, 64, Berkeley Hts, NJ**

*I was already a competitive athlete when I began the Patton Protocol. My regular 30-mile bike ride with a 4000 foot climb - took me 2 hours and 20 minutes. After 3 months on TA-65 it went down to 2 hours.* **Shelby Blackburn, 45, Roswood City, CA**

*For the first time in more than almost five years I can smell again. I can smell dinner cooking and I can tell whether it's chicken or fish. ... It probably doesn't mean much, but it sure pleases me!*

**Ralph A. 82, Calabasas, CA**

*"Going on TA-65 is the best 50<sup>th</sup> birthday gift I could have given myself. I just spent the weekend skiing and I did more than 20 runs in one day. A year ago that would have been unheard of. My knees didn't bother me and I had plenty of energy. I can't wait for my parents to get on the program..."*

**Steve P., 50, New York, NY**



## Complaint

Reasons why you should offer **TA<sup>65</sup>** to your patients

1. There is a growing body of evidence associating most age-related maladies with short telomeres.
2. This same body of evidence also clearly establishes that people with long telomeres age healthier and look younger.
3. As we age our telomeres shorten.
4. Exercising and healthy habits over an extended period of time can slow the attrition of telomeres, but telomere length continually declines as we age.
5. People who have not led a healthy lifestyle have accelerated the decline of their telomere lengths, and most likely will suffer premature aging and associated maladies.
6. The only way to lengthen telomeres is through the activation of an enzyme called telomerase.
7. Currently the only commercially available way to activate telomerase is by taking **TA<sup>65</sup>**.

How to become a T.A. Sciences licensee?

1. The physician must sign the Licensee Agreement.
2. There is a one time \$1,000 Administrative Fee that covers licensee set-up, marketing support and operations support.
3. The physician must study the Doctor's Manual and pass the Telomere, Telomerase and **TA<sup>65</sup>** basic knowledge exam.
  - o Your practice will then have the ability to purchase the products - **TA<sup>65</sup>** and Support Packs, along with Telomere Length and Specialized Immunology tests at licensee discount rates.
  - o **TA<sup>65</sup>** profit for the doctor is \$2000 per client per year.
  - o Cash Flow positive for the licensee. No investment in **TA<sup>65</sup>** inventory is required. Patients pay for **TA<sup>65</sup>** before you have to pay TA Sciences.
  - o Set your practice apart by offering the only scientifically proven Telomerase Activator in the world to your patients, **TA<sup>65</sup>**.

Want More Information?

Call Dean Miller at (631) 697-3241 or (212) 588-8805

Email- [dean@tasciences.com](mailto:dean@tasciences.com)

## Complaint



*What are some of the most important things you can do for your patients?*

- Teach them the importance of diet, exercise, and stress reduction.
- Encourage them to take action before they have symptoms and be proactive about disease prevention.
- Recommend activating telomerase by taking:

**TA<sup>65</sup>**

Telomerase Activation Sciences, Inc.  
24 E. 64th Street, 5th Floor, New York, NY 10065  
Toll-free: 888 360 8886 • office: 212 586 8805 • fax: 212 586 0058  
[www.tasciences.com](http://www.tasciences.com)



## Complaint

## Exhibit B

SUMMER 2011

HEALTHY AGING

Holistic Primary Care 7

## Telomerase Activation, Inhibition of Cellular Aging Becomes a Clinical Reality

In 2000, Elizabeth Blackburn, Carol Greider, and Jack Szostak established a cornerstone principle of cell biology: cellular longevity is governed by the length of telomeres, the DNA caps on the ends of chromosomes. Telomere length, in turn, is regulated by an enzyme called telomerase.

In short, when telomerase activity is high, so is telomere length, and this delays cellular senescence. Articulation of this principle earned Blackburn, Greider and Szostak a Nobel Prize for Physiology & Medicine, and opened up new therapeutic possibilities for preventing diseases of aging and promoting longevity.

But the ability to leverage telomerase science has been somewhat limited because, while researchers have found compounds that slow telomere shortening—omega-3s, folate, vitamin D, ginseng, and useful cytokines among them—until recently, nothing was available that could actually activate telomerase or augment telomere length.

This changed with discovery of an intracellular compound derived from *Astragalus membranaceus*, an herb used widely in traditional Chinese medicine. This proprietary extract, known as TA65, was originally developed by biotech giant Genentech and licensed for nutraceutical distribution by TA Sciences ([www.tasciences.com](http://www.tasciences.com)).

Telomeres are repeating DNA sequences capping each chromosome, that function as biological time clocks, determining cellular lifespan. Human telomeres are between 10,000–15,000 base pairs in length at birth (depending on measurement methods). Each round of cell division shaves off 30–100 base pairs.

"By the time someone dies of old age, telomere length is down below 5,000 base pairs," explained William F. Andrews, PhD, a molecular biologist and president of stem sciences, a biotech firm focused on longevity promotion. While Director of Microbiology at Genentech in the late 1990s, Dr. Andrews led the discovery of the RNA and protein components that make up telomerase.

"Even as a little kid, I was interested in finding a cure for aging. I just wasn't convinced that it was all due to environmental factors, as if a person were like an old truck wearing out and rattling away in a field. I couldn't understand why people in the Arctic seemed to age less quickly the same way as people at the Equator despite the environmental differences," Dr. Andrews told Holistic Primary Care.

Leonard Hayflick's seminal work on the limits of cell cycling in the 1970s, and later, the discovery of telomeres, began to provide an answer: telomeres don't code for specific proteins, though they are linked to most of genetic pathways. They function in a strictly regulatory manner: telomere length sets the outer limit on cellular lifespan.

David Wojanowski, MD, a leading TA, internist specializing in longevity medicine is among a growing cadre of clinicians who believe modulating telomerase and restoring telomere length is a key to slowing aging and enabling people to age more healthfully.

"There are only two functionally immortal cell lines: embryonic stem cells, and the germ cell lines. What they have in common, and what distinguishes them from ordinary somatic cells, is that telomerase is active and restores telomere length in nearly all other tissues, the gene that triggers production of telomerase is inhibited. During cell cycling, telomere length decreases; if they are not repaired by telomerase. The shorter the telomeres, the greater the disease burden."

"The emergence of TA65 is a major advance," said Dr. Wojanowski, who has worked as a consultant for TA Sciences. The compound is produced by the *Astragalus* root in very small amounts and must be purified and concentrated, a proprietary process. Genentech originally developed TA65 as an adjunctive therapy for HIV, though it was never released for that purpose. Animal and human studies show that it can increase telomerase activity and telomere length.

In practice, Dr. Wojanowski said, TA65 improves overall energy, improves skin quality and visual acuity, increases bone mineral density, reduces blood sugar and fasting insulin, reduces CRP and other markers of chronic inflammation, and improves sexual function. "It does this independent of any other changes in diet or lifestyle."

Because the plant only produces small amounts of this compound, *Astragalus* extracts available in retail stores will only have tiny

amounts, if any at all, in order to induce telomerase activity on a medically large dose of the purified compound. This means TA65, sold only through healthcare professionals, an expensive option.

A low dose protocol will cost roughly \$1,200 per 6-month period; the high dose protocol is \$4,000. TA Sciences estimates that approximately 2,000 people are now taking TA65. The company hopes to lower the price in the coming years.

Sara Scazzari, Dr. Andrews is among those taking—and benefiting from—TA65, though he said his company is "actively seeking for telomerase inducers that are safer and more potent."

"TA65 really does work. There's nothing else right now that a doctor can recommend or prescribe that can do what it does. But I would like to find things that work even better. If you turn

telomerase on enough you might not only slow the aging process, you could potentially reverse it. This has been demonstrated in mice but not yet in humans."

Genentech, Dr. Andrews' old employer, is continuing its search for telomerase activators. Early in 2010, the company published the first animal data on a proprietary compound called "TAT158," being developed as a drug for the treatment of pancreatic disease.


Telomerase induction is not the only key to a long, healthy life. Both Dr. Andrews and Dr. Wojanowski emphasized that stress reduction, exercise and a diet rich in antioxidants and anti-inflammatory plant compounds are essential. But they insist that the ability to modulate telomerase and increase telomere length takes the longevity game to a whole new level.

What's the ideal human telomere length? "The longer the better," said Dr. Andrews, noting that there are several ways to assess telomeres. The easiest way is to look at average length in blood cells—a relatively inexpensive test available from Spectracell ([www.spectracell.com](http://www.spectracell.com)). But this will not tell you how short are the shortest telomeres.

Several labs, including Dr. Elizabeth Blackburn's Telomere Health ([www.telomerehealth.com](http://www.telomerehealth.com)), Lifespan ([www.lifespan.com](http://www.lifespan.com)) and Regen Diagnostics ([www.regen-diagnostics.com](http://www.regen-diagnostics.com)), have developed more detailed telomere length assessments. Many experts believe that overall longevity and health is determined by someone's shortest telomeres. "You really want to lengthen the shortest ones,"



## Add Nobel Prize Technology to your Practice



# TA65<sup>MD</sup>

## Cell Rejuvenation

### Through Telomerase Activation

- 100% Naturally Derived Molecule from the Astragalus Plant
- Lengthens Short Telomeres
- Repairs DNA Damage
- Rejuvenates Aging Immune Systems
- Increases Bone Density
- Improves Biomarkers that Decline With Age

Contact us to find out about our special \$500 discount offer for readers of *Holistic Primary Care*

TA-65 is the first clinically effective telomerase activator, only available through Healthcare Practitioners who are licensed by TA Sciences. Help your patients live a longer, healthier life.

Contact Marissa today at **212-588-8805** or visit [www.tasciences.com](http://www.tasciences.com).

## Complaint

**Exhibit C**

Right now is the best time to start providing the world's most unique anti-aging supplement.

It is now **FREE** and **EASY** to sign up and become a **TA-65<sup>®</sup>MD Licensee**.

TA-65<sup>®</sup>MD is the world's only proven telomerase activator with in vivo studies to show efficacy and safety.

Telomerase activation is the most effective way to lengthen short telomeres and to combat age related dysfunctions.

In addition, TA-65<sup>®</sup>MD has proven to rejuvenate the immune system and increase bone density.

As a Licensee, you will receive discounts for each bottle. The savings range between 25% to almost 45%. Our Licensees value TA-65<sup>®</sup>MD not only for the health benefits to their patients, but for the significant increase of revenue for their practice.



Customers have reported several amazing **anecdotal** benefits which include:

- **increased energy and endurance**
- **better joint movements**
- **improved sleep**
- **more youthful skin** (age spots going away, dry patches disappearing, wrinkles smoothing)
- **improved strength and flexibility**
- **sharper memory**
- **sexual enhancement**

When you sign up to **become a Licensee**, you will receive the TA-65<sup>®</sup>MD Manual and Test to learn more about the product. To help with sales, you receive free marketing material to share with your staff and patients, a dedicated website for online orders and of course a discount on every bottle you order!

Call us today to learn how you can become a TA-65<sup>®</sup>MD Licensee and start generating more revenue for your practice!

Request a TA-65<sup>®</sup>MD Licensee Agreement by phone or email: **212-588-8805** or **sales@tasciences.com**.

Visit us online at [www.tasciences.com](http://www.tasciences.com)

## Complaint

**Exhibit D****Cellular Aging Stops Here**

**Inside every cell of your body, there is a powerful clock ticking away. It's telling your body to age, wrinkle, gray, and slow down.**

That clock is your telomeres, the caps at the end of each strand of DNA that protect it, like the plastic tips at the end of shoelaces.

**Telomeres shorten over time, leaving your DNA vulnerable to damage and causing your cells to age.** But now, there is a groundbreaking new way to help slow down, or possibly even reverse, age and lifestyle related telomere shortening.

**Based on Nobel Prize winning science,** TA-65® – a proprietary, all natural plant-based compound – can help maintain or rebuild telomeres.

TA-65® is available from T.A. Sciences® as TA-65MD® nutritional supplements, or in a new skin cream formulation.



**For more information about Telomere Biology or TA-65® products, please visit the T.A. Sciences® display here at the Global Leadership Conference, or our website at**

[www.tasciences.com](http://www.tasciences.com)

**T.A. SCIENCES®**  
CELL REJUVENATION • THROUGH TELOMERASE ACTIVATION

*"Maintaining good health through the stresses and strains of touring and singing with The Who requires enormous stamina. I was recommended TA-65® by a good friend and decided to try it. After taking TA-65® for one year I noticed considerable improvement in energy levels, cold and winter infections have been a rarity. Recently I took a 6 week break from taking the product, and noticed significant energy drop off."*

*"Although to my knowledge the evidence of benefit to everyone is not proven, I have no doubt that this product works for me. I hope it does the same for you."*

**- Roger Daltrey**  
Lead singer, The Who





Complaint

**Exhibit E**

**Video**

**Ask the Experts  
on The Suzanne Show**

**Segment about TA-65**

## Complaint

**Exhibit F**

1

1 OFFICIAL TRANSCRIPT PROCEEDING  
2 FEDERAL TRADE COMMISSION  
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6 MATTER NO. 1423103  
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8  
9 TITLE TELOMERASE ACTIVATION SCIENCES, INC.  
10  
11  
12 DATE RECORDED: DATE UNKNOWN  
13  
14 TRANSCRIBED: JANUARY 22, 2015  
15 REVISED: JANUARY 28, 2015  
16  
17 PAGES 1 THROUGH 12  
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23 ASK THE EXPERTS SEGMENT WITH SUZANNE SOMERS  
24 NOEL PATTON TA SCIENCES  
25 LIFETIME

Complaint

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FEDERAL TRADE COMMISSION

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Ask the Experts segment

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FEDERAL TRADE COMMISSION

In the Matter of:                    )  
Telomerase Activation            ) Matter No. 1423103  
Sciences, Inc.                    )  
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Date Unknown

The following transcript was produced from a  
digital file provided to For The Record, Inc. on January  
15, 2015.

## Complaint

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8                   t w o   a n s w e r s .   T h e r e ' s   y o u r   c a l e n d a r   a g e   --   t h a t ' s   t h e  
9                   b i r t h d a y   y o u   c e l e b r a t e   e v e r y   y e a r   --   a n d   t h e n   t h e r e ' s   t h e  
10                   a g e   o f   y o u r   b o d y ' s   i n d i v i d u a l   c e l l s .   A n d   y o u r   c e l l s   m a y  
11                   b e   m u c h   y o u n g e r   o r   o l d e r   t h a n   y o u r   a c t u a l   y e a r s .  
12                   T h e   e x c i t i n g   n e w   s c i e n c e   o f   t e l o m e r e   b i o l o g y   i s  
13                   s h o w i n g   u s   h o w   t o   n o t   o n l y   d e t e r m i n e   o u r   c e l l u l a r   a g e ,  
14                   b u t   h o w   t o   a c t u a l l y   r e v e r s e   --   I   s a y   i t   a g a i n   --   r e v e r s e  
15                   t h e   a g i n g   p r o c e s s .  
16                   M y   g u e s t s   t o d a y   a r e   N o e l   T h o m a s   P a t t o n ,   f o u n d e r  
17                   o f   T . A .   S c i e n c e s ,   a n d   D r .   E d   P a r k ,   a n   e x p e r t   i n  
18                   t e l o m e r e s .   W e l c o m e ,   b o t h   o f   y o u .  
19                   N O E L   P A T T O N :   G l a d   t o   b e   h e r e .  
20                   S U Z A N N E   S O M E R S :   W e l l ,   y o u   k n o w ,   I   k n o w   b o t h   o f  
21                   y o u   v e r y   w e l l   b e c a u s e   I   i n t e r v i e w e d   y o u ,   N o e l   P a t t o n ,   f o r  
22                   m y   b o o k ,   B o m b s h e l l ,   b e c a u s e   I   w a s   s o   f a s c i n a t e d   a b o u t  
23                   t e l o m e r e s .   I s   y o u r   p r o d u c t   --   i t ' s   a   s u p p l e m e n t   c a l l e d  
24                   T A 6 5   --   i s   t h i s   t h e   f o u n t a i n   o f   y o u t h ?  
25                   N O E L   P A T T O N :   W e l l ,   I   w i s h   I   c o u l d   s a y   y e s ,   b u t

## Complaint

5

1 we're not quite there, yet.

2 ON SCREEN: Noel Thomas Patton

3 Founder and C.E.O., TA Sciences

4 SUZANNE SOMERS: Uh-huh.

5 NOEL PATTON: But this activating of

6 telomerase, this enzyme that our pill activates --

7 SUZANNE SOMERS: Mm-hmm.

8 NOEL PATTON: -- is a very important key

9 medical breakthrough. The Nobel Prize was awarded three

10 years ago for the discovery of this enzyme telomerase --

11 SUZANNE SOMERS: Mm-hmm.

12 NOEL PATTON: -- that our product, TA65, brings

13 forward. And the reason it got the Nobel Prize is

14 because the shortening of the telomeres, which is what's

15 affected by telomerase, is the root cause of aging.

16 SUZANNE SOMERS: Mm-hmm.

17 NOEL PATTON: And Dr. Park will explain this a

18 little bit better, but this is breakthrough, really

19 important science. It's not the usual snake oil stuff

20 that everybody seems to talk about.

21 SUZANNE SOMERS: Well, it is pretty exciting.

22 How does this all work, Dr. Park?

23 DR. ED PARK: Basically, in every cell -- if I

24 can use these props -- you have ends that are protective

25 caps.

## Complaint

6

1           SUZANNE SOMERS: Right.

2           DR. ED PARK: So, every time a cell divides,

3 they get shorter.

4           SUZANNE SOMERS: Mm-hmm.

5           DR. ED PARK: If they get too short, then the

6 actual DNA is damaged and you have a problem. So,

7 telomerase is something that is involved with stem cells.

8 You've heard of stem cells?

9           SUZANNE SOMERS: Right.

10          ON SCREEN: Dr. Ed Park, MD, MPH

11          Telomere and Telomerase Expert

12          DR. ED PARK: Well, stem cells are not like

13 regular cells, they have telomerase. All the other cells

14 don't.

15          SUZANNE SOMERS: Mm-hmm.

16          DR. ED PARK: So, that's why they can go ahead

17 and create more length and that's why they can run copies

18 of themselves millions of times over.

19          SUZANNE SOMERS: Okay. So, my understanding is

20 human beings, approximately 50 trillion or so cells. I

21 don't know who counted.

22          DR. ED PARK: Yeah.

23          SUZANNE SOMERS: And on the end of each cell is

24 a little tail.

25          DR. ED PARK: Yeah.

## Complaint

7

1           SUZANNE SOMERS: And that tail is what we call  
2 the telomere, right? And every time that cell  
3 replicates, which each cell replicates about 50 times, is  
4 that right?

5           DR. ED PARK: That's right.

6           SUZANNE SOMERS: Approximately.

7           DR. ED PARK: Uh-huh, exactly.

8           SUZANNE SOMERS: It gets shorter. That's what  
9 you were just describing, the tail gets shorter.

10          DR. ED PARK: Mm-hmm.

11          SUZANNE SOMERS: It replicates, the tail gets  
12 shorter.

13          ON SCREEN: The "Balancing Act" will return  
14 tomorrow.

15          SUZANNE SOMERS: Inside the cell, these Nobel  
16 Prize winners discovered that there's an enzyme called?

17          DR. ED PARK: Right, telomerase.

18          SUZANNE SOMERS: Telomerase.

19          DR. ED PARK: So, it literally is the oldest  
20 trick in the book.

21          SUZANNE SOMERS: Right.

22          DR. ED PARK: All plants and animals on earth  
23 require it to keep their stem cells young. So, this is  
24 always on and the thing that TR65 does is it just gives  
25 it better gasoline so it operates at higher efficiency.



## Complaint

8

1 Now, the good news is you can do telomerase activation  
2 naturally by meditating, by going to the gym, by eating  
3 well, sleeping, but if you don't have time or the  
4 disposition, now we have a supplement that can safely  
5 turn up that healing.

6 SUZANNE SOMERS: So, if I take your supplement,  
7 TA65, this promotes the growth of the telomere at the end  
8 of each cell, right?

9 NOEL PATTON: Yeah, the TA65 is a single  
10 molecule. It's a natural molecule that comes from a  
11 plant.

12 SUZANNE SOMERS: What's the name of that plant?

13 NOEL PATTON: The plant is the astragalus  
14 plant.

15 SUZANNE SOMERS: Right.

16 NOEL PATTON: It comes from China. It's been  
17 used for 2,000 years in traditional Chinese medicine.

18 SUZANNE SOMERS: Mm-hmm.

19 NOEL PATTON: But it's not a normal extract,  
20 it's a single molecule. There's thousands of molecules  
21 in the plant and we take out only one. It's quite a  
22 burdensome technology to do so. And that single  
23 molecule, when it gets inside of one of these 50 trillion  
24 cells, it turns on a gene that's normally turned off.

25 SUZANNE SOMERS: Okay.

## Complaint

9

1 NOEL PATTON: And that gene activates the  
2 enzyme telomerase and it's the telomerase that makes the  
3 telomeres and the ends of the chromosomes grow back long.

4 SUZANNE SOMERS: So --

5 NOEL PATTON: So, that's what our pill does.

6 SUZANNE SOMERS: But, well, does TR65  
7 strengthen the immune system?

8 NOEL PATTON: It absolutely does. That's one  
9 of the key things that we do. As we get older, our  
10 immune system is deteriorating and everybody knows it  
11 intuitively.

12 SUZANNE SOMERS: Right.

13 NOEL PATTON: But you can measure that.  
14 There's a test -- a blood test done at UCLA's immunology  
15 laboratory that shows how your immune system is aging.

16 SUZANNE SOMERS: Uh-huh.

17 NOEL PATTON: And we measure that with people  
18 that have -- they do a blood test. The same thing, as  
19 you're getting older, you have more and more cancer  
20 cells.

21 SUZANNE SOMERS: Uh-huh.

22 NOEL PATTON: See, we all have cancer cells,  
23 even when we're young.

24 SUZANNE SOMERS: Right.

25 NOEL PATTON: But our immune system kills them.

## Complaint

10

1 SUZANNE SOMERS: Right.

2 NOEL PATTON: So, if those two lines cross --

3 SUZANNE SOMERS: Right.

4 NOEL PATTON: -- we get cancer and we die, one-

5 third of us die. So, what we're doing is we rejuvenate

6 the immune system, turn that curve -- that line down --

7 SUZANNE SOMERS: Right.

8 NOEL PATTON: -- put it back up hoping to keep

9 it above the cancer line. And if it is kept above the

10 cancer line, you won't -- you wouldn't get cancer, your

11 immune system would kill the cancer cells before they

12 kill you.

13 SUZANNE SOMERS: Can you measure your

14 telomeres? Is there a blood test?

15 NOEL PATTON: Yes.

16 SUZANNE SOMERS: Yeah?

17 NOEL PATTON: There are three companies --

18 SUZANNE SOMERS: Uh-huh.

19 NOEL PATTON: -- right now in the United States

20 that do telomere measurements.

21 SUZANNE SOMERS: Mm-hmm.

22 NOEL PATTON: And if you go to one of our

23 doctors, we have over 600 doctors that are licensed from

24 us who have to pass a test so that they know what --

25 about telomeres, telomerase --

## Complaint

11

1           SUZANNE SOMERS: (Inaudible) test.

2           NOEL PATTON: -- and so on. Dr. Park is one of

3 our best doctors, but we have another 599.

4           SUZANNE SOMERS: Uh-huh.

5           NOEL PATTON: And you go on our website and you

6 can find a doctor near you. Go and have a blood test and

7 you can have it sent to one of these three companies to

8 measure your telomere level.

9           SUZANNE SOMERS: The website is TA --

10          NOEL PATTON: Our website is tasciences.com.

11          ON SCREEN: www.tasciences.com

12          SUZANNE SOMERS: Very interesting stuff. Thank

13 you, Dr. Park. Thank you, Noel, for coming. When we

14 come back, we'll tell you some more interesting things.

15          (The recording was concluded.)

16

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Complaint

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1           C E R T I F I C A T I O N   O F   T Y P I S T

2

3       MATTER NUMBER: 1423103

4       CASE TITLE: TELOMERASE ACTIVATION SCIENCES, INC.

5       TAPING DATE:   DATE UNKNOWN

6       TRANSCRIPTION DATE:   JANUARY 22, 2015

7       REVISION DATE:   JANUARY 28, 2015

8           I HEREBY CERTIFY that the transcript contained  
9       herein is a full and accurate transcript of the tapes  
10       transcribed by me on the above cause before the FEDERAL  
11       TRADE COMMISSION to the best of my knowledge and belief.

12

13                                   DATED:   JANUARY 28, 2015

14

15

16                                   ELIZABETH M. FARRELL

17

18           C E R T I F I C A T I O N   O F   P R O O F R E A D E R

19

20           I HEREBY CERTIFY that I proofread the transcript for  
21       accuracy in spelling, hyphenation, punctuation and  
22       format.

23

24

25                                   SARA J. VANCE

Exhibit F - Page 12

**Exhibit G**

**TA-65 Infomercial Video**

Complaint

**Exhibit H**

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OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. 1423103

TITLE TELOMERASE ACTIVATION SCIENCES, INC.

DATE RECORDED: JANUARY 7, 2014  
TRANSCRIBED: JUNE 9, 2014  
REVISED: JANUARY 19, 2015

PAGES 1 THROUGH 46

TELOMERASE INFOMERCIAL

Complaint

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FEDERAL TRADE COMMISSION

I N D E X

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Telomerase Infomercial

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Complaint

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FEDERAL TRADE COMMISSION

In the Matter of:                    )  
Telomerase Activation            ) Matter No. 1423103  
Sciences, Inc.                        )  
-----)

January 7, 2014

The following transcript was produced from a  
digital file provided to For The Record, Inc. on May 21,  
2014.



## Complaint

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1                   P R O C E E D I N G S  
2                   -   -   -   -   -  
3                   T E L O M E R A S E   I N F O M E R C I A L  
4           ON SCREEN:  CESARI DIRECT  
5           ISCI CODE:  TA02  
6           TA65 Show #2  
7           TRT:  28:30 min  
8           Date:  01.07.2014  
9           ON SCREEN:  The following is a paid program for  
10   TA65 MD  
11           Sponsored by T.A. Sciences  
12           CELL REJUVENATION THROUGH T E L O M E R A S E   A C T I V A T I O N  
13           ON SCREEN:  These statements have not been  
14   evaluated by the Food and Drug Administration.  This  
15   product is not intended to diagnose, treat, cure or  
16   prevent any disease.  
17           MALE ANNOUNCER:  The following is a paid  
18   program for TA65, sponsored by T.A. Sciences.  
19           These statements have not been evaluated by the  
20   Food and Drug Administration.  This product is not  
21   intended to diagnose, treat, cure or prevent any disease.  
22           Right now, inside every cell of your body,  
23   there's a powerful clock ticking away.  It's telling your  
24   body to age, to wrinkle, to gray, to slow down.  But can  
25   this cellular aging be slowed, stopped or even reversed.

## Complaint

5

1 Sound like science fiction? Maybe not. Stay tuned.

2 ON SCREEN: BIOLOGICAL BREAKTHROUGHS

3 Breaking the Age Code

4 MALE ANNOUNCER: Today, on Biological

5 Breakthroughs, we're breaking the age code. You're going  
6 to hear about an earth-shaking discovery your doctor may  
7 not even know yet.

8 ON SCREEN: 2009 Nobel Prize Laureates

9 Nobel Prize in Physiology or Medicine

10 "...For the discovery of the enzyme telomerase"

11 MALE ANNOUNCER: You'll hear in detail about  
12 the science around this discovery that was awarded the  
13 Nobel Prize for medicine in 2009. You'll understand how  
14 and why your very own DNA tells your cells it's time to  
15 die. You'll learn about telomeres deep inside your  
16 cells.

17 At the tips of all 23 pairs of your  
18 chromosomes, there is a section of replicated DNA  
19 sequencing that acts to protect your chromosome every  
20 time it duplicates and allows your cells to replicate  
21 perfectly. These are called telomeres. As long as they  
22 maintain their length, they allow perfect cellular  
23 replication. Unfortunately, nature uses telomere length  
24 like a fuse. Every time your cells divide, the telomere  
25 section shortens. When your telomeres get critically

## Complaint

6

1 short, the cell processes shut down replication and  
2 cellular death occurs. Old, dead and worn cells manifest  
3 in what you see as cellular aging.

4 The good news is that a 2009 Nobel winning  
5 discovery in medicine unveiled an enzyme called  
6 telomerase. Naturally produced on the DNA chain itself,  
7 it can extend and rebuild telomeres. It's a fact.  
8 Longer telomeres mean healthier cells that can live  
9 longer.

10 Listen for the next few minutes and you'll  
11 learn about a natural way you can activate the production  
12 of telomerase in your cells. 10,000 people, including  
13 doctors, scientists and clients at elite anti-aging  
14 clinics, are safely doing this right now and they are  
15 getting results.

16 ON SCREEN: Letter written by Roger Daltrey on  
17 the screen:

18 I have been interested in alternative medicine  
19 since the early days of my career.

20 Maintaining good health through the stresses  
21 and strains of touring and singing with The Who requires  
22 enormous stamina. I was recommended TA65 by a good  
23 friend and decided to try it.

24 After taking TA65 for one year I noticed  
25 considerable improvement in energy levels. Colds and

## Complaint

7

1 winter infections have been a rarity.  
2           Recently I took a 6 week break from taking the  
3 product, and noticed significant energy drop off.  
4           Although to my knowledge the evidence of  
5 benefit to everyone is not proven, I have no doubt that  
6 this product works for me. I hope it does the same for  
7 you.  
8           Roger Daltrey  
9           I was recommended T65...and decided to try it.  
10           I noticed considerable improvement in energy  
11 levels.  
12           Colds..have been a rarity.  
13           Roger Daltrey  
14           Lead singer of "The Who"  
15           ROGER DALTREY: I was recommended TA65 by a  
16 good friend and decided to try it. After taking TA65 for  
17 one year, I noticed considerable improvement in energy  
18 levels. Colds and winter infections have been a rarity.  
19 Although, to my knowledge, the evidence of benefit to  
20 everyone is not proven, I have no doubt that this product  
21 works for me. I hope it does the same for you.  
22           ON SCREEN: ACTUAL TA65 CUSTOMERS  
23           BEFORE AND AFTER PHOTOS  
24           MALE ANNOUNCER: Some studies have shown how  
25 this amazing discovery could help support immune health

## Complaint

8

1 and even reverse measurable, obvious effects of cellular  
2 aging. Too good to be true? Watch and decide for  
3 yourself. Join investigative journalist and former CNN  
4 anchor --

5 ON SCREEN: Kathleen Kennedy

6 INVESTIGATIVE JOURNALIST

7 MALE ANNOUNCER: -- Kathleen Kennedy as she  
8 sits with the premier experts in anti-aging science and  
9 debunks the myths, discovers the truth and reveals the  
10 secrets you need to know.

11 This is Biological Breakthroughs: Breaking the  
12 Age Code.

13 ON SCREEN: BIOLOGICAL BREAKTHROUGHS

14 Breaking the Age Code

15 KATHLEEN KENNEDY: Hi and welcome, I'm Kathleen  
16 Kennedy. Today we're discussing probably the most  
17 important topic in your life, telomeres. And in 2009, a  
18 group of scientists were awarded the Nobel Prize in  
19 medicine for the research that led to the discovery of  
20 telomerase.

21 ON SCREEN: Kathleen Kennedy

22 INVESTIGATIVE JOURNALIST

23 KATHLEEN KENNEDY: A growing new body of  
24 evidence is shattering long-held beliefs about aging and  
25 it's creating quite a controversy.

## Complaint

9

1           Today we are going to talk to some of the  
2 world's leading edge scientists that work in the private  
3 sector developing the science that they say promises to  
4 change your life. Listen for the next few minutes as we  
5 delve into the new science of anti-aging at the cellular  
6 level and make up your own mind about what the  
7 implications are for you.

8           ON SCREEN: Calvin B. Harley, Ph.D.  
9           PRESIDENT & CSO, TELOME HEALTH, INC.

10          KATHLEEN KENNEDY: My guests are Dr. Cal  
11 Harley, Ph.D. and expert on cellular regeneration and  
12 telomeres.

13          ON SCREEN: Dr. Joseph Raphaelle, M.D.  
14          CO-FOUNDER, PHYSIO-AGE MEDICAL GROUP

15          KATHLEEN KENNEDY: Dr. Joseph Raphaelle, a  
16 Princeton graduate and internal medicine expert with a  
17 leading anti-age practice, Physio-Age, right here in  
18 Manhattan.

19          ON SCREEN: Noel Patton  
20          CEO AND FOUNDER OF T.A. SCIENCES®

21          KATHLEEN KENNEDY: Noel Patton, CEO of T.A.  
22 Sciences and producer of TA65, a natural telomerase  
23 activating supplement.

24          ON SCREEN: Dr. Ed Park, MD, MPH  
25          AUTHOR: "TELOMERE TIMEBOMBS"



## Complaint

10

1 KATHLEEN KENNEDY: And longevity expert and  
2 private practicing anti-aging physician, Edward Park,  
3 from Orange County, California.

4 The topic is telomeres, and in 2009, a group of  
5 scientists were awarded the Nobel Prize in medicine for  
6 the research that led to the discovery of telomerase. I  
7 want to start with you Dr. Cal Harley. You can tell us  
8 the significance of this discovery.

9 ON SCREEN: Calvin B. Harley, Ph.D.  
10 PRESIDENT & CSO, TELOME HEALTH, INC.

11 "THE DISCOVERY OF TELOMERASE WAS A BREAKTHROUGH  
12 IN MEDICINE"

13 DR. CALVIN HARLEY: Right. The discovery of  
14 telomerase and the role that telomeres play at the end of  
15 chromosomes was a major breakthrough in medicine. It  
16 allowed us to understand the mechanism of cellular aging  
17 and what you can do about it. Aging, of course, is very  
18 complex, but it's clear now that the tips of the  
19 chromosomes provide a counting mechanism for cellular  
20 aging. It was only about 40 or 50 years ago that people  
21 thought our normal body cells were immortal. That's not  
22 the case.

23 ON SCREEN: Calvin B. Harley, Ph.D.  
24 PRESIDENT & CSO, TELOME HEALTH, INC.

25 "OUR BODY CELLS HAVE A TICKING CLOCK"

## Complaint

11

1 "SHORT TELOMERES CAN LEAD TO CELL DEATH"

2 DR. CALVIN HARLEY: They have a clock that

3 ticks down. When the telomeres become short enough, that

4 triggers cellular senescence, loss of normal cell and

5 tissue function.

6 KATHLEEN KENNEDY: Ah, so short telomeres are

7 the culprit.

8 DR. CALVIN HARLEY: Right. This is a double

9 helix, it's a single chromosome.

10 ON SCREEN: Calvin B. Harley, Ph.D.

11 PRESIDENT & CSO, TELOME HEALTH, INC.

12 DR. CALVIN HARLEY: But these tips at the ends

13 of the chromosomes protect the chromosomes from

14 undergoing what's called genomic instability or the

15 inappropriate division of chromosomes between the two

16 daughter cells.

17 So, every time a cell divides because of

18 something called the end replication problem, we lose a

19 little bit of our telomeric DNA. And that's basically

20 the counting mechanism.

21 ON SCREEN: Calvin B. Harley, Ph.D.

22 PRESIDENT & CSO, TELOME HEALTH, INC.

23 "CRITICALLY SHORT TELOMERES CAN LEAD TO

24 CELLULAR AGING"

25 DR. CALVIN HARLEY: When the telomere gets



## Complaint

12

1 critically short, that will trigger cellular aging --

2 KATHLEEN KENNEDY: So, if we could stop that or  
3 slow the process, we can --

4 DR. CALVIN HARLEY: This is still very early  
5 years in understanding this biology and what the clinical  
6 outcomes might be.

7 ON SCREEN: Dr. Joseph Raphaele, M.D.

8 CO-FOUNDER, PHYSIO-AGE MEDICAL GROUP

9 "BAD DIET AND EXERCISE CAN LEAD TO SHORT  
10 TELOMERES"

11 DR. JOSEPH RAPHAELLE: The thing that's really  
12 fascinating to me is all that we've learned about over  
13 the years and decades about diet, exercise, good  
14 nutrition, supplements, all those things that we know are  
15 good for us, telomere biology ties that all together,  
16 because if you have bad diet and exercise habits, you  
17 have shorter telomeres, all things being equal.

18 ON SCREEN: Dr. Joseph Raphaele, M.D.

19 CO-FOUNDER, PHYSIO-AGE MEDICAL GROUP

20 "WE MUST DO EVERYTHING WE CAN TO KEEP OUR  
21 TELOMERES HEALTHY"

22 DR. JOSEPH RAPHAELLE: You want to do  
23 everything you can to keep your telomeres healthy. That  
24 includes having a healthy diet, exercising regularly.  
25 And then, if that's not enough, after we've measured your

## Complaint

13

1 telomeres, then it's time to intervene with something  
2 more.

3 KATHLEEN KENNEDY: All right. I'd like to turn  
4 to you now, Noel Patton, CEO of T.A. Sciences. Tell us  
5 about the science that led to this. This is Nobel Prize  
6 winning science.

7 ON SCREEN: Noel Patton  
8 CEO AND FOUNDER OF T.A. SCIENCES  
9 "THE DISCOVERY OF TELOMERASE WON THE NOBEL  
10 PRIZE"

11 NOEL PATTON: Well, yes, the discovery of the  
12 enzyme, telomerase, won the Nobel Prize three years ago.  
13 But we understand now that telomeres are the ends of the  
14 chromosomes, like the plastic tips at the end of a  
15 shoelace, and they get shorter with age, and that's the  
16 ticking clock in every cell.

17 ON SCREEN: Noel Patton  
18 CEO AND FOUNDER OF T.A. SCIENCES  
19 "TELOMERES ARE THE TICKING CLOCK IN EVERY CELL"

20 NOEL PATTON: Now, what is telomerase, because  
21 our pill, TA65, is a telomerase activator. Telomerase is  
22 a natural enzyme that's produced inside the cells and it  
23 has the ability to add back --

24 ON SCREEN: Noel Patton  
25 CEO AND FOUNDER OF T.A. SCIENCES

## Complaint

14

1 "TELOMERASE CAN LENGTHEN SHORT TELOMERES"

2 NOEL PATTON: -- DNA at the ends of the  
3 chromosomes, to add back length to the telomeres.

4 ON SCREEN: TA65 MD

5 ON SCREEN: Dr. Fredric Stern

6 The Stern Center for Aesthetic Surgery

7 DR. FREDRIC STERN: What TA65 does, which is  
8 completely unique, is that it has a very purified  
9 substance in it which helps to reactivate the enzyme  
10 called telomerase, which helps to repair the telomeres  
11 and lengthen the short telomeres in the body. There is  
12 excellent clinical evidence in clinical studies that have  
13 been done that are very well supported that demonstrate  
14 that the active substance in TA65 does, in fact, simulate  
15 the telomerase enzyme which then lengthens the shorter  
16 telomeres in the cells.

17 ON SCREEN: Bill Wismann, Age 58

18 Taking TA65 for 4 months

19 These results are atypical and other consumers  
20 may not achieve such results.

21 BILL WISMANN: I've noticed that not only am I  
22 healthier, but I'm not catching the cough that, you know,  
23 my wife or my son or others around me are getting. My  
24 condition is just a healthier one and I have more energy.

25 ON SCREEN: Carol Wayne, Age 74

## Complaint

15

1           Taking TA65 for 1 year

2           These results are atypical and other consumers

3 may not achieve such results.

4           CAROL WAYNE: TA65 is such a great product. It

5 makes your whole body healthier and stronger and more

6 energetic.

7           ON SCREEN: Keith Clearwater, Age 53

8           Taking TA65 for 2.5 years

9           KEITH CLEARWATER: I'm a golfer, I play on the

10 PGA Tour, now the Champions Tour. You know, I take TA65

11 every day only because it's working. It makes me feel

12 better.

13           ON SCREEN: These results are atypical and

14 other consumers may not achieve such results.

15           KEITH CLEARWATER: This thing's really doing

16 something and it's doing it at the cellular level. So,

17 you're changing your body. I mean, and it affects

18 everything.

19           KATHLEEN KENNEDY: Now, let's turn to you, Dr.

20 Ed Park. You have a very successful anti-aging business

21 in Orange County, California. This is a community that's

22 very attuned to the latest and greatest in anti-aging.

23 How did you first get involved with TA65?

24           ON SCREEN: Dr. Ed Park, MD, MPH

25           AUTHOR: "TELOMERE TIMEBOMBS"

## Complaint

16

1 DR. ED PARK: When Noel's company came out in  
2 2007 with a product that they claimed would lengthen the  
3 telomeres, it's not hard to figure out that that would be  
4 a good thing. So, I looked at all the safety data that  
5 was published and got in contact with Dr. Raphaele and  
6 Noel and it seemed legit. I looked at all the safety  
7 efficacy and, so, I started trying it.

8 KATHLEEN KENNEDY: Now, this is remarkable.

9 DR. ED PARK: Yeah.

10 KATHLEEN KENNEDY: This is you how long ago?

11 DR. ED PARK: Well, this is me actually when I  
12 was 32 and I'm 45 now.

13 ON SCREEN: These results are atypical and  
14 other consumers may not achieve such results.

15 Dr. Ed Park, MD, MPH

16 AUTHOR: "TELOMERE TIMEBOMBS"

17 "THIS IS ME AT 32, I'M 45 NOW"

18 KATHLEEN KENNEDY: That really truly is  
19 remarkable.

20 DR. ED PARK: I was practicing OB/GYN, so my  
21 patients would come back for their annual exams and  
22 they'd say, you literally look like a different person.

23 ON SCREEN: Dr. Ed Park, MD, MPH

24 AUTHOR: "TELOMERE TIMEBOMBS"

25 "I LOOK LIKE A DIFFERENT PERSON"

## Complaint

17

1 DR. ED PARK: What happened, what are you  
2 taking?  
3 KATHLEEN KENNEDY: So, at what point did you  
4 start prescribing it for your patients?  
5 ON SCREEN: Dr. Ed Park, MD, MPH  
6 AUTHOR: "TELOMERE TIMEBOMBS"  
7 "THIS STUFF WORKS, MY PATIENTS WANT IT"  
8 DR. ED PARK: About a year into it, I called  
9 Noel. I was patient number 19, I think, somewhere around  
10 there. I called Noel and I said, this stuff works, my  
11 patients want it, what can we do. So, that was 2008.  
12 KATHLEEN KENNEDY: What is it that you tell  
13 your patients when recommending TA65?  
14 ON SCREEN: Dr. Ed Park, MD, MPH  
15 AUTHOR: "TELOMERE TIMEBOMBS"  
16 "IT'S VERY SAFE AND I TAKE IT EVERY NIGHT"  
17 DR. ED PARK: I explain to them that it really  
18 is about maintaining your health and that this is  
19 literally the oldest trick in your book. All of your  
20 stem cells, as Dr. Raphaelle said, have this mechanism to  
21 stay healthy. So, I tell them it's nothing unnatural,  
22 it's very safe, and something that I take every night.  
23 I've even given it to my family, so...  
24 ON SCREEN: Kathleen Kennedy  
25 INVESTIGATIVE JOURNALIST



## Complaint

18

1           KATHLEEN KENNEDY: Through today's program, you  
2 can find out how to learn more about TA65. You can call  
3 or go online right now for more information.

4           ON SCREEN: This is a paid program for TA65  
5           BuyTA65Direct.com

6           KATHLEEN KENNEDY: You can also find out if you  
7 qualify to order TA65 directly. Plus, if you're a  
8 physician interested in TA65 for yourself or maybe for  
9 your patients, they can help you as well.

10          ON SCREEN: Consult your physician before  
11 beginning any dietary supplement program, particularly if  
12 you have special medical needs.

13          BuyTA65Direct.com

14          (Scrolling) CALL NOW FOR MORE INFORMATION -  
15 CALL IF YOU ARE A PHYSICIAN INTERESTED IN DISTRIBUTING  
16 TA65 - CALL TO SEE IF YOU ARE QUALIFIED TO PURCHASE TA65  
17 DIRECTLY

18          KATHLEEN KENNEDY: Coming up next, you'll hear  
19 from more doctors around the world that are utilizing  
20 telomerase activation for their clients and we'll ask  
21 some tougher questions. We'll ask our doctors about  
22 which ones here take TA65 and why and how they know it  
23 works. Stay tuned.

24          ON SCREEN: Letter written by Roger Daltrey on  
25 the screen:

## Complaint

19

1 I have been interested in alternative medicine  
2 since the early days of my career.

3 Maintaining good health through the stresses  
4 and strains of touring and singing with The Who requires  
5 enormous stamina. I was recommended TA65 by a good  
6 friend and decided to try it.

7 After taking TA65 for one year I noticed  
8 considerable improvement in energy levels. Colds and  
9 winter infections have been a rarity.

10 Recently I took a 6 week break from taking the  
11 product, and noticed significant energy drop off.

12 Although to my knowledge the evidence of  
13 benefit to everyone is not proven, I have no doubt that  
14 this product works for me. I hope it does the same for  
15 you.

16 Roger Daltrey

17 Maintaining good health...while touring and  
18 singing with The Who...requires enormous stamina.

19 I was recommended TA65...and decided to try it.

20 I noticed considerable improvement in energy  
21 levels.

22 Colds...have been a rarity.

23 Recently, I took a 6-week break from the  
24 product, and noticed a significant energy drop-off.

25 Roger Daltrey



## Complaint

20

1           Lead singer of "The Who"

2           ROGER DALTRY: Well, I've been interested in

3           alternative medicine since the early days of my career.

4           Maintaining good health through the stresses and strains

5           of touring and singing with The Who required enormous

6           stamina. I was recommended TA65 by a good friend and

7           decided to try it. After taking TA65 for one year, I

8           noticed considerable improvement in energy levels. Colds

9           and winter infections have been a rarity.

10          Recently, I took a six-week break from the

11          product and noticed significant energy drop-off.

12          Although, to my knowledge, the evidence of benefit to

13          everyone is not proven, I have no doubt that this product

14          works for me. I hope it does the same for you.

15          ON SCREEN: TA65 MD

16          MALE ANNOUNCER: It's no secret that your body

17          is silently aging daily.

18          ON SCREEN: Photos at age 19, age 37, age 56

19          MALE ANNOUNCER: Look at photos of yourself

20          five years, 10 years, 20 years apart. Can you see it?

21          Of course you can. Time takes its toll. You want to hit

22          the stop button, don't you? But can your cellular aging

23          be slowed, stopped or even reversed? Listen closely.

24          ON SCREEN: 2009 Nobel Prize Laureates

25          Nobel Prize in Physiology or Medicine

## Complaint

21

1            "...for the discovery of the enzyme telomerase"

2            MALE ANNOUNCER: A profound discovery related  
3            to this led to the Nobel Prize for medicine in 2009. It  
4            unlocked potentially the most powerful anti-aging secret  
5            science has ever discovered.

6            Sound like science fiction? It's not. It's  
7            science fact and has become a reality for you in TA65.

8            ON SCREEN: CALL NOW

9            BuyTA65Direct.com

10           MALE ANNOUNCER: Deep inside of you, there is a  
11           biological clock ticking away in every one of your three  
12           trillion cells. In young people, cells divide easily,  
13           replicating themselves. As we age, this process slows.  
14           Deep inside the nucleus, the secret of aging is revealed.  
15           In every cell, you have 23 pairs of chromosomes. At the  
16           tips are a sequence of repeating DNA code called  
17           telomeres. This section protects the DNA during  
18           duplication, much the same way the plastic tip of a  
19           shoelace protects it from fraying.

20           Unfortunately, every time division occurs, the  
21           telomeres shorten. Eventually, they shorten so much,  
22           they can no longer protect the replication process. The  
23           cell can no longer divide. Its healthy replication over,  
24           it becomes senescent or dies.

25           Some scientists today accept this as a root

## Complaint

22

1 cause of cellular aging. This was the research behind  
2 the awarding of the Nobel Prize.

3 ON SCREEN: EXTRACTED FROM NATURAL PLANT  
4 MOLECULES

5 CALL NOW  
6 BuyTA65Direct.com

7 MALE ANNOUNCER: T.A. Sciences has developed a  
8 process for extracting a naturally-occurring plant  
9 molecule and refining it in a capsule you can take to  
10 signal your body that it's time to lengthen your  
11 telomeres.

12 Here's how it works. TA65 enters the  
13 bloodstream and travels throughout the body where it  
14 passes through individual cells and activates the  
15 production of an enzyme called telomerase. This enzyme  
16 travels to the tips of the chromosome and attaches and  
17 add lengths to the telomeres and restores them. This  
18 effect allows healthy cells to live longer and  
19 potentially replicate many more times. More healthy  
20 identical cellular replication is what you want.

21 ON SCREEN: KEYS TO HEALTH:

- 22 - Quality Sleep
- 23 - Good Nutrition
- 24 - Regular Exercise

25 CALL NOW

## Complaint

23

1 BuyTA65Direct.com

2 MALE ANNOUNCER: Call now and discover TA65 for

3 yourself. Yes, you need great quality sleep, healthy

4 eating and nutrition. Even exercise helps retain

5 cellular health.

6 ON SCREEN: PROVEN TELOMERASE ACTIVATION

7 CALL NOW

8 BuyTA65Direct.com

9 MALE ANNOUNCER: But only TA65 has been shown

10 to activate telomerase which starts life's most important

11 cellular anti-aging chain reaction.

12 ON SCREEN: SUPPORTS IMMUNITY

13 CALL NOW

14 BuyTA65Direct.com

15 MALE ANNOUNCER: Some studies have shown how

16 this amazing discovery could help support immune health

17 and even reverse measurable obvious effects of cellular

18 aging. Why wait one more minute when the clock is

19 ticking?

20 ON SCREEN: CALL NOW FOR MORE INFORMATION

21 CALL NOW

22 BuyTA65Direct.com

23 (Scrolling) TA65 IS A PATENTED PRODUCT ONLY

24 AVAILABLE FROM TA SCIENCES

25 MALE ANNOUNCER: Call now and find out more

## Complaint

24

1     about TA65.

2             ON SCREEN: CALL NOW IF YOU ARE A PHYSICIAN

3             YOU MAY QUALIFY TO ORDER DIRECT

4             CALL NOW

5             BuyTA65Direct.com

6             MALE ANNOUNCER: If you're a doctor and want to

7     learn more, consultants are standing by. You can even

8     see if you qualify to purchase TA65 directly through a

9     special direct program, only available to viewers of this

10    program.

11            ON SCREEN: AFFORDABLE & EFFECTIVE

12            AVAILABLE AS A NUTRITIONAL SUPPLEMENT

13            CALL NOW

14            BuyTA65Direct.com

15            MALE ANNOUNCER: TA65 is affordable, it works,

16    and it's available direct to you as a nutritional

17    supplement.

18            ON SCREEN: CALL NOW FOR MORE INFORMATION

19            30 day money-back guarantee less s/h

20            CALL NOW

21            BuyTA65Direct.com

22            MALE ANNOUNCER: It's only available from one

23    company in the world, T.A. Sciences. Don't hesitate.

24    Call now.

25            ON SCREEN: BIOLOGICAL BREAKTHROUGHS

## Complaint

25

1           Breaking the Age Code

2           KATHLEEN KENNEDY: Welcome back to Biological

3 Breakthroughs. Today we're talking to a team of

4 scientists and doctors around the world about an

5 explosive growth topic for baby boomers and younger.

6           ON SCREEN: Kathleen Kennedy

7           INVESTIGATIVE JOURNALIST

8           KATHLEEN KENNEDY: The topic is telomeres, and

9 in 2009, a group of scientists were awarded the Nobel

10 Prize in medicine for the research that led to the

11 discovery of telomerase.

12           ON SCREEN: Calvin B. Harley, Ph.D.

13           PRESIDENT & CSO, TELOME HEALTH, INC.

14           KATHLEEN KENNEDY: For those of you just

15 joining us, Dr. Cal Harley, since the beginning of time

16 we have thought that the wrinkles we get, the skin

17 becoming thinner, our bones becoming more brittle is all

18 part of just being old. But what we're learning now is

19 that this is simply a manifestation of something else, is

20 that correct?

21           ON SCREEN: Calvin B. Harley, Ph.D.

22           PRESIDENT & CSO, TELOME HEALTH, INC.

23           "THERE IS A CLOCKING MECHANISM FOR OUR DNA"

24           DR. CALVIN HARLEY: Yeah, that's correct,

25 Kathleen. Basically, what we see on the surface are a



## Complaint

26

1 manifestation of what's going on inside the body in cells  
2 and surrounding cells. So, it's quite clear now that  
3 there is a clocking mechanism for aging within our DNA,  
4 and it's very clear that telomerase can elongate  
5 telomeres.

6 KATHLEEN KENNEDY: I think most people want to  
7 know, where does it derive from?

8 ON SCREEN: Calvin B. Harley, Ph.D.  
9 PRESIDENT & CSO, TELOME HEALTH, INC.

10 "TA65 IS DERIVED FROM A NATURAL PRODUCT"

11 DR. CALVIN HARLEY: So, TA65 is supplement.  
12 It's not a drug, at least not at this point in time. But  
13 what's important is that it's derived from a natural  
14 product. So, aspirin, Digitoxin, the heart medicine,  
15 penicillin, Taxol, these are all natural product derived  
16 entities.

17 ON SCREEN: Calvin B. Harley, Ph.D.  
18 PRESIDENT & CSO, TELOME HEALTH, INC.

19 "5000 DIFFERENT EXTRACTS WERE SCREENED TO  
20 IDENTIFY THE COMPOUND IN TA65"

21 DR. CALVIN HARLEY: It turns out that this  
22 particular molecule is derived from a plant that was  
23 known to have health maintenance or longevity type  
24 properties. We actually screened 5,000 different  
25 extracts of natural products. We screened them for the

## Complaint

27

1 ability to activate telomerase in normal human cells that  
2 have telomerase capability or are able to activate  
3 telomerase. And one compound stood out amongst all of  
4 them and that's the product that went into TA65.

5 KATHLEEN KENNEDY: And Noel Patton, your  
6 company, T.A. Sciences, has the exclusive global  
7 distribution of TA65. I think most people want to know,  
8 is this going to cost me a fortune?

9 ON SCREEN: Noel Patton

10 CEO AND FOUNDER OF T.A. SCIENCES

11 "TONS OF PLANT MATERIAL ARE REQUIRED TO PRODUCE  
12 A SMALL AMOUNT OF TA65"

13 NOEL PATTON: As Dr. Harley said, this is a  
14 very rare molecule in the plant. We literally start with  
15 tons of plant material to end up with a small amount of  
16 TA65. So, it started out very expensive. Most of our  
17 clients were either really rich people or professional  
18 athletes, movie stars, these kinds of people. But, now,  
19 we have tens of thousands of people that are taking the  
20 product and the costs have been able to come down.

21 KATHLEEN KENNEDY: So, it's not going to cost  
22 me an arm and a leg?

23 ON SCREEN: Noel Patton

24 CEO AND FOUNDER OF T.A. SCIENCES

25 "IT'S AFFORDABLE FOR EVERYONE"



## Complaint

28

1 NOEL PATTON: Not going to cost you an arm and  
2 a leg. Now it's affordable for everyone.

3 ON SCREEN: Kathleen Kennedy

4 INVESTIGATIVE JOURNALIST

5 KATHLEEN KENNEDY: Good news, all right. Well,  
6 Dr. Raphaelle, your practice offers independent testing  
7 of telomeres. Tell me a little bit about the process.

8 ON SCREEN: Dr. Joseph Raphaelle, M.D.

9 CO-FOUNDER, PHYSIO-AGE MEDICAL GROUP

10 "IT'S MORE IMPORTANT TO KNOW YOUR TELOMERE  
11 LENGTH THAN YOUR CHOLESTEROL"

12 DR. JOSEPH RAPHAELLE: Well, the process is  
13 pretty simple. The patient comes in and we can get a  
14 sample of blood or saliva and send it off to a lab and  
15 we'll have the results in a couple of weeks. I like all  
16 my patients to get their telomeres tested in my practice  
17 now because I really think that it's probably more  
18 important to know what your telomere length is than to  
19 know what your cholesterol is. It gives you more  
20 information about the health of your body, not just your  
21 vascular system, about all the other organ systems that  
22 we've been talking about.

23 ON SCREEN: TA65

24 DR. FREDRIC STERN: People coming to see me are  
25 coming for various reasons, but what it comes down to is

## Complaint

29

1 they're wanting to feel better, they're wanting to look  
2 better, they're wanting to appear more refreshed and  
3 youthful.

4 ON SCREEN: Dr. Fredric Stern

5 The Stern Center for Aesthetic Surgery

6 DR. FREDRIC STERN: And I can offer them  
7 procedures, I can offer them laser procedures, I can  
8 offer them cosmetic surgeries to improve these things.  
9 But, now, I have something that I can offer them that  
10 they can take that I can feel confident can also promote  
11 their health and make them feel better internally and get  
12 down to the very basic genetic nature of what causes  
13 aging.

14 ON SCREEN: Carol Wayne, Age 74

15 Taking TA65 for 1 year

16 CAROL WAYNE: At my age, at 74, I want to enjoy  
17 the time I have left, whatever that is. I want to have  
18 as much vitality and energy as I can possibly get.

19 ON SCREEN: These results are atypical and  
20 other consumers may not achieve such results.

21 CAROL WAYNE: And I find that with the TA65, I  
22 have the energy that I want and I need to do all the  
23 things I like to do. I like to travel. It helps with my  
24 quality of life.

25 KARL GITTELMAN: I still play baseball. And

## Complaint

30

1 one of the things I noticed was that when I went to throw  
2 a ball -- normally, when you throw a ball, you reach back  
3 like this and throw.

4 ON SCREEN: Karl Gittelman, Age 75  
5 Taking TA65 for 2 years

6 KARL GITTELMAN: When I tried to do that, I  
7 felt pain in this shoulder. And, so, I adapted to that  
8 and I was able to throw from my ear, you know, and I was  
9 able to throw pretty well.

10 ON SCREEN: These results are atypical and  
11 other consumers may not achieve such results.

12 KARL GITTELMAN: Well, I started taking TA65,  
13 as I said, in April, I'm out there throwing my short arm  
14 one day, and all of a sudden, I reach back and throw, no  
15 pain. Two years later, I am -- that's the way I throw  
16 now. I have never had an inch of pain or any kind of  
17 indication of pain. You can see where my arm's out here,  
18 which I could never have done, you know, three years ago.  
19 I mean, for 23 years, I couldn't do it and, all of a  
20 sudden, bam, I started taking TA65, and six months later,  
21 I could do it.

22 ON SCREEN: Keith Clearwater, Age 53  
23 Taking TA65 for 2.5 years

24 KEITH CLEARWATER: I'm 53 years old. I don't  
25 feel any different than when I was 20, and that's

## Complaint

31

1 genuine. I do the same things. I'm very active with  
2 kids, grandkids.

3 ON SCREEN: These results are atypical and  
4 other consumers may not achieve such results.

5 KEITH CLEARWATER: And for me, I believe that  
6 I'll be able to do these things late into my eighties and  
7 nineties. My goal is to fight this thing forever and be  
8 able to maintain, I don't know, the kind of lifestyle and  
9 activity level that I've had my whole life.

10 KATHLEEN KENNEDY: What would you say, Dr.  
11 Park, is the most surprising benefit you've seen for your  
12 patients?

13 ON SCREEN: Dr. Ed Park, MD, MPH

14 AUTHOR: "TELOMERE TIMEBOMBS"

15 DR. ED PARK: Thanks to Dr. Raphaele and T.A.  
16 Sciences, we have a whole way of measuring and that model  
17 allows us to tell you, hey, this stuff is worth it, it's  
18 working.

19 KATHLEEN KENNEDY: And let me just see a show  
20 of hands right now. Who here is taking TA65?

21 ON SCREEN: Consult your physician before  
22 beginning any dietary supplement program, particularly if  
23 you have special medical needs.

24 KATHLEEN KENNEDY: Well, that speaks volumes to  
25 me.

## Complaint

32

1 All right. Well, the secret of aging silently  
2 ticks away inside your cells.

3 ON SCREEN: Consult your physician before  
4 beginning any dietary supplement program, particularly if  
5 you have special medical needs.

6 BuyTA65Direct.com

7 KATHLEEN KENNEDY: That secret is revealed in  
8 your telomeres. Your body seems to have the secret  
9 itself to lengthening your telomeres with an enzyme  
10 created in the DNA chain itself, telomerase.

11 ON SCREEN: This is a paid program for TA65  
12 BuyTA65Direct.com

13 (Scrolling) CALL NOW FOR MORE INFORMATION --  
14 CALL IF YOU ARE A PHYSICIAN INTERESTED IN DISTRIBUTING  
15 TA65 - CALL TO SEE IF YOU ARE QUALIFIED TO PURCHASE TA65  
16 DIRECTLY - CALL TO FIND OUT ABOUT TELOMERE TESTING

17 KATHLEEN KENNEDY: If you'd like to learn more  
18 on how you can educate yourself further or try TA65, go  
19 to the web address on your screen or call the number  
20 below. There is no obligation. The call is absolutely  
21 free. There are informed people just waiting to answer  
22 your questions.

23 We'll be back after this short break.

24 ON SCREEN: TA65 MD  
25 HOW WILL YOU LOOK?

## Complaint

33

1 (PHOTOS)

2 AGE 70

3 AGE 80

4 AGE 90

5 MALE ANNOUNCER: Longevity experts have  
6 identified key factors that define what your personal  
7 cellular aging will look like, quality sleep, active  
8 exercise, good nutrition, plus genetics are all  
9 important.

10 ON SCREEN: LIVE HEALTHY LONGER

11 CALL NOW

12 BuyTA65Direct.com

13 MALE ANNOUNCER: If you're the kind of person  
14 that wants a long healthy life, you probably make good  
15 choices daily. But what can be done about your cellular  
16 health?

17 Deep inside of you, there is a biological clock  
18 ticking away in every one of your three trillion cells.  
19 In young people, cells divide easily, replicating  
20 themselves. As we age, this process slows. Deep inside  
21 the nucleus, the secret of aging is revealed. In every  
22 cell, you have 23 pairs of chromosomes. At the tips are  
23 a sequence of repeating DNA code called telomeres. This  
24 section protects the DNA during duplication, much the  
25 same way the plastic tip of a shoelace protects it from



## Complaint

34

1     fraying.

2             Unfortunately, every time division occurs, the  
3     telomeres shorten. Eventually, they shorten so much,  
4     they can no longer protect the replication process. The  
5     cell can no longer divide. Its healthy replication over,  
6     it becomes senescent or dies.

7             Some scientists today accept this as a root  
8     cause of cellular aging. This was the research behind  
9     the awarding of the Nobel Prize.

10            ON SCREEN: EXTRACTED FROM NATURAL PLANT  
11     MOLECULES

12            CALL NOW

13            BuyTA65Direct.com

14            MALE ANNOUNCER: T.A. Sciences has developed a  
15     process for extracting a naturally-occurring plant  
16     molecule and refining it in a capsule you can take to  
17     signal your body that it's time to lengthen your  
18     telomeres.

19            Here's how it works. TA65 enters the  
20     bloodstream and travels throughout the body where it  
21     passes through individual cells and activates the  
22     production of an enzyme called telomerase. This enzyme  
23     travels to the tips of the chromosome and attaches and  
24     add lengths to the telomeres and restores them. This  
25     effect allows healthy cells to live longer and

## Complaint

35

1 potentially replicate many more times. More healthy  
2 identical cellular replication is what you want.  
3 There's only one company in the world that  
4 distributes patented TA65, T.A. Sciences.  
5 ON SCREEN: PROVEN TELOMERASE ACTIVATION  
6 CALL NOW  
7 BuyTA65Direct.com  
8 MALE ANNOUNCER: Call now. Discover TA65 for  
9 yourself. TA65 could be a component to your cellular  
10 health.  
11 ON SCREEN: SUPPORTS IMMUNITY  
12 CALL NOW  
13 BuyTA65Direct.com  
14 MALE ANNOUNCER: Some studies have shown how  
15 this amazing discovery could help support immune health  
16 and even reverse measurable obvious effects of cellular  
17 aging. Why wait one more minute when the clock is  
18 ticking?  
19 ON SCREEN: CALL NOW FOR MORE INFORMATION  
20 CALL NOW  
21 BuyTA65Direct.com  
22 (Scrolling) TA65 IS A PATENTED PRODUCT ONLY  
23 AVAILABLE FROM TA SCIENCES  
24 MALE ANNOUNCER: Call now to find out more  
25 about TA65.



## Complaint

36

1 ON SCREEN: CALL NOW IF YOU ARE A PHYSICIAN  
2 YOU MAY QUALIFY TO ORDER DIRECT  
3 CALL NOW  
4 BuyTA65Direct.com  
5 MALE ANNOUNCER: If you're a doctor and want to  
6 learn more, we can help you as well. You may even  
7 inquire to purchase TA65 directly through a special  
8 direct program.  
9 ON SCREEN: AFFORDABLE & EFFECTIVE  
10 AVAILABLE AS A NUTRITIONAL SUPPLEMENT  
11 CALL NOW  
12 BuyTA65Direct.com  
13 MALE ANNOUNCER: TA65 is affordable, it works,  
14 and it's available direct to you as a nutritional  
15 supplement.  
16 ON SCREEN: CALL NOW FOR MORE INFORMATION  
17 CALL NOW  
18 BuyTA65Direct.com  
19 MALE ANNOUNCER: There's even an available  
20 testing protocol to demonstrate that you, in fact, are  
21 lengthening your telomeres over time with TA65. Over  
22 10,000 people are currently experiencing TA65.  
23 ON SCREEN: CALL NOW FOR MORE INFORMATION  
24 30 day money back guarantee less s/h  
25 CALL NOW

## Complaint

37

1 BuyTA65Direct.com

2 MALE ANNOUNCER: Now, it's your turn. Don't

3 hesitate. Call T.A. Sciences now.

4 ON SCREEN: TA65 MD

5 ON SCREEN: Letter written by Roger Daltrey on

6 the screen:

7 I have been interested in alternative medicine

8 since the early days of my career.

9 Maintaining good health through the stresses

10 and strains of touring and singing with The Who requires

11 enormous stamina. I was recommended TA65 by a good

12 friend and decided to try it.

13 After taking TA65 for one year I noticed

14 considerable improvement in energy levels. Colds and

15 winter infections have been a rarity.

16 Recently I took a 6 week break from taking the

17 product, and noticed significant energy drop off.

18 Although to my knowledge the evidence of

19 benefit to everyone is not proven, I have no doubt that

20 this product works for me. I hope it does the same for

21 you.

22 Roger Daltrey

23 Maintaining good health...while touring and

24 singing with The Who...requires enormous stamina.

25 I was recommended TA65...and decided to try it.

## Complaint

38

1 I noticed considerable improvement in energy  
2 levels.

3 Colds..have been a rarity.

4 Recently, I took a 6-week break from the  
5 product, and noticed a significant energy drop-off.

6 Roger Daltrey

7 Lead singer of "The Who"

8 ROGER DALTREY: Well, I've been interested in  
9 alternative medicine since the early days of my career.  
10 Maintaining good health through the stresses and strains  
11 of touring and singing with The Who required enormous  
12 stamina. I was recommended TA65 by a good friend and  
13 decided to try it. After taking TA65 for one year, I  
14 noticed considerable improvement in energy levels. Colds  
15 and winter infections have been a rarity.

16 Recently, I took a six-week break from the  
17 product and noticed significant energy drop-off.  
18 Although, to my knowledge, the evidence of benefit to  
19 everyone is not proven, I have no doubt that this product  
20 works for me. I hope it does the same for you.

21 ON SCREEN: TA65 MD

22 ON SCREEN: Greg Gerber, Age 61

23 Taking TA65 for 2 years

24 GREG GERBER: When I first started using TA, it  
25 was to see what I could do with reentering competitive

## Complaint

39

1 swimming. That has been the primary marker that I've  
2 used is to watch my swimming times plummet.

3 ON SCREEN: These results are atypical and  
4 other consumers may not achieve such results.

5 GREG GERBER: All of a sudden, you go from  
6 being, yeah, he's 59 or 60 and kind of one of the guys in  
7 the water. All of a sudden, you end up being one of the  
8 guys in the water getting out first.

9 My recovery time for anything I do is  
10 negligible.

11 ON SCREEN: Consult a physician before  
12 beginning any dietary supplement program, particularly if  
13 you have special medical needs.

14 GREG GERBER: If I do a four-hour race or a  
15 four-hour swim or a four-mile race and two hours, I'm  
16 able to go again within 90 minutes. And the other  
17 fellows my age group just plain can't do that. They're  
18 recovering, they're telling about their aches and pains  
19 the day after, their shoulders ache, their muscles ache.  
20 And I just sort of look at them and shrug and say, well,  
21 see, isn't that interesting, guys, I don't have any of  
22 that.

23 ON SCREEN: BIOLOGICAL BREAKTHROUGHS

24 Breaking the Age Code

25 KATHLEEN KENNEDY: Gentlemen, thank you all for

## Complaint

40

1 being here today.

2 ON SCREEN: Kathleen Kennedy

3 INVESTIGATIVE JOURNALIST

4 KATHLEEN KENNEDY: I want to hear from all of

5 you if there was one thing that you could tell our

6 viewers today, that you could convey to them about

7 telomeres, telomerase, TA65, what would it be, Dr.

8 Harley?

9 ON SCREEN: Calvin B. Harley, Ph.D.

10 PRESIDENT & CSO, TELOME HEALTH, INC.

11 DR. CALVIN HARLEY: Kathleen, I think -- I've

12 been working in the area for over 30 years now and I'm

13 excited about the opportunity for anti-aging

14 interventions, using the knowledge that we have now,

15 understanding the basic mechanisms that we hope to

16 leverage in the future for mankind.

17 KATHLEEN KENNEDY: Dr. Raphaelle?

18 ON SCREEN: Dr. Joseph Raphaelle, M.D.

19 CO-FOUNDER, PHYSIO-AGE MEDICAL GROUP

20 DR. JOSEPH RAPHAELLE: I always tell my

21 patients the most important thing to know is where you

22 are in the aging process, because in some organ systems,

23 you're aging faster than in others.

24 ON SCREEN: Dr. Joseph Raphaelle, M.D.

25 CO-FOUNDER, PHYSIO-AGE MEDICAL GROUP

## Complaint

41

1           "TELOMERE TESTING IS A GOOD WAY TO KNOW WHERE  
2 YOU ARE IN THE AGING PROCESS"

3           DR. JOSEPH RAPHAELLE: Telomere measurements  
4 are a good way to get an overall idea about where your  
5 body is in the aging process so that you know when it's  
6 time to intervene with something like TA65 or anything  
7 else that can help you age as slowly as possible.

8           KATHLEEN KENNEDY: And, Dr. Park, what about  
9 you?

10          ON SCREEN: Dr. Ed Park, MD, MPH

11          AUTHOR: "TELOMERE TIMEBOMBS"

12          "NOW WE HAVE A TOOL TO DO SOMETHING ABOUT  
13 AGING"

14          DR. ED PARK: I agree. I think that there are  
15 real objective ways to measure aging and now we have a  
16 tool that can actually do something about it. Last time  
17 I checked, there was 15,000 articles relating to  
18 telomeres. So, I think it's just a matter of time before  
19 the science catches up to what my patients are already  
20 experiencing --

21          ON SCREEN: Dr. Ed Park, MD, MPH

22          AUTHOR: "TELOMERE TIMEBOMBS"

23          "MY PATIENTS EXPERIENCE BETTER HEALTH, BETTER  
24 QUALITY OF LIFE"

25          DR. ED PARK: -- which is better health, just a

## Complaint

42

1 better quality of life and something that is safe and  
2 something that I have been taking for five years.

3 KATHLEEN KENNEDY: And, Noel, your message?

4 ON SCREEN: Noel Patton  
5 CEO AND FOUNDER OF T.A. SCIENCES

6 "TA65 WORKS FOR ME, MY FAMILY, MY FRIENDS, MY  
7 LOVED ONES"

8 NOEL PATTON: Well, I was looking for a  
9 solution to aging for myself and discovered TA65. We've  
10 been working on it for ten years. And it works for me,  
11 it's worked for my family, my friends, loved ones, and  
12 now for tens of thousands of people, and we've made it  
13 affordable and accessible to everyone, and I'm really  
14 proud to be at the beginning of this revolution in  
15 science.

16 KATHLEEN KENNEDY: This truly is compelling  
17 stuff.

18 ON SCREEN: (Scrolling) CALL NOW FOR MORE  
19 INFORMATION - CALL IF YOU ARE A PHYSICIAN INTERESTED IN  
20 DISTRIBUTING TA65 - CALL TO SEE IF YOU ARE QUALIFIED TO  
21 PURCHASE TA65 DIRECTLY

22 This is a paid program for TA65  
23 CALL NOW  
24 BuyTA65Direct.com

25 KATHLEEN KENNEDY: That's all the time that we



## Complaint

43

1 have today, but if you want to learn more about TA65 or  
2 telomeres or your telomere length or how you can order  
3 TA65 today, go to the web address on your screen or,  
4 better yet, call. There's no obligation, no cost for the  
5 call, just friendly, trained information consultants who  
6 will answer your specific questions. They're trained to  
7 get you the answers that you're looking for.

8 Thanks for watching. Bye now.

9 ON SCREEN: TA65 MD

10 ON SCREEN: CALL NOW

11 BuyTA65Direct.com

12 MALE ANNOUNCER: There's only one company in  
13 the world that distributes patented TA65, T.A. Sciences.  
14 Call now.

15 ON SCREEN: PROVEN TELOMERASE ACTIVATION

16 CALL NOW

17 BuyTA65Direct.com

18 MALE ANNOUNCER: Discover TA65 for yourself.

19 ON SCREEN: SUPPORTS IMMUNITY

20 CALL NOW

21 BuyTA65Direct.com

22 MALE ANNOUNCER: Some studies have shown how  
23 this amazing discovery could help support immune health  
24 and even reverse measurable obvious effects of cellular  
25 aging. Why wait one more minute when the clock is



## Complaint

44

1     ticking?

2             ON SCREEN: CALL NOW FOR MORE INFORMATION

3             CALL NOW

4             BuyTA65Direct.com

5             MALE ANNOUNCER: Call now to find out more

6     about TA65.

7             ON SCREEN: CALL NOW IF YOU ARE A PHYSICIAN

8             YOU MAY QUALIFY TO ORDER DIRECT

9             (Scrolling) TA65 IS A PATENTED PRODUCT ONLY

10    AVAILABLE FROM TA SCIENCES

11            CALL NOW

12            BuyTA65Direct.com

13            MALE ANNOUNCER: If you're a doctor and want to

14    learn more, we can help you as well. You may even

15    inquire to purchase TA65 directly through a special

16    direct program.

17            ON SCREEN: AFFORDABLE & EFFECTIVE

18            AVAILABLE AS A NUTRITIONAL SUPPLEMENT

19            CALL NOW

20            BuyTA65Direct.com

21            MALE ANNOUNCER: TA65 is affordable, it works,

22    and it's available direct to you as a nutritional

23    supplement.

24            ON SCREEN: CALL NOW FOR MORE INFORMATION

25            30 day money-back guarantee less s/h

## Complaint

45

1           CALL NOW

2           BuyTA65Direct.com

3           MALE ANNOUNCER: Now, it's your turn. Don't

4 hesitate. Call T.A. Sciences now.

5           ON SCREEN: TA65 MD

6           ON SCREEN: The preceding was a paid program

7 for TA65 MD

8           Sponsored by T.A. Sciences

9           CELL REJUVENATION THROUGH TELOMERASE ACTIVATION

10          MALE ANNOUNCER: The preceding was a paid

11 program for TA65, sponsored by T.A. Sciences.

12          (The recording was concluded.)

13

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Complaint

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1           C E R T I F I C A T I O N   O F   T Y P I S T

2

3       MATTER NUMBER: 1423103

4       CASE TITLE: TELOMERASE ACTIVATION SCIENCES, INC.

5       TAPING DATE: JANUARY 7, 2014

6       TRANSCRIPTION DATE: JUNE 9, 2014

7       REVISION DATE: JANUARY 19, 2015

8           I HEREBY CERTIFY that the transcript contained  
9       herein is a full and accurate transcript of the tapes  
10       transcribed by me on the above cause before the FEDERAL  
11       TRADE COMMISSION to the best of my knowledge and belief.

12

13                                   DATED: JANUARY 19, 2015

14

15

16                                   ELIZABETH M. FARRELL

17

18           C E R T I F I C A T I O N   O F   P R O O F R E A D E R

19

20           I HEREBY CERTIFY that I proofread the transcript for  
21       accuracy in spelling, hyphenation, punctuation and  
22       format.

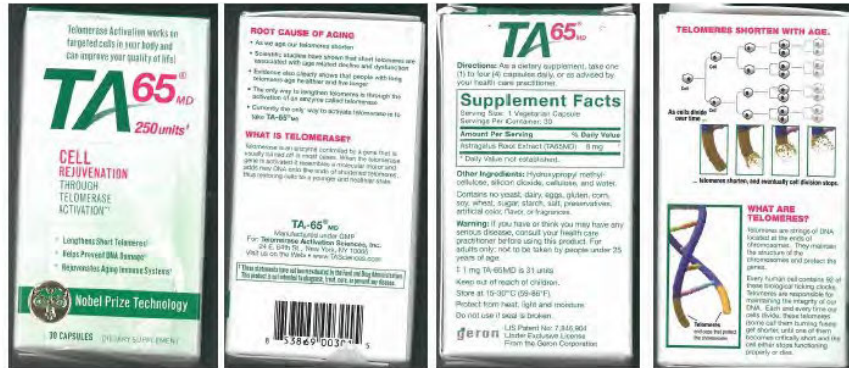
23

24

25                                   SARA J. VANCE

Complaint

Exhibit I

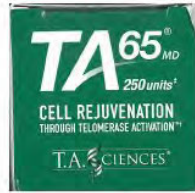


Front Panel

Side Panel

Rear Panel

Side Panel



Top Panel



Bottom Panel

Complaint

Exhibit J

**Who Should Take TA-65<sup>MD</sup>?**

*\*Anyone who had a telomere length test and has short telomeres*

*\*Anyone who's immune system is compromised and can benefit from its restoration*

*\*Everyone who is concerned about aging healthy and living longer*



**What people are saying:**

*As a practicing MD, I am surprised at the improvement in my immune system after only 6 months.*

**-Dr. Fred Vagnini, 70, New York, NY**

*I'm more active physically than any time I can remember. At age 80 I feel like the "prancer boy" for TA Sciences.*

**-Ralph A. 80, Los Angeles, CA**

To learn more about TA-65<sup>MD</sup> and how it can help you, consult one of our licensed healthcare practitioners or visit: [www.ta65supps.com](http://www.ta65supps.com)

**Why should you consider taking TA-65<sup>MD</sup>?**

As we age, our Telomeres shorten. Regular exercise and healthy habits can slow the attrition of telomeres, but telomere length continually declines as we age. If you have not followed a healthy lifestyle, your telomeres are shorter than they should be. Many recent scientific studies have shown short telomeres are associated with age related decline and dysfunction. Evidence also clearly shows people with long telomeres age healthier and look younger. The only way to lengthen telomeres is through the activation of an enzyme called telomerase. The world's only commercially available way to activate telomerase is to take TA-65<sup>MD</sup>.



**T. A. Sciences, Inc.**  
 24E 64<sup>th</sup> Street, 5<sup>th</sup> Floor,  
 New York, NY 10065  
 Phone: 212-588-8805  
 Fax: 212-588-0558  
[www.ta65supps.com](http://www.ta65supps.com)



Telomerase Activation works on a genetic level to help you improve your quality of life.

**TA 65<sup>MD</sup>**  
 250 units<sup>†</sup>

**CELL REJUVENATION THROUGH TELOMERASE ACTIVATION<sup>™</sup>**

- + Lengthens Short Telomeres!
- + Helps Prevent DNA Damage!
- + Rejuvenates Aging Immune Systems!

**Nobel Prize Technology**





Complaint

### What is the key to aging healthy and living longer?

## Telomeres!!!

**Telomeres:** Strings of DNA located at the ends of chromosomes. They maintain the structure of the chromosome and protect the genes.



Every human cell contains 92 telomeres, or biological ticking clocks. Telomeres are responsible for maintaining the integrity of our DNA. Each and every time our cells divide, these telomeres (some call them burning fuses) get shorter. When one becomes critically short, the cell either stops functioning properly or dies. Telomere biology won the 2009 Nobel Prize in Medicine for good reason.

Birth marks the beginning of telomere erosion in most tissues throughout life. Telomere shortening inevitably proceeds as we grow older. It is further accentuated by environmental, physical, and emotional stress. Unless something can be done to keep telomeres from shortening, (even if every disease known to mankind is cured)....

**We will all still die from telomere shortening!**

### What can be done to keep telomeres long?

**Lead a healthy lifestyle**  
This will only help slow down the shortening of your telomeres

**Activate Telomerase**  
In published studies, it has been proven to be the only way to lengthen short telomeres

**What is Telomerase?**  
Telomerase is an enzyme that maintains the telomeres at the end of the chromosomes in order to prevent cell death. The gene producing the telomerase is usually turned off in most cells. When the telomerase gene is activated, it resembles a molecular motor and adds new DNA onto the ends of telomeres, thus lengthening short telomeres.



From circulating in the blood stream, TA-65<sup>MD</sup> enters aging cells

TA-65<sup>MD</sup> has the ability to activate the dormant **TELOMERASE** enzyme

Activated Telomerase causes telomeres at the end of the chromosome to grow longer

Cells with long healthy telomeres are able to continue to divide and proliferate

### Is there a way to activate telomerase?

According to published studies, the only proven way available is:

**TA-65<sup>MD</sup>**

TA-65<sup>MD</sup> is a purified molecule originating from the Astragalus plant.

Astragalus is a well-respected Chinese medicinal plant which has been in use for over 2,000 years.

TA-65<sup>MD</sup> is proven to:

- ✓ Activate telomerase
- ✓ Lengthen short telomeres
- ✓ Restore an aging immune system
- ✓ Increase bone density
- ✓ Improve various biomarkers that usually decline with age

Our clients report anecdotal benefits such as:

- ✓ Increased energy
- ✓ Improved endurance
- ✓ Vision improvements
- ✓ Enhanced libido
- ✓ Better skin elasticity
- ✓ and more....

Exhibit J - Page 2

Complaint

Exhibit K

Can we age healthier and live longer?

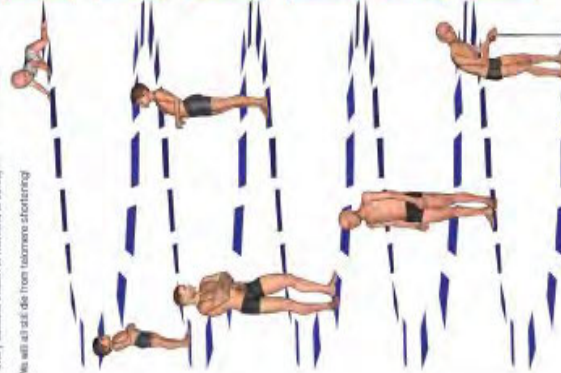
What's the key to aging healthy and living longer?

**Telomeres:** Strings of DNA located at the ends of the chromosomes. They maintain the structure of the chromosome and protect the genes.

Every human cell contains 50 of these biological ticking clocks. Telomeres are responsible for maintaining the integrity of our DNA. Each and every time our cells divide, these telomeres become a bit shorter, until one of them becomes critically short and the cell either stops functioning properly or dies.

Each time the beginning of telomere erosion in most tissues throughout life. Telomere shortening proceeds naturally as we grow older and is further accelerated by environmental, physical, and emotional stress. Telomere biology won the Nobel Prize in 2019 and for good reason, unless something can be done to keep telomeres from shortening, then every disease known to mankind is caused.

We will all slide from telomere shortening



What can be done to keep telomeres long?

Lead a healthy lifestyle  
This will only help to slow down shortening of your telomeres.

Activate Telomerase

In published studies it has been proven to be the only way to lengthen short telomeres

What is Telomerase?

Telomerase is an enzyme controlled by a specific gene (the telomerase gene) that is usually turned off in most cells. But when that gene is activated (turned on) it reassembles a molecular motor and adds new DNA onto the ends of telomeres thus lengthening telomeres.

**Why Humans Age:** When we are first conceived, five telomeres in each stem-cell embryo are approximately 15,000 nucleotides long. But by the time we are born, our telomeres have decreased in length to approximately 10,000 nucleotides.

At about age 1, the telomeres have shortened to approximately 9,000 nucleotides.

At about age 20, the telomeres have shortened to approximately 8,000 nucleotides.

At about age 30, the telomeres have shortened to approximately 7,000 nucleotides.

At about age 50, the telomeres have shortened to approximately 6,000 nucleotides.

By the age of 90, when the telomeres have decreased to an average of about 5,000 nucleotides, our cells cannot divide any further, and we die of old age.

Is there a way to activate telomerase?

The only way, proven in published studies, available to you is



**TA-650**, is a purified molecule originating from the ginseng plant. Astragalus is well respected Chinese medicinal plant, which has been in use for over 2,000 years.

TA-650 is proven to:

- Activate telomerase
- Lengthen short telomeres
- Activate an aging immune system
- Increase bone density
- Improve various hormones that usually decline with age

Our clients report anecdotal benefits, such as:

- Increased energy
- Improved endurance
- Vision improvements
- Enhanced libido
- Better skin elasticity
- Abnormal ...




Ask your physician if you can benefit from anti-aging therapy with TA-65.

Complaint

**Exhibit L****Maximize Your Potential for Health and Longevity****Minimize Your Age Related Decline and Dysfunction**

"As a practicing MD, I am surprised at the improvement in my immune system after only 6 months."  
Dr. Fred Vagnini, 70, New York, NY

 **TA-65<sup>®</sup>** is the first product to emerge from Nobel Prize winning science, focused on improving your health and quality of life.

**TA<sup>65</sup>** is the world's only telomerase activator proven in published studies to safely lengthen critically short telomeres, prevent DNA damage, and restore an aging immune system. TA-65 has been shown to increase bone density and improve various biomarkers which usually decline with age.

**Hypoallergenic:** Contains no yeast, dairy, eggs, gluten, corn, soy, wheat, sugar, starch, salt, preservatives, artificial color, flavor, or fragrances.

Visit [www.tasciences.com](http://www.tasciences.com) or call us at 212-588-8805

Mention this ad and receive 5% off your purchase.  
Offer expires: Sept. 30<sup>th</sup> 2011



## Complaint

**Exhibit M**

Telomere Science

Page 1 of 3



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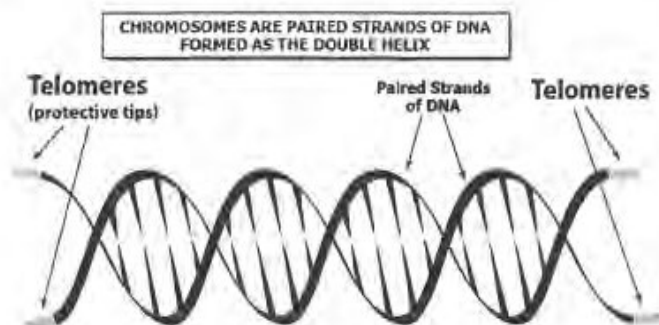
**Telomere Science**

There are trillions of cells in our body and at any given time a great number are dividing furiously to keep us alive and well. The process is directed by genes sitting on the 23 pairs of chromosomes found in the nucleus of each and every cell. The chromosomes are long sequences of DNA that contain all our genetic material. Each pair of chromosomes consists of one from your mother and one from your father and they are twisted around each other to form a structure called the double helix.

## Complaint

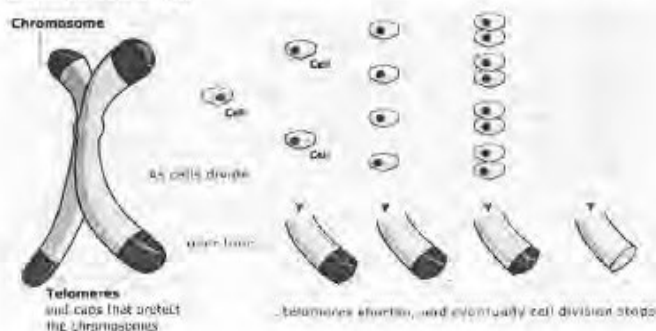
Telomere Science

Page 2 of 3



Of particular interest to the scientists at T.A. Sciences are the ends of each chromosome known as telomeres. Telomeres have no genetic function; they are simply stretches of DNA (repeats of base pairs) that protect the rest of the chromosome. These little bits of DNA are critical to healthy cell function and have been likened to the plastic tips on shoelaces because they prevent the chromosome from "fraying."

However, telomeres become progressively shorter each time the cell divides. When they get too short, cells reach replicative senescence and can no longer divide. The result can be the various conditions associated with old age.



Scientists have only recently begun to understand the critical importance of shortened telomeres. Research has shown that people over 60 who have long telomeres experience greater heart and immune system health than their age-matched counterparts with shorter telomeres. Thus, it is becoming well-understood that maintaining telomere length is preventing age-related decline.

The phenomenon of cellular aging was first noted by Professor Lenhard Hayflick in 1961. He discovered that cells cannot divide beyond a specific number of times. This is called the Hayflick Limit. Cells reaching this limit become old. Although Professor Hayflick discovered this important scientific principle, he had no idea what caused it.

Exhibit M - Page 2

<http://www.tasciences.com/introduction-to-telomere-science/>

1/24/2014

## Complaint

Telomere Science

Page 3 of 1

It took almost 30 more years before the role telomeres play in cellular aging was finally understood. In 1990, Calvin Harley at McMaster University in Canada and Carol Greider at Cold Spring Harbor Laboratory in the USA discovered that telomere shortening goes hand-in-hand with the aging process and is the direct cause of cells reaching the Hayflick Limit.

### Join our mailing list

Enter your e-mail:

**DISCLAIMER:** The information provided on this website is intended for educational purposes only. The educational material contained in this site is based on a careful analysis of the scientific literature and the experience of the T.A. Sciences team. Telomerase Activation is cutting edge science and knowledgeable scientists have differing views as to its benefits and safety. We urge each prospective client to become educated about TA and to consult their own experts prior to using any product that is a true telomerase activator.

This product is not intended to diagnose, treat, cure, or prevent any disease.

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[Home](#)

## Complaint

TA-65 Dosing Guideline

Page 1 of 2



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## TA-65 Dosing Guideline

The statistics showing TA-65's efficacy in the ground breaking scientific paper published Sept. 8, 2010 in the peer-reviewed scientific journal *Rejuvenation Research* allows us to offer different dosing options. Below is the guideline for you to choose the appropriate dosage and price for your unique situation:

1. **250 units (1 capsule daily)** is efficacious for healthy adults in their 40's or 50's. Also 250 units can serve as a maintenance dose for older people who have been taking higher doses of TA-65 for several years and want to continue on a reduced cost program. Clients who took this dose were shown to have increased short telomere length and significantly improved immune system function. There are also anecdotal reports of increased endurance and other benefits. **Cost: US \$600.00 for each 3 month segment.**
2. **500 units (2 capsules daily)** has been proven to lengthen short telomeres, restore the immune system, and improve other important bio markers. Anecdotal reports included increased energy,

Exhibit M - Page 4

<http://www.tasciences.com/ta-65/ta-65-dosing-guideline/>

1/24/2014

## Complaint

TA-65 Dosing Guideline

Page 2 of 7

endurance, vision improvements, sexual enhancement, and more. This medium strength dose is recommended for people who are generally in good health and want to be proactive in longevity and healthy aging. Many people in their 50's or 60's fall into this category. **Cost: US \$1,200.00 for each 3 month segment.**

3. **1000 units (4 capsules daily)** This is considered the HIGH DOSE and is recommended for clients who are:
1. Over 70 years of age, or
  2. Are of any age and have measured their telomeres and found them to be short, or
  3. Have reason to believe that strengthening their immune system would have particular benefit.

It is expected that this dose will give an increased benefit over the lower doses (although not a proportional benefit). Study subjects experienced lengthened telomeres, restoration of weak immune systems, bone density improvements and other important bio marker improvements which usually decline with age. Anecdotal reports include energy increase, endurance, cognitive improvements, improved vision, sexual enhancement, and an overall feeling of well being. **Cost: US \$2,200.00 for each 3 month segment.**

**Join our mailing list**

Enter your e-mail:

**DISCLAIMER:** The information provided on this website is intended for educational purposes only. The educational material contained in this site is based on a careful analysis of the scientific literature and the experience of the T.A. Sciences team. Telomerase Activation is cutting edge science and knowledgeable scientists have differing views as to its benefits and safety. We urge each prospective client to become educated about TA and to consult their own experts prior to using any product that is a true telomerase activator.

This product is not intended to diagnose, treat, cure, or prevent any disease.

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## Complaint

FAQ

Page 1 of 4



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## FAQ

### *What are telomeres?*

**Telomeres (te-lo-mere-s)** are buffers, protective pieces of DNA material at the ends of each and every chromosome in every cell in the body. Imagine a shoelace with the little plastic endpiece that keeps the strings of the lace bound together. This is what a telomere looks like and how it functions. Just as a shoelace unravels if the protective tip is missing, so the genetic material of the chromosomes degrades if not properly protected by telomeres of a certain length.

### *What is Telomerase Activation?*

**Telomerase (te-lo-mere-ase)** is a naturally-occurring enzyme in the body and a vital factor in cell health. It helps maintain the protective telomeres located at the ends of all



## Complaint

FAQ

Page 2 of 3

chromosomes. Scientific studies have shown that controlled activation of telomerase in normal cells can increase telomere length, improve functional capacity, and promote the proliferative lifespan of cells. The Telomerase-Activating potency of the molecule TA-65 has been independently proven in rigorous tests by 3rd party laboratories.

***Have these products been tested?***

T.A. Sciences™ follows stringent scientific procedures to back up the safety and efficacy of our products. For more than a decade, we have conducted a series of studies including, most importantly, a 2005 Anti-Aging Trial designed to directly measure the effect of TA-65 when taken internally. In this trial we saw a reduction in the signs of aging from the introduction of TA-65 into the bloodstream. A 125-person safety study showed no negative effects from daily use of TA-65. More exciting news on testing will be available as soon as on-going studies are completed.

***Is there real science behind these products?***

The presence of telomerase and the effects of telomere shortening are so basic to human aging and the maladies of old age that an entirely new branch of biology (Telomere Biology) has sprung up in the last two decades. The science of telomeres and telomerase activation is a new frontier, attracting some of the brightest scientific minds in both the academic and pharmaceutical worlds. To maintain its leadership role in Telomerase Activation, T.A. Sciences™ maintains unique relationships with leading edge biotech firms and opinion leaders in the field of Telomere Biology. Dr. Calvin Harley, who first discovered the link between Telomeres and aging, works closely with T.A. Sciences to integrate the latest scientific discoveries into T.A. Sciences' products. T.A. Sciences has also established working relationships with several other of the world's leading Telomere Biologists.

For more information on the science behind TA Activation [click here](#).

***How does T.A. Sciences assure the quality of its products?***

Quality and purity are assured through a series of analytical tests. Here is the process from the beginning to the end of the supply chain:

- T.A. Sciences harvests high-potency, naturally grown Astragalus. The raw plant material is refined into a base powder at our exclusive plant-extraction facility.
- This refined base material is then further extracted and purified through a proprietary process perfected over more than a decade of research and development to yield the single molecule TA-65 at over 98% purity. Using HPLC/ELSD/CAD, mass spectrometry, and gas chromatography, TA-65 is tested for purity, solvent residue, microbial, heavy metals, and pesticides.
- The Purified TA-65 is then sent to an FDA-certified facility for further processing utilizing advanced delivery technology to improve the bioavailability of the TA-65 molecule.
- The bioenhanced TA-65 is blended with USP (United States Pharmacopeia) grade GRAS (Generally Recognized As Safe) excipients and encapsulated and packaged at our subcontractor's state of the art GMP (Good Manufacturing Practices) certified facility. The final product must pass another series of tests including microbial and heavy metals before it can be released.
- Through these and other rigorous quality programs, T.A. Sciences can assure our clients that what we say on our label is 100% accurate.

***What is the plant from which TA-65 is derived?***

Exhibit M - Page 7

<http://www.tasciences.com/faq/>

1/24/2014

## Complaint

FAQ

Page 3 of 4

TA-65 is a naturally occurring molecule found in an ancient Chinese medicinal herb. Well known to most of China's 1.3 billion people for over 1000 years, this medicinal root can be found in every traditional Chinese herbal shop. Major health benefits from this plant have long been recognized by practitioners in China, but never before has the TA-65 active ingredient been isolated and purified.

***If TA-65 is a molecule coming from an ancient medicinal plant and extracts are available in any vitamin shop, why not just buy these inexpensive commercial products?***

To answer this question, we purchased four commonly available extract products and had them tested to verify how much, if any, TA-65 is present. In all four cases, the testing lab could not detect any TA-65. Their assay is accurate to one part per million.

This is not surprising because not only is the TA-65 molecule rare, but extraction processes used by Chinese processing companies normally destroy it. T.A. Sciences uses a proprietary production process that took years of research and over several million dollars to develop. Several patents have been issued to T.A. Sciences over the years related to this technology.

***Are there any allergens in the product I should be aware of?***

TA-65 does not contain dairy, eggs, gluten, corn, soy, wheat, sugar, starch, salt, preservatives, artificial color, flavor, or fragrances.

***Is TA-65 Scientifically Supported?***

T.A. Sciences is the first and only company in the world to offer Telomerase-Activating products to combat the effects of cellular aging through leading-edge science. After more than 10 years of rigorous Research and Development, T.A. Sciences is proud to market the unique and potent TA-65 molecule available in TA-65MD®.

***Is TA-65 a drug?***

TA-65 is a nutritional supplement, not a drug. It activates telomerase and this helps keep cells functioning in a normal and healthy way as we age. TA-65 is not a drug and we make no claims that it prevents or treats any disease.

***Is there a risk of unwanted cell proliferation?***

TA-65 is a single molecule found in the Astragalus plant. Astragalus extracts have been safely consumed by humans for over a thousand years and are available in any vitamin shop. TA-65's method of action is to activate the enzyme telomerase which in turn affects the telomeres, which are located at the tips of every chromosome in every cell of the body. Telomeres are the cellular clock of aging, every time a cell divides, telomeres get shorter. When telomeres get too short, cells can no longer divide and proliferate, they become old cells. Maintaining telomere health and length allows cells to continue to divide and proliferate for a longer time; they simply live and function longer. However if cells live longer, there is a theoretical concern that they might over proliferate. Therefore, theoretically, TA-65 could stimulate unwanted growth and cell overpopulation. Of course what TA-65 aims to do is to keep healthy cells alive and functioning for as long as possible. But what about the possibility of allowing unhealthy cells to live longer?



## Complaint

FAQ

Page 4 of 4

There is evidence that suggests that TA-65 boosts and strengthens the immune system, which we believe should address or suppress any cell overpopulation. Thus, we believe the overall effect of TA-65 regarding cell proliferation to be positive.

Furthermore, we believe that a number of physical changes associated with old age are due to the presence of short telomeres. TA-65 is specifically designed to promote overall cell health and longevity by increasing telomere length or slowing the rate of telomere shortening. When telomerase is activated, cell distress due to shortened telomeres is reduced.

In summary, considering the lack of evidence of TA-65 causing unwanted human cell proliferation, we believe the potential beneficial effects of activating telomerase and maintaining healthy tissue function outweigh any theoretical risk. And we practice what we preach; many T.A. Sciences employees are currently taking TA-65.

A doctor or professional health care provider who is familiar with Telomere Biology is in the best position to assess if TA-65 is right for you. Products that activate telomerase are on the frontiers of science and before you take TA-65, you should consult your physician or health care provider.

*TA-65 sounds too good to be true. How do I know this is not just snake oil like other so-called anti-aging products?*

TA-65 has been proven by outside, 3rd party laboratories to activate telomerase. Telomerase lengthens telomeres and longer telomeres allow cells to continue to divide and replicate longer.

In 2005 we did an Anti-Aging Trial that statistically shows in black and white what real people experienced from TA-65. This was a double-blind, placebo controlled study with data interpreted by Stanford University Ph.D., Dr. Jochen Kumm.

*T.A. Sciences is solidly grounded in patented telomerase technology and validated by additional controlled studies.*

#### Join our mailing list

Enter your e-mail:

**DISCLAIMER:** The information provided on this website is intended for educational purposes only. The educational material contained in this site is based on a careful analysis of the scientific literature and the experience of the T.A. Sciences team. Telomerase Activation is cutting edge science and knowledgeable scientists have differing views as to its benefits and safety. We urge each prospective client to become educated about TA and to consult their own experts prior to using any product that is a true telomerase activator.

This product is not intended to diagnose, treat, cure, or prevent any disease.

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## Complaint

## Exhibit N

www.tasciences.com/new-products/

T.A. SCIENCES®  
DR. SCHEUBER & DR. HANSEN

About T.A. Sciences® Telomere Biology TA-65® Nutritional Supplements New Products Contact Us

New Products

T.A. Sciences® has invested over \$5 million in the acquisition of technologies and related patent rights that offer the potential to greatly expand the company's portfolio of product offerings.

T.A. Sciences® is dedicated exclusively to creating grass-roots based, clinically tested wellness products that help address cellular aging through the coenzyme of Telomerase Activation. Built upon a foundation strongly grounded in scientific evidence, T.A. Sciences® is widely recognized as the leader in the field of Telomere Biology.

In addition to spending over \$1 million last year for leading-edge, cutting-edge research on Telomere Biology, T.A. Sciences® invested another \$5 million on the acquisition of technologies and related patent rights that offer the potential to greatly expand the company's portfolio of product offerings.

TA-65® for Skin

Human skin is an amazing organ. It is not only the largest organ in the body, but it is also the fastest growing. There are about 19 million skin cells in every inch of the body, which are constantly being replaced as they age and die. In fact, 30,000 to 40,000 skin cells die every day.<sup>1</sup>

TA-65® nutritional supplements have been shown to improve skin elasticity and decrease the amount of time it takes skin to recover after a procedure. Due to the large number of requests from physicians and customers for a TA-65® product that can be applied directly to particular areas of the skin, the company added topical formulation development to its research plan. After conducting three-dimensional modeling, in vitro and in vivo studies on a variety of formulations, T.A. Sciences® developed its first topical product, TA-65® for skin.

TA-65® for Skin is available now. Please [click here](#) to request more information.

Please check back here for updates on this and other exciting developments.

TA-65® for Skin  
Telomerase Complex

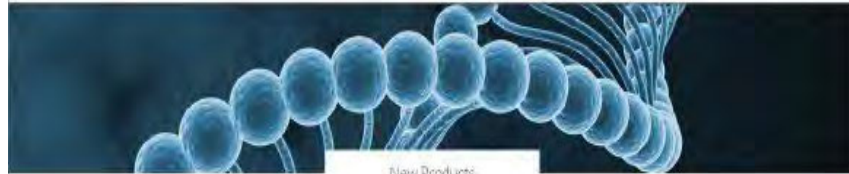
TA-65® Skin  
Telomerase Complex

Net Volume 1.5 fl. oz. (44 mL)

Complaint



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New Products

T.A. Sciences® has invested over \$5 million in the acquisition of technologies and related patent rights that offer the potential to greatly expand the company's portfolio of product offerings.

T.A. Sciences® is dedicated exclusively to creating research-based, clinically tested wellness products that help address cellular aging through the science of Telomerase Activation. Built upon a foundation strongly grounded in scientific evidence, T.A. Sciences® is widely recognized as the leader in the field of Telomere Biology.

In addition to spending over \$1 million per year for leading edge, scientific research on Telomere Biology, T.A. Sciences® invested another \$3 million on the acquisition of technologies and related patent rights that offer the potential to greatly expand the company's portfolio of product offerings.

TA-65® for Skin

Human skin is an amazing organ. It is not only the largest organ in the body, but it is also the fastest growing. There are about 19 million skin cells in every inch of the body, which are constantly being replaced as they age and die. In fact, 30,000 to 40,000 skin cells die every day.\*

TA-65MD® nutritional supplements have been shown to improve skin elasticity and decrease the amount of time it takes skin to recover after a procedure. Due to the large number of requests from physicians and customers for a TA-65® product that can be applied directly to particular areas of the skin, the company added topical formulation development to its research plan. After conducting three-dimensional modeling, in vitro, and in-vivo studies on a variety of formulations, T.A. Sciences® developed its first topical product, TA-65® for Skin.

TA-65® for Skin is available now. Please click here to request more information.

Please check back here for updates on this and other exciting developments.



Canine Chews



Studies have shown that telomere length in dog breeds correlates to lifespan, a result consistent with findings in humans. However, unlike humans, dogs lose telomeric DNA 10 times as fast, making them relatively short-lived.

A 2012 study published in the journal Cell Reports® tested 13 breeds of dog and found that breeds like Beagles, Golden retrievers, Labrador retrievers, and Miniature poodles, which have long telomeres compared to others, also live longer.

Dog owners view their pets as another member of the family and they want to take steps to improve their health span too. Anecdotally, T.A. Sciences® has heard of owners giving their dogs TA-65® products, which is why the company decided to include canine testing in its research plan. 125 dogs of various breeds were studied to develop safe formulation and dosing criteria.


In 2014, T.A. Sciences® will introduce its first product developed specifically for pets: Canine Chews.

Complaint

Please check back here for updates on (a) and other exciting developments!


Equine Formulation

In addition to its forthcoming product for dogs, T.A. Sciences® is also in the process of creating a formulation of TA-65® for horses



Please check back here for updates on (a) and other exciting developments!

Therapeutic Drugs



Find out more about  
Therapeutic Drugs

CLICK HERE

T.A. Sciences® is working to develop U.S. Food and Drug Administration (FDA) approved therapeutic drugs. While the company has focused on the nutritional supplement market since its founding in 2002, it has always operated at a higher standard than the norms for the industry. T.A. Sciences® conducts extensive safety and efficacy studies on both animals and humans that are far beyond the level found in most supplement companies. This commitment to a research based, clinically tested approach has made T.A. Sciences® a recognized leader in bringing Telomere Biology to the marketplace. Thus, it was only natural for the company to expand into developing therapeutic drugs for treating diseases associated with aging.


In 2012 T.A. Sciences® acquired the worldwide rights to a new patent-pending compound that has the potential to prevent or treat many diseases associated with aging.

[Click here to read more.](#)

References:

[info@tasciences.com](mailto:info@tasciences.com)

Toll-Free: 888.360.8886



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**Nutritional Supplements**

- [Purchase TA-65MD®](#)
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- [Telomeres and Cellular Aging](#)
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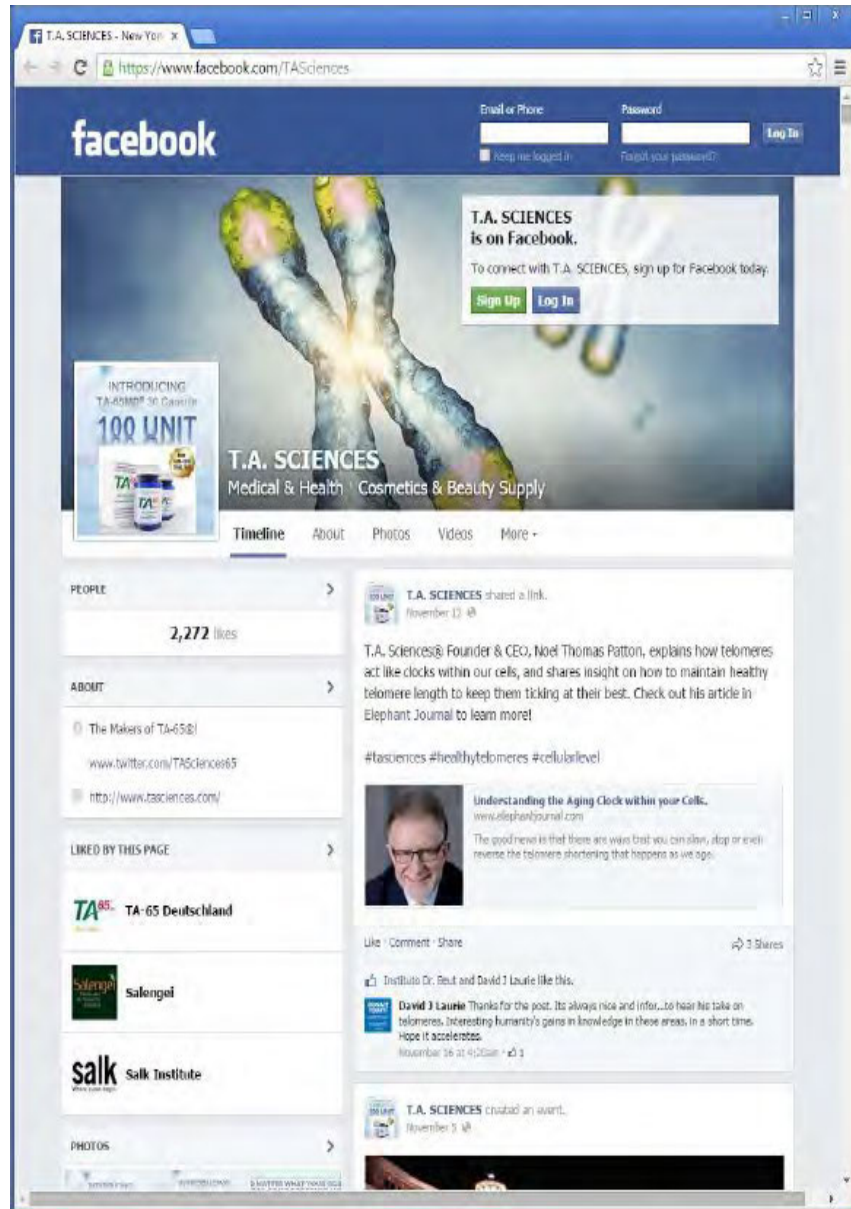
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Exhibit O





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**Maurice Dwayne Smith**  
September 2 at 9:03am  
Hi I've met DR. Linda SalvinHillebrand!  
Like · Comment · Share

**T.A. SCIENCES**  
September 22  
T.A. Sciences@ has over 3,000 Certified Licensees spread throughout the globe. For those in Germany looking to discover the benefits of TA-65®, visit [www.ta-65.de](http://www.ta-65.de) today!  
#TA65 #healthyliving #cellularlevel

**TA-65 Deutschland. Online-shop für TA-65® Produkte von T.A.Sciences USA. Deutschland, Schweiz,...**  
[www.ta-65.de](http://www.ta-65.de)  
Zellverjüngung durch Telomerase-Aktivierung. Das Original von TA-65 Deutschland GmbH mit allen Informationen über Telomere, Telomerase und Wirkweise. Lieferung für Deutschland und Europa.

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**T.A. SCIENCES**  
September 22  
Did you know that human skin is the largest organ in the body? There are about 19 million skin cells in every inch of the body! TA-65® for Skin may improve skin elasticity and recovery time post-procedure!  
For more info, call 888-360-8886 or email [info@tasciences.com](mailto:info@tasciences.com) today!  
#TA65 #TelomeraseComplex #CellularLevel

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Maurice Dwayne Smith  
September 2 at 9:03am  
Hi I've met DR. Linda SelvinHillebrand!

T.A. SCIENCES  
September 22  
Conference Season continues this Thursday at AAM Chicago! Have you registered to attend yet?  
#AAM #A4MChicago #AntiAging #CellularLevel

Anti-Aging Conference Chicago 2014  
www.aam.com  
This two day symposium is designed for physicians, nurse practitioners, and other medical professionals to provide an advanced, in-depth understanding of immune mechanisms and empower them to assess immune function and develop interventions...

T.A. SCIENCES  
September 19 - Edited  
Visiting Spain any time soon? Check out T.A. Sciences' exclusive Spanish Distributor, Salengel! For information on how you can order TA-65 from them, email info@tasciences.com or info@salengel.com today!  
#HealthierLiving at the #cellularlevel #TA65

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**Salk Institute**

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**T.A. SCIENCES** shared a link.  
March 19, 2013

Not only have age-related disorders been tied to shorter telomeres, but more and more research is showing how all kinds of illnesses and infections may be linked to them as well.

**Telomere length linked to catching a cold in preliminary study**  
www.latimes.com  
Test subjects with shorter (more cell) telomeres faced an increased risk of catching a cold, researchers wrote Tuesday in JAMA. (abstract here...)

**T.A. SCIENCES**  
March 12, 2013

What's the best way to know if TA-65 is working? Measure your shortest telomeres with a telomere-length test! Get tested before you start taking TA-65, and then retake the test 12-13 months later to see the growth!

**T.A. SCIENCES**  
March 4, 2013

Another happy customer placed an order for TA-65 today. She said both her husband's and her hands have less wrinkles than they did when they started taking TA-65—only a month and a half ago!

**T.A. SCIENCES**  
February 26, 2013

We get this question all the time; What's the difference between taking TA-65 and taking some astragalus supplement from the health food store?

The answer? TA-65 is a single, rare molecule found in only one astragalus plant species' roots. And not all of those species' roots will have it; our lab sifts through a lot of plant material to find the molecule. Thus, when you're taking a capsule of TA-65, you're not merely taking an astragalus root extract; you're taking a very specific, very concentrated extract of one rare molecule in a very specific extract of one very specific kind of astragalus root.

**Edgar Emmanuel Hinojosa Diaz**  
November 25 at 11:30am

I'd like to get this product, how much is it?

**Maurice Dwayne Smith**  
September 2 at 3:03pm

Hi I've met DR. Linda SalvinHilebrand!

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**T.A. SCIENCES**  
February 25, 2013

taking a very specific, very concentrated extract of one rare molecule in a very specific extract of one very specific kind of astragalus root.

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It doesn't really matter what time of day you take your TA-65. Here are a few things our customers have reported to us:

Taking TA-65 in the morning: Customers have reported having more energy throughout the day, being more productive, and having more endurance.

Taking TA-65 at night: Customers have reported having more vivid dreams, remembering their dreams better, sleeping more restfully, dreaming more vividly, and having a more regulated sleep cycle.

Like · Comment · Share

**T.A. SCIENCES** shared a link.  
February 22, 2013

T.A. Sciences is proud to be exhibiting at three shows for healthcare professionals in the next couple of weeks:

- American Academy of Anti-Aging Medicine (Las Vegas)
- Integrative Healthcare Symposium (New York City)
- American Academy of Dermatology (Miami Beach)

If you're in attendance, come by and check us out!

(event details can be found on our website at <http://www.tasciences.com/about/events/>)

**Events**  
[www.tasciences.com](http://www.tasciences.com)

DISCLAIMER: The information provided on this website is intended for educational purposes only. The educational material contained in this site is based on a careful analysis of the scientific literature and the experience of the T.A. Sciences team. Telomerase Activation is cutting edge science and...

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**T.A. SCIENCES**  
February 15, 2013

Going to #LasVegas for #AHM ? So are we! Stop by our booth anytime between February 28th and March 2nd. We'd love to see you!

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November 25 at 11:30am  
I'd like to get this product, how much is it?

Maurice Dwayne Smith  
September 2 at 9:00am  
Hi I've met DR. Linda SelvinHillebrand

T.A. SCIENCES shared a link.  
November 2, 2012  
For information on Telomere Science, click here:  
<http://ow.ly/eVYfa>

Telomere Science  
www.2telomeres.com  
There are trillions of cells in our body and at any given time a great number are dividing furiously to keep us alive and well. The process is...

T.A. SCIENCES shared a link.  
November 1, 2012  
Your cells are on a timer - one that's running out. Learn how you can modify cells to literally reverse the aging process  
<http://ow.ly/eTFZF>

<http://ow.ly/eTFZF>  
www.burtondirect.com  
Telomeres have been called the genetic keys to the fountain of youth...

T.A. SCIENCES shared a link.  
October 31, 2012  
October 31, 1969 - The Beatles: "Something" b/w Come Together" (Apple R 5814) 45 single is released in the UK.

"Something" is a song by The Beatles, featured on their 1969 album Abbey Road. It was released that same year as a Double A-sided single with another track from the album, "Come Together". "Something" was the first Beatles song written by lead guitarist George Harrison to appear as an A-side, and the only song written by him to top the US charts while he was in the band. The single was also one of the first Beatles singles to contain tracks already available on an LP album.

John Lennon and Paul McCartney, the band's principal songwriters, both praised "Something" as one of the best songs Harrison had written, or that the group had to offer. As well as critical acclaim, the single achieved commercial success, topping the Billboard charts in the United States and making the top 10 in the United Kingdom. The song has been covered by over 200 artists.

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**T.A. SCIENCES**  
June 6, 2012  
AgeMarker.com English Longitudinal Study of Ageing Links Happiness to...  
www.agemarker.com  
The English Longitudinal Study of Ageing shows that respondents with the highest level of positive affect are 33% less likely to die than those...

**T.A. SCIENCES**  
June 6, 2012  
Looking for some TA-65 in the greater Seattle area? Contact Anna Manays @ Immune Matrix:  
**Immune Matrix, LLC**  
www.immunematrix.com  
DISEASE, allergy elimination, (auto) immune, hay fever, acupuncture, NET, massage, toxic loads, food allergies, food allergy, nutritional therapies...

**T.A. SCIENCES**  
June 7, 2012  
TA-65md, a clinically-proven telomerase activator, is a naturally-occurring single molecule extracted from the root of an herb. TA-65md adds back base pairs of telomeric DNA that have been lost in the aging process. This lengthening of telomeres protects chromosomes from damage, essentially protecting the cells where telomerase is activated from age-related decline.

**T.A. SCIENCES**  
June 7, 2012  
T.A. Sciences is committed to ensuring the highest quality from end-to-end of the supply chain, i.e., from the sourcing of T.A. Sciences' starting raw ingredient in China to the formulation and manufacture of the finished product in the United States.

## Decision and Order

**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 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 Respondents are:
  - a. Respondent Telomerase Activation Sciences, Inc., is a Delaware corporation with its principal office or place of business at 420 Lexington Avenue, Suite 2900, New York, NY 10170.

## Decision and Order

- b. Respondent Noel Thomas Patton is the founder, Chairman, CEO, and majority owner of the Corporate Respondent, Telomerase Activation Sciences, Inc. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Telomerase Activation Sciences, Inc. His principal office or place of business is the same as that of Telomerase Activation Sciences, 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

## Decision and Order

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 same display panel as the representation that requires the disclosure appears.
  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.

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- C. “Cosmetic” means: (a) articles to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof intended for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (b) articles intended for use as a component of any such article; except that such term shall not include soap.
- D. “Covered product” means TA-65MD® and TA-65® for Skin or any other drug, food, dietary supplement, or cosmetic.
- E. “Dietary supplement” means:
1. any product labeled as a dietary supplement or otherwise represented as a dietary supplement; or
  2. any pill, tablet, capsule, powder, softgel, gelcap, liquid, or other similar form containing one or more ingredients that are a vitamin, mineral, herb or other botanical, amino acid, probiotic, or other dietary substance for use by humans to supplement the diet by increasing the total dietary intake, or a concentrate, metabolite, constituent, extract, or combination of any ingredient described above, that is intended to be ingested, and is not represented to be used as a conventional food or as a sole item of a meal or the diet.
- F. “Drug” means: (a) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; (b) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or other animals; (c) articles (other than food) intended to affect the structure or any function of the body of humans or other animals; and (d) articles intended for use as a component of any article specified in (a), (b), or (c); but does not include devices or their components, parts, or accessories.

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- G. “Essentially equivalent product” means a product that contains the identical ingredients, except for inactive ingredients (e.g., inactive binders, colors, fillers, excipients), in the same form and dosage, and with the same route of administration (e.g., orally, sublingually), as the covered product; *provided that* the covered product may contain additional ingredients if reliable scientific evidence generally accepted by experts in the field indicates that the amount and combination of additional ingredients are unlikely to impede or inhibit the effectiveness of the ingredients in the essentially equivalent product.
- H. “Food” means: (a) any article used for food or drink for humans or other animals; (b) chewing gum; and (c) any article used for components of any such article.
- I. “Licensee” means any person licensed, or otherwise authorized, by Respondents to advertise, market, or sell any covered product.
- J. “Licensee-Patient Relationship” means the relationship between a licensee and an individual when the licensee affirmatively has provided a medical or healthcare service to that individual by examining, diagnosing, treating, or agreeing to examine, diagnose, or treat such individual.
- K. “Person” means a natural person, an organization, or other legal entity, including a corporation, partnership, sole proprietorship, limited liability company, association, cooperative, or any other group or combination acting as an entity.
- L. “Respondents” means the Corporate Respondent and the Individual Respondent, individually, collectively, or in any combination.
1. “Corporate Respondent” means Telomerase Activation Sciences, Inc., , and its successors and assigns.



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2. "Individual Respondent" means Noel Thomas Patton.

**Provisions****I. Prohibited Representations:  
Disease and Other Specific Health Claims**

**IT IS ORDERED** that Respondents, Respondents' officers, agents, and employees, 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, promoting, offering for sale, sale, or distribution of any covered product, must not make any representation, expressly or by implication, that such product:

- A. Reverses human aging;
- B. Prevents or repairs DNA damage;
- C. Restores aging immune systems;
- D. Increases bone density;
- E. Reverses the effects of aging, including:
  1. Improves skin elasticity;
  2. Increases energy and endurance; or
  3. Improves vision;
- F. Decreases recovery time of the skin after medical procedures;
- G. Prevents or reduces the risk of cancer; or
- H. Cures, mitigates, or treats any disease,

unless the representation is non-misleading, including that, at the time such representation is made, Respondents possess and rely

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upon competent and reliable scientific evidence that substantiates that the representation is true. For purposes of this Provision, “competent and reliable scientific evidence” means human clinical testing of the covered product, or of an essentially equivalent product, that is sufficient in quality and quantity, based on standards generally accepted by experts in the relevant disease, condition, or function to which the representation relates, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. Such testing must (1) be randomized, double-blind, and placebo-controlled; and (2) be conducted by researchers qualified by training and experience to conduct such testing. In addition, all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of such testing as described in the Provision entitled Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies must be available for inspection and production to the Commission. Respondents will have the burden of proving that a product satisfies the definition of an essentially equivalent product.

## **II. Prohibited Representations Other Health-Related Claims or Safety**

**IT IS FURTHER ORDERED** that Respondents, Respondents’ officers, agents, and employees, 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, promoting, offering for sale, sale, or distribution of any covered product, must not make any representation, other than representations covered under the Provision titled Prohibited Representations: Disease and Other Specific Health Claims, expressly or by implication, about the health benefits, performance, efficacy, safety, or side effects of such product, unless the representation is non-misleading, including that, at the time such representation is made, Respondents possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted by experts in the relevant disease, condition, or function to which the representation relates, when considered in light of the entire body

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of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this Provision, “competent and reliable scientific evidence” means tests, analyses, research, or studies (1) that have been conducted and evaluated in an objective manner by experts in the relevant disease, condition, or function to which the representation relates; (2) that are generally accepted by such experts to yield accurate and reliable results; and (3) that are randomized, double-blind, and placebo-controlled human clinical testing of the covered product, or of an essentially equivalent product, when such experts would generally require such human clinical testing to substantiate that the representation is true. In addition, when such tests or studies are human clinical tests or studies, all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of such testing as described in the Provision of this Order entitled Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies must be available for inspection and production to the Commission. Respondents will have the burden of proving that a product satisfies the definition of essentially equivalent product.

**III. Prohibited Misrepresentations:  
Regarding Tests, Studies, or Other Research**

**IT IS FURTHER ORDERED** that Respondents, Respondents’ officers, agents, and employees, 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, promoting, offering for sale, sale, or distribution of any product must not:

- A. Make any misrepresentation, expressly or by implication, that any covered product is:
  - 1. Clinically or scientifically proven to reverse human aging;
  - 2. Clinically or scientifically proven to prevent or repair DNA damage;

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3. Clinically or scientifically proven to restore aging immune systems; or
  4. Clinically or scientifically proven to increase bone density;
- B. Make any misrepresentation, expressly or by implication, that the performance or benefits of any product are scientifically or clinically proven or otherwise established; or
- C. Make any misrepresentation, expressly or by implication, about the existence, contents, validity, results, conclusions, or interpretations of any test, study, or other research.

**IV.****FDA Approved Claims**

**IT IS FURTHER ORDERED** that nothing in this Order prohibits Respondents, Respondents' officers, agents, and employees, or all other persons in active concert or participation with any of them from:

- A. For any drug, making a representation that is approved in labeling for such drug under any tentative final or final monograph promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and
- B. For any product, making a representation that is specifically authorized for use in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 or permitted under Sections 303-304 of the Food and Drug Administration Modernization Act of 1997.

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**V. Prohibited Misrepresentations:  
Paid Commercial Advertising**

**IT IS FURTHER ORDERED** that Respondents, Respondents' officers, agents, and employees, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the marketing, advertising, or promoting of any product, service, or program must not make any misrepresentation, expressly or by implication, that paid commercial advertising is independent programming, including independent, educational programming.

**VI. Required Disclosures:  
Material Connections**

**IT IS FURTHER ORDERED** that Respondents, Respondents' officers, agents, and employees, 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, promoting, offering for sale, sale, or distribution of any covered product must not make any representation, expressly or by implication, about any user, consumer, or endorser of such product without disclosing, clearly and conspicuously, and in close proximity to that representation, any unexpected material connection between such 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.

**VII. Prohibited Misrepresentations:  
Endorsements**

**IT IS FURTHER ORDERED** that Respondents, Respondents' officers, agents, and employees, 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,

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advertising, promoting, offering for sale, sale, or distribution of any covered product, must not make any misrepresentation, expressly or by implication, about the status of any endorser or person providing a review of the product, including a misrepresentation that the endorser or reviewer is an independent or ordinary user of the product.

**VIII. Means and Instrumentalities**

**IT IS FURTHER ORDERED** that Respondents, Respondents' officers, agents, and employees, 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, promoting, offering for sale, sale, or distribution of any covered product, must not provide the means and instrumentalities with which to make, directly or indirectly, any false or misleading statement of material fact, including the prohibited representations covered by Provisions I, II, and III of this Order. For purposes of this Provision, "means and instrumentalities" mean any information, document, or article referring or relating to any covered product, including any advertising, labeling, promotional, or purported substantiation materials, for use by a licensee to market or sell any covered product.

**IX. Preservation of Records Relating to  
Competent and Reliable Human Clinical Tests or Studies**

**IT IS FURTHER ORDERED** that, with regard to any human clinical test or study ("test") upon which Respondents rely to substantiate any claim covered by this Order, Respondents must secure and preserve all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of the test, including:

- A. All protocols and protocol amendments, reports, articles, write-ups, or other accounts of the results of the test, and drafts of such documents reviewed by the test sponsor or any other person not employed by the research entity;

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- B. All documents referring or relating to recruitment; randomization; instructions, including oral instructions, to participants; and participant compliance;
- C. Documents sufficient to identify all test participants, including any participants who did not complete the test, and all communications with any participants relating to the test; all raw data collected from participants enrolled in the test, including any participants who did not complete the test; source documents for such data; any data dictionaries; and any case report forms;
- D. All documents referring or relating to any statistical analysis of any test data, including any pretest analysis, intent-to-treat analysis, or between-group analysis performed on any test data; and
- E. All documents referring or relating to the sponsorship of the test, including all communications and contracts between any sponsor and the test's researchers.

*Provided, however,* the preceding preservation requirement does not apply to a reliably reported test, unless the test was conducted, controlled, or sponsored, in whole or in part by (1) any Respondent; (2) any Respondent's officers, agents, representatives, or employees; (3) any other person or entity in active concert or participation with any Respondent; (4) any person or entity affiliated with or acting on behalf of any Respondent; (5) any supplier of any ingredient contained in the product at issue to any of the foregoing or to the product's manufacturer; or (6) the supplier or manufacturer of such product.

For purposes of this Provision, "reliably reported test" means a report of the test has been published in a peer-reviewed journal, and such published report provides sufficient information about the test for experts in the relevant field to assess the reliability of the results.

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For any test conducted, controlled, or sponsored, in whole or in part, by Respondents, Respondents must establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of any personal information collected from or about participants. These procedures must be documented in writing and must contain administrative, technical, and physical safeguards appropriate to Respondents' size and complexity, the nature and scope of Respondents' activities, and the sensitivity of the personal information collected from or about the participants.

**X. Acknowledgments of the Order**

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

- A. Each Respondent, within 7 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 8 years after the issuance date of this Order, each Individual Respondent for any business that such Respondent, individually or collectively with any other Respondent, 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 Report and Notices. Delivery must occur within 7 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.



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**XI. Compliance Report 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 Individual Respondent must describe if he knows or should know due to his 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, 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

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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, 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

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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 Telomerase Activation Sciences, Inc.

## **XII. 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. Specifically, Corporate Respondent, in connection with the manufacturing, labeling, advertising, promoting, offering for sale, sale, or distribution of any covered product, and Individual 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;
- 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. Copies or records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

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- D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and
- E. A copy of each unique advertisement or other marketing material.

**XIII. Compliance Monitoring**

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

- A. Within 30 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

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Respondent, pursuant to Section 604(2) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(2).

**XIV. Notice and Monitoring of Licensees**

**IT IS FURTHER ORDERED** that Respondents must:

- A. Send, within 30 days after the issuance date of this Order, by first class mail, postage prepaid and return receipt requested, or by courier service with signature proof of delivery, in one envelope, a copy of this Order and an exact copy of the notice and acknowledgment form attached hereto as Appendix A, showing the date of mailing, to each licensee. For any future licensees, delivery by first class mail, postage prepaid and return receipt requested, or by courier service with signature proof of delivery, in one envelope of a copy of this Order and an exact copy of the notice and acknowledgement form attached hereto as Appendix B, showing the date of the mailing, must occur within 10 days of becoming a licensee. Any mailing required by this Paragraph must not include any other documents or enclosures.
- B. Obtain from each licensee, within 20 days after receipt of the notice and acknowledgement form required by Paragraph A of this Provision, a signed and dated acknowledgment form that the licensee has received the notice and expressly agrees to comply with it.
- C. Establish, implement, and thereafter maintain a system to monitor and review the advertisements of each licensee, as specified below in Subparagraphs 1 and 2, to ensure compliance with Provisions I, II, and III of this Order. The system must be implemented as follows:
  1. No later than 30 days after the issuance date of this Order, and on an annual basis thereafter, Respondents must identify the licensees who ordered, purchased, or otherwise obtained the

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specified amount of covered product as scheduled below:

- a. In the first 5 years after the issuance date of this Order, \$20,000 or more of any covered product within the last 12 months;
  - b. After 5 years and until 10 years from the issuance date of this Order, \$30,000 or more of any covered product within the last 12 months;
  - c. After 10 years and until 15 years from the issuance date of this Order, \$40,000 or more of any covered product within the last 12 months; and
  - d. After 15 years from the issuance date of this Order and until this Order is terminated in accordance with Provision XVI of this Order, \$50,000 or more of any covered product within the last 12 months.
2. Respondents must monitor and review a representative sample of advertisements, including online advertising, social media postings, or brochures or pamphlets, of each licensee identified in accordance with Paragraph C(1) of this Provision.

*Provided however,* Respondents are not required to monitor and review any representations by a licensee about the potential safety, health benefits, performance, efficacy, or side effects of a covered product when, in connection with a licensee-patient Relationship, a licensee is consulting privately with one patient about such covered product.

*Provided further,* Respondents are not required to monitor and review any representations by a licensee about the potential safety, health benefits, performance, efficacy, or side effects of a covered

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product when: 1) the licensee has purchased a covered product solely for incorporation into the licensee's own product; and 2) Respondents are not involved in the advertising, marketing, promoting, or sale of that licensee's product.

- D. Suspend any licensee, regardless of time, within 10 days after any Respondent becomes aware that a licensee has made any representation prohibited by Provisions I, II, or III of this Order in connection with the advertising, promotion, or sale of any covered product after receipt of the notice required by Paragraph A of this Provision.

Respondents must provide a suspended licensee with a notice of noncompliance and may provide an opportunity to cure the noncompliance within 10 days after any Respondent becomes aware of the noncompliance. Respondents must inform any licensee to whom they have provided a notice of noncompliance that any continued or subsequent noncompliance will result in immediate termination. Respondents may reinstate a licensee who has cured the noncompliance. However, Respondents must terminate immediately any licensee who has received previously a notice of noncompliance under Paragraph D of this Provision and has any continued or subsequent noncompliance.

### **XV. Notice to Customers**

**IT IS FURTHER ORDERED** that Respondents must send, within 30 days after the issuance date of this Order, all customers who purchased directly from them TA-65MD® or TA-65® for Skin: 1) within one year prior to the issuance of this Order; or 2) through a currently active enrollment in a continuity or autoship program, by first-class mail, postage paid, or by courier service with signature proof of delivery, an exact copy of the notice attached hereto as Appendix C, showing the date of mailing. This mailing must not include any other documents or enclosures.

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**XVI. Order Effective Dates**

**IT IS FURTHER ORDERED** that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on April 18, 2038, 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.



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**Appendix A****APPENDIX A****[On Telomerase Activation Sciences, Inc. Letterhead]**

Date

[insert addressee name]  
 [insert addressee address]

Dear [name of licensee]:

The Federal Trade Commission (FTC) has investigated and sued our company, Telomerase Activation Sciences (TAS) alleging that TAS made false and deceptive advertising claims for TA-65MD and TA-65 for Skin. Without admitting wrongdoing, TAS settled the case with the FTC and agreed to send this notification to our licensees.

According to the FTC, our claim that TA-65MD and TA-65 for Skin reverse aging was misleading. The FTC also says other specific claims about the products were misleading. The FTC says we claimed that TA-65MD:

- a. prevents and repairs DNA damage;
- b. restores aging immune systems;
- c. increases bone density;
- d. reverses the effects of aging, including improving skin elasticity, increasing energy and endurance, and improving vision;
- e. prevents or reduces the risk of cancer; and
- f. is clinically or scientifically proven to reverse aging, prevent and repair DNA damage, restore aging immune systems, and increase bone density.

According to the FTC, we also claimed that TA-65 for Skin reverses the effects of aging, including improving skin elasticity, and decreases recovery time of the skin after medical procedures. Although we disagree, the FTC says we do not have adequate scientific evidence that the above claims are true.

Under our settlement with the FTC, TAS has agreed not to make any claims about disease, health, or safety unless we have scientific evidence that supports them. You should review any advertising and marketing materials for TA-65 products and stop using any materials that make the above claims. In the future, TAS will monitor licensees' advertising and marketing of TA-65 products, including on websites and social media postings, and could terminate licensees for noncompliance. Please sign and date the enclosed acknowledgement form and return it to TAS at \_\_\_\_\_ within 20 days of receiving this notice.

Very truly yours,

Name, Title  
 Telomerase Activation Sciences, Inc.

Enclosures

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**ACKNOWLEDGMENT FORM**

I have received the notice dated [insert date of notice], accompanied by [a Federal Trade Commission administrative/an United States federal court] order, from Telomerase Activation Sciences. I agree to comply with the notice.

\_\_\_\_\_  
Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

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## Appendix B

### APPENDIX B

[On Telomerase Activation Sciences, Inc. Letterhead]

Date

[insert addressee name]  
[insert addressee address]

Dear [name of future licensee]:

The Federal Trade Commission (FTC) previously settled a lawsuit with our company, Telomerase Activation Sciences (TAS) about allegedly false and deceptive advertising claims for TA-65MD and TA-65 for Skin. Without admitting wrongdoing, TAS settled the case with the FTC and agreed to send this notification to our licensees.

According to the FTC, our claim that TA-65MD and TA-65 for Skin reverse aging was misleading. The FTC also says other specific claims about the products were misleading. The FTC says we claimed that TA-65MD:

- a. prevents and repairs DNA damage;
- b. restores aging immune systems;
- c. increases bone density;
- d. reverses the effects of aging, including improving skin elasticity, increasing energy and endurance, and improving vision;
- e. prevents or reduces the risk of cancer; and
- f. is clinically or scientifically proven to reverse aging, prevent and repair DNA damage, restore aging immune systems, and increase bone density.

According to the FTC, we also claimed that TA-65 for Skin reverses the effects of aging, including improving skin elasticity, and decreases recovery time of the skin after medical procedures. Although we disagree, the FTC says we do not have adequate scientific evidence that the above claims are true.

Under our settlement with the FTC, TAS has agreed not to make any claims about disease, health, or safety unless we have scientific evidence that supports them. You should review any advertising and marketing materials for TA-65 products and stop using any materials that make the above claims. In the future, TAS will monitor licensees' advertising and marketing of TA-65 products, including on websites and social media postings, and could terminate licensees for noncompliance. Please sign and date the enclosed acknowledgement form and return it to TAS at \_\_\_\_\_ within 20 days of receiving this notice.

Very truly yours,

Name, Title  
Telomerase Activation Sciences, Inc.

Enclosures

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**ACKNOWLEDGMENT FORM**

I have received the notice dated [insert date of notice], accompanied by [a Federal Trade Commission administrative/an United States federal court] order, from Telomerase Activation Sciences. I agree to comply with the notice.

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Name

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Signature

---

Date

Decision and Order

## Appendix C

### APPENDIX C

[On Telomerase Activation Sciences, Inc. Letterhead]

Date

[insert addressee name]  
[insert addressee address]

Dear [name of customer]:

Our records show that you have bought TA-65MD and/or TA-65 for Skin from our company, Telomerase Activation Sciences (TAS). The Federal Trade Commission (FTC) has investigated and sued TAS alleging that TAS made false and deceptive advertising claims for TA-65MD and TA-65 for Skin. Without admitting wrongdoing, TAS settled the case with the FTC and agreed to send this notification to our customers.

According to the FTC, our claim that TA-65MD and TA-65 for Skin reverse aging was misleading. The FTC also says other specific claims about the products were misleading. The FTC says we claimed that TA-65MD:

- a. prevents and repairs DNA damage;
- b. restores aging immune systems;
- c. increases bone density;
- d. reverses the effects of aging, including improving skin elasticity, increasing energy and endurance, and improving vision;
- e. prevents or reduces the risk of cancer; and
- f. is clinically or scientifically proven to reverse aging, prevent and repair DNA damage, restore aging immune systems, and increase bone density.

According to the FTC, we also claimed that TA-65 for Skin reverses the effects of aging, including improving skin elasticity, and decreases recovery time of the skin after medical procedures. Although we disagree, the FTC says we do not have adequate scientific evidence that the above claims are true. TAS has agreed not to make any claims about disease, health, or safety unless we have scientific evidence that supports them.

If you have questions about TA-65MD and TA-65 for Skin, talk to your doctor or health care provider. If you currently purchase the products through our autoship or continuity program and would like to cancel or have any questions, please contact TAS at \_\_\_\_\_.

Very truly yours,

Name, Title  
Telomerase Activation Sciences, Inc.

Analysis to Aid Public Comment

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order as to Telomerase Activation Sciences, Inc. and Noel Thomas Patton (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 final the agreement’s order.

This matter involves respondents’ advertising for TA-65MD, a product that comes in capsule and powder forms, and TA-65 for Skin (“TA-65 Skin”), a topical cream product. The complaint alleges that respondents violated Sections 5(a) and 12 of the FTC Act by making false or unsubstantiated health or performance claims that: TA-65MD and TA-65 Skin reverse aging; TA-65MD prevents and repairs DNA damage; TA-65MD restores aging immune systems; TA-65MD increases bone density; TA-65MD reverses the effects of aging, including improving skin elasticity, increasing energy and endurance, and improving vision; TA-65MD prevents or reduces the risk of cancer; TA-65 Skin reverses the effects of aging, including improving skin elasticity; and TA-65 Skin decreases recovery time of the skin after medical procedures. The complaint also alleges that respondents claimed that some of the above performance claims were clinically or scientifically proven.

The complaint further alleges that respondents misrepresented that a 2012 paid-for segment on *The Suzanne Show* featuring TA-65MD was independent, educational programming and not paid commercial advertising. Additionally, the complaint alleges that respondents deceptively represented that consumers appearing in advertisements were independent users of TA-65MD, expressing their impartial views of satisfaction. According to the complaint, respondents failed to disclose that these consumer endorsers

## Analysis to Aid Public Comment

received compensation, including free TA-65MD. Finally, the complaint alleges that by providing promotional materials that had false or unsubstantiated health or performance claims to marketers of other products containing TA-65MD, respondents provided these other marketers the means and instrumentalities to engage in deceptive acts and practices.

The order includes injunctive relief that prohibits these alleged violations and fences in similar and related violations. The order applies to marketing claims for any covered product, defined as TA-65MD and TA-65 Skin or any other drug, food, dietary supplement, or cosmetic. As additional fencing-in relief, the order requires respondents to provide a notice to all of its licensees authorized to advertise, market, or sell any covered product, monitor certain high-selling licensees, and follow appropriate recordkeeping, compliance reporting, and document preservation requirements.

**Provision I** prohibits any representation that a covered product reverses human aging; prevents or repairs DNA damage; restores aging immune systems; increases bone density; reverses the effects of aging, including improving skin elasticity, increasing energy and endurance, and improving vision; decreases recovery time of the skin after medical procedures; prevents or reduces the risk of cancer; or cures, mitigates, or treats any disease unless the representation is non-misleading and respondents possess and rely upon competent and reliable scientific evidence that substantiates that the representation is true. The definition of competent and reliable scientific evidence in Provision I specifies human clinical testing and requires that the testing be sufficient in quality and quantity, based on standards generally accepted by experts in the relevant disease, condition, or function to which the representation relates, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. Such testing must (1) be randomized, double-blind, and placebo-controlled; and (2) be conducted by researchers qualified by training and experience to conduct such testing. In addition, respondents must maintain all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of such testing.



## Analysis to Aid Public Comment

**Provision II** prohibits representations regarding the health benefits, performance, efficacy, safety, or side effects of any covered product unless the representation is non-misleading and respondents possess and rely upon competent and reliable scientific evidence to substantiate that the representation is true. Provision II defines competent and reliable scientific evidence as tests, analyses, research, or studies: (1) that have been conducted and evaluated in an objective manner by experts in the relevant disease, condition, or function to which the representation relates; (2) that are generally accepted by such experts to yield accurate and reliable results; and (3) that are randomized, double-blind, and placebo-controlled human clinical testing of the covered product, when such experts would generally require such human clinical testing to substantiate that the representation is true. When such tests or studies are human clinical tests or studies, respondents must maintain all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of such testing.

**Provision III** prohibits misrepresentations that any covered product is clinically or scientifically proven to reverse human aging, prevent or repair DNA damage, restore aging immune systems, or increase bone density. Provision III also prohibits any misrepresentation that the performance or benefits of any product are scientifically or clinically proven or about the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

**Provision IV** is a provision for FDA-approved claims.

**Provision V** prohibits misrepresentations in connection with the marketing, advertising, or promoting of any product, service, or program that paid commercial advertising is independent programming.

**Provision VI** prohibits any representation about any user, consumer, or endorser of a covered product without disclosing, clearly and conspicuously, and in close proximity to that representation, any unexpected material connection between such endorser and (1) any respondent; or (2) any other individual or entity affiliated with the product. “Unexpected material



## Analysis to Aid Public Comment

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.

**Provision VII** prohibits misrepresentations regarding the status of any endorser or person providing a review of a product, including a misrepresentation that the endorser or reviewer is an independent or ordinary user of the product.

**Provision VIII** prohibits respondents from providing the means and instrumentalities to make any false or misleading statement of material fact, including the representations prohibited by Provisions I to III. “Means and instrumentalities” mean any information, document, or article referring or relating to any covered product, including any advertising, labeling, promotional, or purported substantiation materials, for use by a licensee to market or sell any covered product.

**Provision IX**, triggered when the human clinical testing requirement in Provisions I or II applies, requires that respondents secure and preserve all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of the test, such as protocols, instructions, participant-specific data, statistical analyses, and contracts with the test’s researchers. There is an exception for a reliably reported test (defined as a test that is published in a peer-reviewed journal) that was not conducted, controlled, or sponsored by, with, or on behalf of any respondent or by any supplier or manufacturer of the product. Also, the published report must provide sufficient information about the test for experts in the relevant field to assess the reliability of the results.

**Provision X** 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 XI** requires that respondents submit compliance reports to the FTC 60 days after the order’s issuance and submit notifications when certain events occur for 10 years.

## Analysis to Aid Public Comment

**Provision XII** requires that respondents create and retain certain records for 10 years.

**Provision XIII** provides for the FTC's continued compliance monitoring of respondents' activities during the order's effective dates.

**Provision XIV** requires that respondents notify their licensees, monitor their highest-selling licensees' advertising to ensure compliance with Provisions I through III, and suspend any licensee who makes any prohibited claims. Respondents must terminate any licensee who continues to make prohibited claims. There are two limited exceptions to the monitoring requirement: (1) representations during private consultations between a licensee and one of the licensee's patients about the potential safety, health benefits, performance, efficacy, or side effects of a covered product; and (2) representations about the potential safety, health benefits, performance, efficacy, or side effects of a covered product by a licensee who has purchased a covered product solely for incorporation into the licensee's own product and markets that product without any involvement by respondents.

**Provision XV** requires that respondents send a notice to all customers who purchased directly from them TA-65MD or TA-65 Skin within one year prior to the issuance of the order or through a currently active enrollment in a continuity or autoship program.

**Provision XVI** provides 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

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

*Docket No. C-4645; File No. 161 0230*  
*Complaint, April 24, 2018 – Decision, April 24, 2018*

This consent order addresses Oregon Lithoprint Inc.'s email inviting the parent company of *The Newberg Graphic* to join the *News-Register* in instructing mutual clients that they should place foreclosure notices in the newspaper dominant in the area of the foreclosed property. The complaint alleges that the respondent violated Section 5 of the Federal Trade Commission Act by inviting a competitor in the publication of foreclosure notices to divide clients by geographic market. The consent order requires Oregon Lithoprint to cease and desist from communicating with its competitors about the placement of foreclosure notices.

*Participants*

For the *Commission*: *Michael Turner*.

For the *Respondent*: *Jon E. Bladine, President, pro se*.

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Oregon Lithoprint, Inc., has violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

**NATURE OF THE CASE**

1. Oregon Lithoprint, Inc. (“OLI”) publishes a newspaper, the *News-Register*, which is distributed principally in Yamhill County, Oregon. OLI invited its closest rival in Yamhill County to divide geographic markets for printing foreclosure notices. By

## Complaint

inviting collusion, OLI endangered competition and violated Section 5 of the FTC Act.

**RESPONDENT**

2. OLI is a corporation organized, existing, and doing business under and by virtue of the laws of Oregon, with its principal place of business in McMinnville, Oregon 97128.

3. OLI publishes a twice-weekly community newspaper—the *News-Register*. The publisher of the *News-Register*, as well as co-owner of OLI, is Jeb Bladine.

4. The *News-Register* has a circulation of approximately 7000 subscribers in Yamhill County, Oregon. In addition to its paid subscribers, *News-Register* is available for purchase in newsstands in Yamhill County, and it is available for viewing on its website.

**JURISDICTION**

5. At all times relevant herein, OLI 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 business practices of OLI, including the acts and practices alleged herein, are in commerce or affect commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

**INVITATION TO COLLUDE**

7. Oregon law requires that certain legal actions, including the impending foreclosure of real property, be announced in qualifying newspapers. Foreclosure notices provide significant income for qualifying newspapers.

8. *The Newberg Graphic* (“*The Graphic*”), a community newspaper, is the main competitor to OLI for the publication of foreclosure notices in Yamhill County. *The Graphic* is owned by

## Complaint

Pamplin Media Group, which manages its various newspapers through its subsidiary, Oregon Publishing.

9. Clear Recon Corporation is a business that places foreclosure notices on behalf of lenders. From 2014 through 2016, Mr. Bladine sought to convince employees of Clear Recon Corporation that Clear Recon should place in the *News-Register* all foreclosure notices for properties located in zip codes where the *News-Register* has the largest circulation among qualifying newspapers.

10. On August 17, 2016, Mr. Bladine learned that Clear Recon intended to place all future foreclosure notices for Yamhill County in *The Graphic* because it charged less for its services than the *News-Register*.

11. On August 29, 2016, Mr. Bladine emailed the president of Oregon Publishing. Mr. Bladine wrote that *News-Register* was “pursuing efforts to convince Clear Recon Corp that foreclosure notices involving properties in our marketplace should be placed in the *News-Register*.”

12. In the August 29 email, Mr. Bladine further explained that “[o]ur efforts are based on the belief that Oregon’s ‘best suited’ law creates a responsibility to consider actual notice to interested parties,” and thus he has “maintained that the belief [sic] that foreclosures should be published in the newspaper predominantly circulated in the community of the property.”

13. Finally, Mr. Bladine used the August 29 email to invite Mr. Garber to divide foreclosure notice orders by geographic area:

As we continue our efforts, I would invite Pamplin Media Group to join *News-Register Publishing Co.* in a formal request to parties placing foreclosure notices – including private attorney firms – that the notices be placed using the “best suited” language concept as we understand the intent of that legal phrase.

## Complaint

14. On August 31, 2016, through counsel, Pamplin Media repudiated the invitation and stated its disagreement with Mr. Bladine's interpretation of Oregon law related to the placement of foreclosure notices.

15. On October 25, 2016, Mr. Bladine sent another email to the president of Oregon Publishing explaining that *The Graphic* was getting a new client and thousands of dollars in new revenue because of Mr. Bladine's efforts:

A new client, no doubt representing many thousands of dollars in future revenue, is headed to the Newberg Graphic because we are aggressively pursuing our interpretation of Oregon law – wherever the chips may fall. As we urge publication in the Graphic of related to properties in Dundee, Newberg and St. Paul, we will be equally or more aggressive in responding to situations we believe violate the intent of the law. It is probably too much to expect that others would do likewise.

16. Pamplin Media interpreted this communication as another invitation to allocate customers based on the location of the property, with the newspaper that has the greatest circulation in the zip code where the property is located receiving the foreclosure notice. On November 11, 2016, Pamplin Media explicitly rejected the second invitation.

**VIOLATION CHARGED**

17. As set forth in Paragraphs 9 through 17 above, OLI invited its competitor to agree to divide the market for publishing foreclosure notices by zip code in violation of Section 5 of the Federal Trade Commission Act, as amended.

18. The acts and practices of OLI, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. Such acts and practices of OLI will continue or recur in the absence of appropriate relief.

## Decision and Order

**WHEREFORE, THE PREMISES CONSIDERED**, the Federal Trade Commission on this twenty-fourth day of April, 2018, issues its complaint against OLI.

By the Commission.

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of Oregon Lithoprint, Inc. (“Respondent”), and Respondent having been furnished thereafter with a copy of the draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent had violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment filed by an interested person, now

## Decision and Order

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 Oregon Lithoprint, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Oregon with its principal place of business at 611 NE 3<sup>rd</sup> Street, McMinnville, Oregon 97128.
2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondent, and the proceeding is in the public interest.

**ORDER****I.**

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

- A. “Respondent” means Oregon Lithoprint, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Oregon Lithoprint, Inc., including the News-Register Publishing Co., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “Communicating” means transmitting, exchanging, transferring, or disseminating information by or through any means, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, and email.



## Decision and Order

- D. “Competing Newspaper” means any Newspaper that is distributed on a more than *de minimis* basis in Yamhill County or at least one other county in which Respondent distributes a Newspaper on a more than *de minimis* basis. For clarity, a Newspaper is distributed in any county in which physical copies of the Newspaper are offered for sale, delivered to subscribers, or circulated to readers.
- E. “Competitor” means any Person who owns, publishes, or distributes a Competing Newspaper.
- F. “Foreclosure Notice” means any notice of the foreclosure of real property required by Oregon law to be placed for publication in a qualifying Newspaper.
- G. “Legal Notice” means any notice required by Oregon law to be placed for publication in a qualifying Newspaper and includes Foreclosure Notices.
- H. “Newspaper” means a publication that meets the definition of Newspaper under Oregon Revised Statute 193.010, or its successor.
- I. “Person” includes Respondent and means natural persons and artificial persons, including, but not limited to, corporations, partnerships, and unincorporated entities.
- J. “Relating to” or “related to” means in whole or in part, addressing, analyzing, concerning, constituting, containing, commenting on, describing, discussing, embodying, explaining, identifying, referring to, reflecting, reporting on, stating, dealing with, or in any way pertaining to.

**II.**

**IT IS FURTHER ORDERED** that in connection with the publication of any Legal Notice in or affecting commerce, as “commerce” is defined by the Federal Trade Commission Act,

## Decision and Order

Respondent shall cease and desist from, either directly or indirectly, or through any corporate or other device:

- A. Entering into, attempting to enter into, or participating in any express or implied agreement or understanding, between or among Respondent and one or more Competitors:
  1. To refuse to publish a Legal Notice; or
  2. To allocate or divide the market(s) for publishing Legal Notices by types of customers, transactions, types of notices, geographic area, or any other means.
- B. Communicating with any Competitor, either publicly or privately, that such Competitor:
  1. Should advise customers to place Foreclosure Notices in the local Newspaper with the widest circulation in the zip code or other geographic area where the property is located; or
  2. Should refuse to publish Foreclosure Notices for properties located in a zip code or other geographic area where the Competitor has a smaller distribution than Respondent.
- C. Nothing in the Order shall prohibit Respondent from:
  1. Communicating with any governmental body regarding the interpretation of statutes and rules related to Legal Notices or the promulgation of new statutes or rules relating to Legal Notices;
  2. Promoting, planning, or participating in any effort by the Oregon Newspaper Publishers Association to communicate with or lobby any governmental body regarding the interpretation of statutes and rules related to Legal Notices or the promulgation

## Decision and Order

of new statutes or rules relating to Legal Notices;  
and

3. If acting alone, disseminating information regarding Legal Notices through signage, broadly distributed direct mail, or media widely available to the public, including websites, Newspapers, television, and social media.

**III.**

**IT IS FURTHER ORDERED** that for five (5) years after the Commission issues this Order:

- A. Respondent will appoint a compliance officer who is responsible for promoting compliance with the terms of this Order. The compliance officer must be an employee, officer or antitrust counsel of Respondent.
- B. Respondent will distribute a copy of this Order to Respondent's officers and directors, and any employee with responsibilities related to Legal Notices:
  1. Within thirty (30) days after the Commission issues the Order; and
  2. At least once a year thereafter.

**IV.**

**IT IS FURTHER ORDERED** that:

- A. Respondent will file a verified written report to the Commission ("compliance report"):
  1. Thirty (30) days after the date this Order is issued; and
  2. One (1) year after the date this Order is issued, and annually for the next four (4) years on the anniversary of that date, and

## Decision and Order

3. At such other times as the Commission may require.
- B. In each compliance report, Respondent shall describe the manner and form in which Respondent intends to comply, is complying, and has complied with this Order, including by:
1. Providing the name and title of the compliance officer appointed under Paragraph III.A.;
  2. Describing how Respondent complied with Paragraph III.B., including the date Respondent distributed copies of the Order and the name and title of each person who was provided a copy of the Order; and
  3. Providing a summary of activities that fall within Paragraph II.C. of the Order that were undertaken since submission of the most recent prior compliance report.

**V.**

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

- A. Any proposed dissolution of Oregon Lithoprint, Inc.;
- B. Any proposed acquisition of, or merger or consolidation involving, Oregon Lithoprint, Inc.; or
- C. Any other change in Respondent, including assignment or the creation, sale, or dissolution of subsidiaries, including any Newspapers or the News-Register Publishing Co., if such change may affect compliance obligations arising out of this Order.

## Decision and Order

**VI.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and five (5) days' notice to Respondent, made to its principal place of business as identified in this Order, 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 business and other records and all documentary material and electronically stored information as defined in Section 2.7(a)(1) and (2) of the Commission's Rules, 16 C.F.R. § 2.7(a)(1),(2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

**VII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on April 24, 2028.

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 consent order (“Consent Agreement”) from Oregon Lithoprint Inc. (“OLI”). The Commission’s Complaint alleges that OLI violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by inviting a competitor in the publication of foreclosure notices to divide clients by geographic market.

Under the terms of the proposed Consent Agreement, OLI is required to cease and desist from communicating with its competitors about the placement of foreclosure notices. It is also barred from entering into, participating in, inviting, or soliciting an agreement with any competitor to divide markets or to allocate customers.

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

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

**I. The Complaint**

The allegations of the Complaint are summarized below:

OLI owns the *News-Register*, a twice-weekly community newspaper based in Yamhill, Oregon. Among other things, the *News-Register* charges clients to publish a type of legal notice

## Analysis to Aid Public Comment

known as a foreclosure notice. Under Oregon law, parties foreclosing on real property must place a notice of foreclosure in a qualifying newspaper in the county within which the property is located.

The *News-Register*'s only competitor in Yamhill County is *The Newberg Graphic*, a weekly community newspaper. *The Newberg Graphic* also publishes foreclosure notices, and it charges considerably less than the *News-Register* for the service. The *News-Register* has more subscribers and a wider circulation within Yamhill County than *The Newberg Graphic*.

In August 2016, the publisher of the *News-Register* learned that a client intended to place foreclosure notices only in *The Newberg Graphic* from that point on because *The Newberg Graphic* was less expensive than the *News-Register*. In response, on August 29, 2016, the publisher emailed a manager at the parent company of *The Newberg Graphic* and explained the publisher's view that, under state law, foreclosure notices should be placed in the newspaper with the largest circulation in the area that the property is located. The publisher concluded his email by inviting the competitor to join the *News-Register* in instructing mutual clients that they should place foreclosure notices in the newspaper dominant in the area of the foreclosed property. The parent company of the *The Newberg Graphic* rejected the invitation and reported it to the Federal Trade Commission.

Several months later, in October 2016, the publisher of the *News-Register* emailed the competitor again to state that the *News-Register* had told a client to use *The Newberg Graphic* because the property in question was located in its area, and that the client was in fact going to use *The Newberg Graphic* to publish the notice. He ended the email stating "[i]t is probably too much to expect that others would do likewise."

The parent company of the *The Newberg Graphic* interpreted this second email as another invitation to collude, rejected the invitation, and reported it to the Federal Trade Commission.

## Analysis to Aid Public Comment

**II. Analysis**

OLI's August 29, 2016, email to its competitor is an explicit attempt to arrange an agreement between the two companies to divide foreclosure notices by geography. It is an invitation to collude. The October 2016 email is also an invitation to collude: OLI proposed a market allocation scheme and expressed a hope that its competitor would join that conduct. The Commission has long held that invitations to collude violate Section 5 of the FTC Act.

In a 2015 statement, the Commission explained that unfair methods of competition under Section 5 “must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications.”<sup>1</sup> Potential violations are evaluated under a “framework similar to the rule of reason.”<sup>2</sup> Competitive effects analysis under the rule of reason depends upon the nature of the conduct that is under review.<sup>3</sup>

An invitation to collude is “potentially harmful and . . . serves no legitimate business purpose.”<sup>4</sup> For this reason, the Commission

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<sup>1</sup> Fed. Trade Comm'n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015) (Section 5 Unfair Methods of Competition Policy Statement), *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/735201/150813\\_section5enforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/735201/150813_section5enforcement.pdf). Acting Chairman Ohlhausen dissented from the issuance of the Section 5 Unfair Methods of Competition Policy Statement. *See* <https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy>.

<sup>2</sup> Section 5 Unfair Methods of Competition Policy Statement.

<sup>3</sup> *See, e.g., California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) (“What is required . . . is an inquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”).

<sup>4</sup> *In re Valassis Commc'ns., Inc.*, 141 F.T.C. 247, 283 (2006) (Analysis of Agreement Containing Consent Order to Aid Public Comment); *see also* Address by FTC Chairwoman Edith Ramirez, Section 5 Enforcement Principles, George Washington University Law School at 5 (Aug. 13, 2015), *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/735411/150813section5speech.pdf](https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf).



## Analysis to Aid Public Comment

treats such conduct as “inherently suspect” (that is, presumptively anticompetitive).<sup>5</sup> Accordingly, an invitation to collude can be condemned under Section 5 without a showing that the respondent possesses market power.<sup>6</sup>

The Commission has long held that an invitation to collude violates Section 5 of the FTC Act even where there is no proof that the competitor accepted the invitation.<sup>7</sup> This is for several reasons. First, unaccepted solicitations may facilitate coordination between competitors because they reveal information about the solicitor’s intentions or preferences. Second, it can be difficult to discern whether a competitor has accepted a solicitation. Third, finding a violation may deter conduct that has no legitimate business purpose.<sup>8</sup>

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<sup>5</sup> See, e.g., *In re North Carolina Bd. of Dental Examiners*, 152 F.T.C. 640, 668 (2011) (noting that conduct is inherently suspect if it can be “reasonably characterized as ‘giv[ing] rise to an intuitively obviously inference of anticompetitive effect.’” (citation omitted)).

<sup>6</sup> See, e.g., *In re Realcomp II, Ltd.*, 148 F.T.C. \_\_\_\_, No. 9320, 2009 FTC LEXIS 250 at \*51 (Oct. 30, 2009) (Comm’n Op.) (explaining that if conduct is “inherently suspect” in nature, and there are no cognizable procompetitive justifications, the Commission can condemn it “without proof of market power or actual effects”).

<sup>7</sup> See, e.g., *In re Valassis Commc’ns, Inc.*, 141 F.T.C. 247 (2006); *In re Stone Container*, 125 F.T.C. 853 (1998); *In re Precision Moulding*, 122 F.T.C. 104 (1996). See also *In re McWane, Inc.*, Docket No. 9351, *Opinion of the Commission on Motions for Summary Decision* at 20–21 (F.T.C. Aug. 9, 2012) (“an invitation to collude is ‘the quintessential example of the kind of conduct that should be . . . challenged as a violation of Section 5’”) (citing the Statement of Chairman Liebowitz and Commissioners Kovacic and Rosch, *In re U-Haul Int’l, Inc.*, 150 F.T.C. 1, 53 (2010)). This conclusion has been endorsed by leading antitrust scholars. See P. Areeda & H. Hovenkamp, VI ANTITRUST LAW ¶ 1419 (2003); Stephen Calkins, *Counterpoint: The Legal Foundation of the Commission’s Use of Section 5 to Challenge Invitations to Collude is Secure*, ANTITRUST Spring 2000, at 69. In a case brought under a state’s version of Section 5, the First Circuit expressed support for the Commission’s application of Section 5 to invitations to collude. *Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012).

<sup>8</sup> *In re Valassis Comm’c, Inc.*, 141 F.T.C. 247, 283 (2006) (Analysis of Agreement Containing Consent Order to Aid Public Comment).

## Analysis to Aid Public Comment

**III. The Proposed Consent Order**

The Proposed Order contains the following substantive provisions:

Section II, Paragraph A of the Proposed Order enjoins OLI from entering or attempting to enter any agreement to refuse to publish legal notices or allocate customers for the publication of legal notices.

Section II, Paragraph B prohibits OLI from publically or privately communicating with a competitor that the competitor should advise customers to place foreclosure notices in the newspaper with the widest circulation in the area in which the property is located, or refuse to publish notices for properties located in a competitor's primary distribution area.

Section II, Paragraph C, contains three provisos. The first allows OLI to communicate with any governmental body regarding the proper interpretation of state law related to legal notices. The second allows OLI to participate with any effort of the Oregon newspaper association to lobby any governmental body regarding legal notices. The third allows OLI to disseminate information regarding legal notices to the public.

Sections III-VI of the Proposed Order impose certain standard reporting and compliance requirements on OLI.

The Proposed Order will expire in 10 years.

## Complaint

## IN THE MATTER OF

**BENJAMIN MOORE & CO., INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4646; File No. 162 3079*  
*Complaint, April 24, 2018 – Decision, April 24, 2018*

This consent order addresses Benjamin Moore & Co., Inc.'s marketing, sale, and distribution of purportedly "emission-free" paints. The complaint alleges that respondent made unsubstantiated representations that Natura paints: (1) are emission-free; (2) are emission-free during or immediately after painting; (3) will not emit any chemical or substance, including VOCs, that causes material harm to consumers, including sensitive populations such as babies and allergy and asthma sufferers; and (4) will not emit any chemical or substance, including VOCs, during or immediately after painting, that causes material harm to consumers, including sensitive populations such as babies and allergy and asthma sufferers. The consent order prohibits emission-free and VOC-free claims unless both content and emission are actually zero or at trace levels.

*Participants*

For the *Commission*: *Robert M. Frisby, Megan Gray, Katherine Johnson, and Alejandro Rosenberg.*

For the *Respondent*: *Mark Godler, Kaye Scholer LLP.*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Benjamin Moore & Co., Inc., a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Benjamin Moore & Co., Inc. is a New Jersey corporation, with its principal office or place of business at 101 Paragon Drive, Montvale, New Jersey 07645.
2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed paint products to consumers, including Natura paints.

## Complaint

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.

**Benjamin Moore’s Natura Paints**

4. Respondent distributes Natura paints through a network of authorized, independent retailers, as well as through its own stores and website.

5. Respondent and its independent retailers have disseminated or have caused to be disseminated advertisements, packaging, and other promotional materials for Natura paints to consumers, including the attached Exhibits A-G. These materials include the following statements and depictions:

a.

**ON SCREEN**

A group of painters enter quietly into a room filled with cribs. While a baby sleeps in a crib, they begin to paint a mural on a wall.

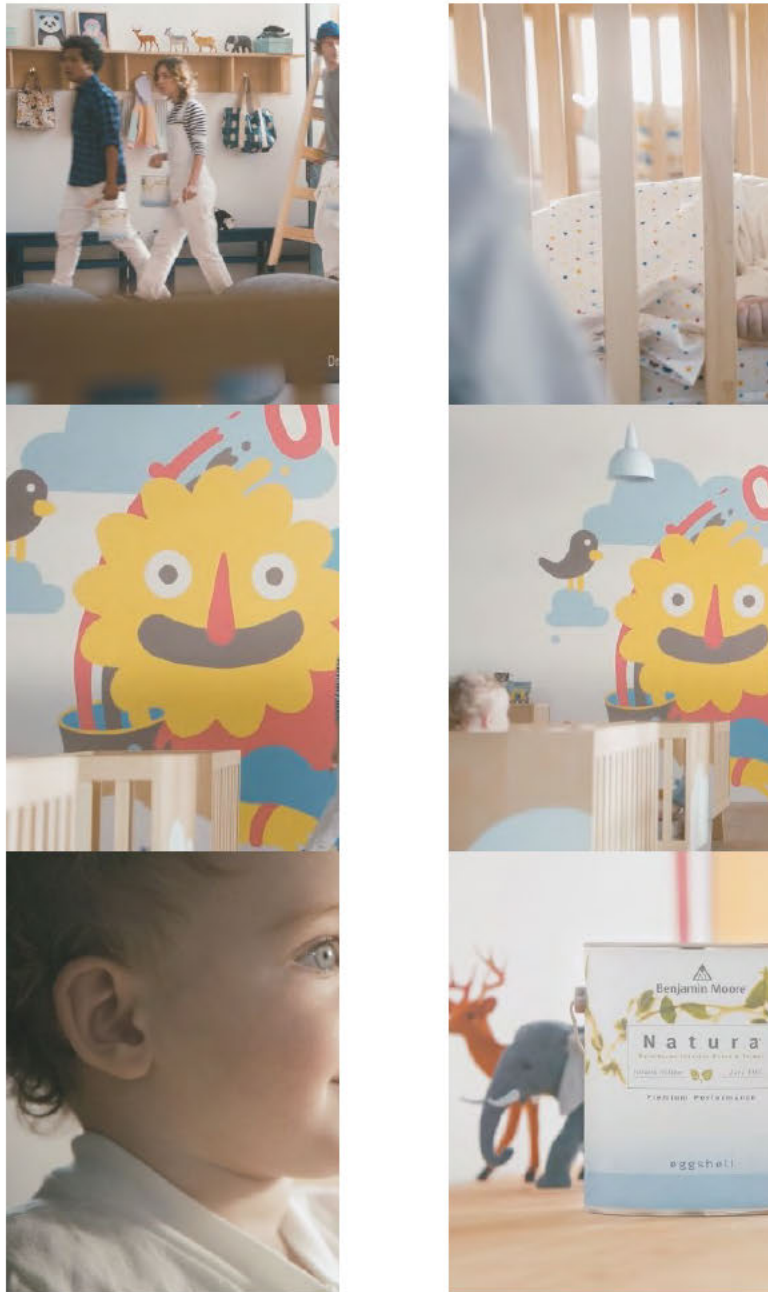
Painters exit and the baby wakes up, smiling and standing in the crib.

**VOICEOVER**

If you want a paint with no harsh fumes; if you want a paint without harmful chemicals; if you want a paint that is safer for your family and the environment, only this can. Natura by Benjamin Moore.

(Exhibit A, Benjamin Moore Natura 30-second advertisement).

Complaint



(Exhibit A, screenshots from Benjamin Moore Natura 30-second advertisement).



## Complaint

a.



(Exhibit D, [www.benjaminmoore.com](http://www.benjaminmoore.com)).

b.



(Exhibit E, Natura paint can label).

**Count I**  
**Unsubstantiated Claims**

7. In connection with the advertising, promotion, offering for sale, or sale of Natura paints, Respondent has represented, directly or indirectly, expressly or by implication, that:

- a. Natura paints are emission-free.
- b. Natura paints are emission-free during or immediately after painting.

## Complaint

- c. Natura paints will not emit any chemical or substance, including VOCs, that causes material harm to consumers, including sensitive populations such as babies, asthmatics, and allergy sufferers.
- d. Natura paints will not emit any chemical or substance, including VOCs, during or immediately after painting, that causes material harm to consumers, including sensitive populations such as babies, asthmatics, and allergy sufferers.

8. The representations set forth in Paragraph 7 were not substantiated at the time the representations were made.

**Count II**  
**Deceptive Failure to Disclose—Material Connection with**  
**Green Promise**

9. In connection with the advertising, promotion, offering for sale, or sale of its paints, such as through the use of its Green Promise seal, Respondent has represented, directly or indirectly, expressly or by implication, that these paints have been endorsed or certified by an independent third party.

10. Respondent has failed to disclose or adequately disclose that Respondent has a material connection to Green Promise, such as the fact the Green Promise seal is Respondent's own designation. This fact would be material to consumers in their purchase or use decisions regarding Respondent's paints.

11. Respondent's failure to disclose or adequately disclose the material information described in Paragraph 10, in light of the representation set forth in Paragraph 9, is a deceptive act or practice.

**Count III**  
**Means and Instrumentalities**

12. Respondent has distributed promotional materials, including the statements and depictions contained in Exhibits A through G to independent distributors and retailers. In so doing,



## Complaint

Respondent has provided them with the means and instrumentalities for the commission of deceptive acts or practices.

**Violations of Section 5**

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

**THEREFORE**, the Federal Trade Commission this twenty-fourth day of April, 2018, has issued this Complaint against Respondent.

By the Commission.

**Exhibit A**

**CD Containing Benjamin Moore 30-Second Natura  
Commercial**

Complaint

Exhibit B



**AVAILABLE FINISHES**



**FEATURES**

- Zero VOCs
- Zero emissions with no harsh fumes
- Self-priming on most surfaces
- Stays flat for splatter stains to remove
- Excellent adhesion with a durable finish
- Available in over 2000 colors

**TECHNICAL DATA**

Finish	VOCs (g/L)	APPLIED RATE (sq ft/gal)	COVERAGE (sq ft/gal)	COVERAGE (sq ft/gal)	COVERAGE (sq ft/gal)	COVERAGE (sq ft/gal)
Flat	0.01	100% Arylic Latex	40.2	370-420	100 to 120 coats on walls, trim, base	1 to 2 coats
Eggshell	0.01	100% Arylic Latex	48.0	375-425	100 to 120 coats on walls, trim, base	1 to 2 coats
Matte Gloss	0.01	100% Arylic Latex	51.0	375-425	100 to 120 coats on walls, trim, base	1 to 2 coats

**green SOURCE**

The Green Source logo is a symbol of trust. It means that Benjamin Moore has been certified by GreenSource for its commitment to environmental responsibility and superior quality.

Learn more about GreenSource at [www.greensource.com](http://www.greensource.com). For more information, visit [www.benjaminmoore.com/green](http://www.benjaminmoore.com/green).

To find a GreenSource retailer, visit [www.benjaminmoore.com/green](http://www.benjaminmoore.com/green).

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# NATURA

BENJAMIN MOORE INTERIOR PAINT



**SAFER FOR HOMES, BUILDINGS AND THE ENVIRONMENT.**

**Benjamin Moore**  
Paint by the other™

## GOING BEYOND JUST GREEN



**NATURA IS GREEN WITHOUT COMPROMISE®**

With zero VOCs, zero emissions and no harsh fumes™, Natura can have a positive impact on air quality. This is a truly environmentally friendly paint without sacrifice to performance or color integrity.



## INDEPENDENTLY TESTED & CERTIFIED

Natura is Benjamin Moore's most decorated product.

Whether you are painting a home, school or a building, you can be confident in knowing you've used the best for your environmentally sensitive project needs.



**2015 Product of the Year award**

This award seeks to guide consumers to products for their quality and innovation by category. It is a consumer award based on a survey of 40,000 consumers conducted by TNS, a global consumer research company. Natura was selected in the Interior Paint category.



**asthma & allergy friendly™**

Recognized by the American and Allergy Foundation of America, this program seeks to identify low and zero VOC consumer products that are most suitable for people with asthma and allergies. For more information, visit [www.aafp.org/certified](http://www.aafp.org/certified).



**Cradle to Cradle Certified™ Silver**

Cradle to Cradle Certified™ is a multi-attribute certification program. Products are evaluated for material health, material reuse, renewable energy use and carbon management, water



**GreenSource**

GreenSource is a national program that certifies products for their environmental friendliness. For more information, visit [www.greensource.com](http://www.greensource.com).



**Qualifier for LEED®**

The U.S. Green Building Council's rating system for green building, awarding credit for certified products in design, construction and maintenance for their environmental performance.



**MPI Green Performance™**

Monterey Peninsula Institute certifies professionals or products based on performance based standards and so-called. Natura meets multiple specifications including those under MPI Green Performance™.



**CES® Collaborative for High Performance Schools**

Provides the adoption criteria for products that help schools meet their green building criteria and deliver environmental benefits to their occupants.

Complaint

**Exhibit C**



GIRL'S BEDROOM

Natura comes in any color - so you can select a neutral option for your family that offers zero emissions and virtually no odor without having to compromise on color or anything else.

Natura® Zero VOC and Zero Emissions\* Paint



Beautiful Color. Lasting Durability. None of the other stuff.

Creating a greener and safer life for you and your family should be simple. It should be easy to find environmentally sustainable products that offer exactly what you want - and nothing you don't.

At Benjamin Moore, we're committed to providing environmentally-friendly products that both protect and beautify your home. Natura paint goes beyond zero VOC to offer zero emissions and virtually no odor, so there is nothing standing between you and gorgeous rooms your whole family can enjoy. Its patented manufacturing process was also designed to ensure that there is no compromise on style or results. With Natura, what's good for your walls is even better for your family - and the planet.

[LEARN MORE >](#) [FIND A STORE >](#)

"Green Without Compromise"® - what Natura offers

- Patented manufacturing process - Natura is produced on a dedicated manufacturing line to ensure virtually no odor and low emissions.
- Zero VOCs, zero emissions & virtually odorless - allows you to return to using your space quickly.
- Unlimited color selection - going green doesn't mean giving up your options - you can get any Benjamin Moore color in Natura paint.
- Paint and primer together - in fact, any application that requires less product overall.
- Provides a durable, washable film - so you can wash and scrub as needed, and your walls will still look beautiful for years to come.



The Green Good Housekeeping Seal helps consumers choose products that demonstrate environmental responsibility on a wide range of criteria.

In order for a product to earn the Green Good Housekeeping Seal, the product must first earn the primary Good Housekeeping Seal, which signifies that the product has been reviewed by the experts at the Good Housekeeping Institute. It is then evaluated on a wide range of environmental criteria, including reduction of energy and water use in manufacturing, ingredient and product safety, packaging, distribution and the brand's corporate social responsibility. Natura was the first and is currently the only paint to earn the Green Good Housekeeping Seal in the Paints and Coatings category.

Among the features of Natura that stood out in the evaluation process was the absence of VOCs in Natura's base paint and the rollers and its patented manufacturing process - requiring less energy usage and producing less waste.




Products carrying the Green Promise designation indicate the Benjamin Moore assurance that the product is environmentally friendly and meets - and even exceeds - the strictest industry standards and regulations, while maintaining the premium level of performance you expect from Benjamin Moore.

Complaint

**Exhibit D**


Benjamin Moore Natura Paint - No VOC Paint - Odorless, Zero... Page 1 of 4

customer service: 855-734-6882 [Log In](#) [William B](#)

[Search...](#) 


[For Architects & Designers](#) [For Contractors](#)

[For Your Home](#) [Painting Ideas](#) [Explore Color](#) [Find Products](#) [Learn More](#) [Retailer Locator](#) [Shop Now](#) [Store Locator](#) [Register Now](#)




**Natura® Zero-VOC and Zero Emissions\*  
Paint**

Natura Waterborne Interior Paint continues Benjamin Moore's commitment to providing the most environmentally friendly paint. Natura goes beyond zero VOC to offer zero emissions, making it a safer paint for your family and the environment, all without compromise to performance or color selection. Natura is truly "Green Without Compromises."

 [SAVE](#) | [PRINT](#) | [SHARE](#)

AVAILABLE IN



**Natura Waterborne Interior  
Paint - Flat Finish**

Flat(512)

DOWNLOAD (PDF) :  
[MSDS 512 \(English\)](#) | [MSDS 512 \(Español\)](#)  
[TDS 512 \(English\)](#)

Flat

FEATURES :

- Virtually odorless
- Zero VOC and zero emissions\*
- Quick return to service
- Now Certified **asthma & allergy friendly**\*
- 100% Acrylic
- Provides a durable, washable film
- Spatter-resistant
- Unlimited color selection
- One hour recoat for quick return to service
- Carries the Green Promise designation
- Self-priming on most surfaces.
- Voted 2015 Product of the Year

Survey of 40,500 people by TRS  
Interior Paint Category: Natura

\* Zero VOC according to EPA Method 24. No VOC emissions detected according to CRI's/DLL's standard method v1.1, 2010.

ADDITIONAL INFO :

<http://www.benjaminmoore.com/en-us/for-your-home/paint-prod...> 10/9/2015

Complaint

Benjamin Moore Natura Paint - No VOC Paint - Odorless, Zero... Page 2 of 4

Available Colors : All Colors, Ready Mix White

Sheen (or Gloss) : Flat

Cleanup : Soap and Water

Resin Type : Acrylic Latex

Recommended Use : Interior



**Natura Waterborne Interior Paint - Eggshell Finish**

Eggshell(513)

DOWNLOAD (PDF) :

<a href="#">SDS 513-01 (English)</a>	<a href="#">SDS 513-01 (Spanish)</a>
<a href="#">SDS 513-02 (English)</a>	<a href="#">SDS 513-02 (Spanish)</a>
<a href="#">SDS 513-03 (English)</a>	<a href="#">SDS 513-03 (Spanish)</a>
<a href="#">SDS 513-04 (English)</a>	<a href="#">SDS 513-04 (Spanish)</a>
<a href="#">SDS 513-05 (English)</a>	<a href="#">SDS 513-05 (Spanish)</a>

TDS 513 (English)

**Eggshell**

**FEATURES :**

- Virtually odorless
- Zero VOC and zero emissions\*
- Quick return to service
- Now Certified **asthma & allergy friendly**\*\*
- 100% Acrylic
- Provides a durable, washable film
- Spatter-resistant
- Unlimited color selection
- One hour recoat for quick return to service
- Carries the Green Promise designation.
- Self-priming on most surfaces.
- Voted 2015 Product of the Year

Survey of 40,000 people by TRS

Interior Paint Category: Natura

\* Zero VOC according to EPA Method 24. No VOC emissions detected according to CDPH/DHS/standard method v1.1, 2010

**ADDITIONAL INFO :**

Available Colors : All Colors, Ready Mix White

Sheen (or Gloss) : Eggshell

Cleanup : Soap and Water

Resin Type : Acrylic Latex

Recommended Use : Interior

## Complaint

Benjamin Moore Natura Paint - No VOC Paint - Odorless, Zero... Page 3 of 4


**Natura Waterborne Interior  
Paint - Semi-Gloss Finish**

Semi-Gloss(514)

**DOWNLOAD (PDF) :**
[MSDS 514 \(English\) | MSDS 514 \(Español\)](#)
[TDS 514 \(English\)](#)

## Semi-Gloss

**FEATURES :**

- Virtually odorless
- Zero VOC and zero emissions\*
- Quick return to service
- Now Certified **asthma & allergy friendly**\*\*
- 100% Acrylic
- Provides a durable, washable film
- Spatter-resistant
- Unlimited color selection
- One hour recoat for quick return to service
- Carries the Green Promise designation.
- Self-priming on most surfaces.
- Voted 2015 Product of the Year

Survey of 40,000 people by TRS

Interior Paint Category: Natura

\* Zero VOC according to EPA Method 24. No VOC emissions detected according to CDRH/DHL standard method v1.1, 2010.

**ADDITIONAL INFO :**

Available Colors : All Colors, Easy Mix White

Sheen (or Gloss) : Semi-Gloss

Cleanup : Soap and Water

Resin Type : Acrylic Latex

Recommended Use : Interior



Complaint

Benjamin Moore Natura Paint - No VOC Paint - Odorless, Zero... Page 4 of 4

INNOVATIONS LIKE NO OTHER

**OUR PHILOSOPHY OF CAN**

**PROBLEM SOLVING PAINT**

**PUT TO THE TEST**

Sign up for exclusive offers, promotions and news:

<p>Company Info</p> <ul style="list-style-type: none"> <li>About Us</li> <li>Contact Us</li> <li>Careers</li> <li>Press</li> <li>Site Help</li> <li>Site Map</li> <li>For Dealers</li> <li>FAQs</li> <li>Become a Dealer</li> </ul>	<p>Tools</p> <ul style="list-style-type: none"> <li>Search</li> <li>Color Gallery</li> <li>Personal Color Viewer®</li> <li>Paint Calculator</li> <li>Store Locator</li> <li>My Favorites</li> </ul>	<p>Dealer Info</p> <ul style="list-style-type: none"> <li>Shipping Policy</li> <li>Returns Policy</li> <li>Track My Order</li> <li>Shop Now</li> <li>Store Help</li> </ul>	<p>Product</p> <ul style="list-style-type: none"> <li>Product Catalog</li> <li>Interior Paint Chooser</li> <li>Green Primers®</li> <li>Paint Calculator</li> </ul>	<p>Connect With Us</p> <ul style="list-style-type: none"> <li>Facebook</li> <li>Twitter</li> <li>Pinterest</li> <li>YouTube</li> <li>Google+</li> <li>Instagram</li> </ul>
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101 Pentagon Drive, Northvale, NJ 07645 | Privacy | Terms and Conditions | Best Viewed | Unsubscribe | CA Supply Chain Act

Complaint

Exhibit E





Complaint

**Exhibit F**

# NATURA

PREMIUM INTERIOR PAINT

GREEN WITHOUT COMPROMISE™

Natura® continues Benjamin Moore's commitment to innovation by providing our most decorated and environmentally friendly paint. Natura® is safer for your family and the environment while still providing a durable, beautiful finish.

- Zero VOCs\* and zero emissions\*\* with no harsh fumes\*\*\*
- Self-priming on most surfaces
- Dries fast for quicker return to service
- Excellent adhesion with a durable finish

**Customer Profile:**

- Consumers who seek an environmentally-friendly paint, and are unwilling to compromise on performance or color integrity
- Consumers looking for a paint that is more suitable for people with allergies
- Residential contractors needing a high performing green, zero VOC\* paint to meet their clients' needs
- Architects, designers, and specifiers seeking a premium quality product which meets LEED®, MPI and CHPS standards

**Available Sheens:** Flat, Eggshell and Semi-Gloss  
**Available Colors:** Available in four bases. Can be tinted in thousands of colors.  
**Cleanup:** Soap and water  
**Recommended Use:** Natura® is ideal for residential or commercial applications where a zero-VOC\* paint with low emissions is desired. It's perfect for residential homes, hospitals, healthcare facilities, LEED® certified facilities and green buildings.  
**Competitive Advantage:** "Certified asthma & allergy friendly"™ now joins Natura's® other recognitions and accolades; Natura® is truly Green Without Compromise®.

**Awards and Certifications:**



\*Zero VOC according to EPA Method 24  
 \*\*Zero emissions detected according to CARB's 1.0 Standard Method V11, 2010  
 \*\*\*No harsh fumes - Zero emissions detected according to LEED's 99-1.5/Standard Method V1.1, 2010  
 ©2015 Benjamin Moore & Co. All trademarks are registered trademarks of their respective owners. The CERTIFIED ASTHMA & ALLERGY FRIENDLY Mark is a Registered Certification Mark of the ASTHMA AND ALLERGY FOUNDATION OF AMERICA



## Complaint

**Exhibit G**


# Natura<sup>®</sup>

## Waterborne Interior Paint

### The Program

The Natura advertising program will build consumer awareness and drive foot traffic to local retailers, ultimately supporting sales of Natura. There are several new programs and initiatives that will establish Natura's long term growth so that it continues to be our flagship green product, especially in light of the growing demand for green products.

**Why Natura?**  
Natura was one of the first products in the industry to be a true zero VOC product. However, Natura is more than just zero VOCs.

Natura also offers unique benefits including:

- Patented manufacturing, odor and emission technology
- Low emissions
- Lowest odors – No harsh chemical smell
- Segregated and proprietary manufacturing process that uses exclusive resin
- Meets or exceeds the most comprehensive environmental testing standards in the industry
- The first paint to earn the Green Good Housekeeping seal

### National Advertising

Benjamin Moore will be leveraging multiple media outlets to gain visibility and provide consumer education about Natura, Benjamin Moore's greenest product.

- Shades of Green – an educational TV program devoted to the advancement of renewable energy and sustainable living
  - 4-6 minute feature on Discovery (Dish/Direct TV) and CNN Airport
  - 30 second commercial spots
- Good Housekeeping print and digital advertising
- Digital Experience
  - Natura landing page
  - Expanded keyword search buy
  - Display ads
- PR outreach behind patent
- Trade shows



### Retail Support

- Print, digital and social media assets
- 100% co-op reimbursement when select Natura ad slicks are utilized
- Free Natura 2013 POP KIT
  - Window Poster, End Cap Kit, Color Preview Studio Graphic, Bail Hangers and Shelf Talker
  - Available for order to all Natura dealers on [www.mybenjaminmoore.com](http://www.mybenjaminmoore.com)
- Please note that coupons cannot be utilized on these ads

\*VOC < 5 g/L  
© 2013 Benjamin Moore & Co. Benjamin Moore, Green Promise, Natura and the triangle "M" symbol are registered trademarks and For everything that matters is a trademark of Benjamin Moore & Co. Printed in USA.



**Benjamin Moore**  
In everything that matters.

## Decision and Order

**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 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 Benjamin Moore & Co., Inc, a New Jersey corporation with its principal office or place of business at 101 Paragon Drive, Montvale, New Jersey 07645.

## Decision and Order

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. “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.

## Decision and Order

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.
- B. “Close proximity” means that the disclosure is very near the triggering representation. In an interactive electronic medium (such as a mobile app or other computer program), a visual disclosure that cannot be viewed at the same time and in the same viewable area as the triggering representation, on the technology used by ordinary consumers, is not in close proximity. A disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering representation. A disclosure made on a different printed page than the triggering representation is not in close proximity.
- C. “Covered product” means any architectural coating applied to stationary structures, portable structures, and their appurtenances.
- D. “Volatile Organic Compound” (“VOC”) means any compound of carbon that participates in atmospheric

## Decision and Order

photochemical reactions, but excludes carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate, and specific compounds that the EPA has determined are of negligible photochemical reactivity, which are listed at 40 C.F.R. Section 51.100(s).

- E. “Emission” means any compound that is emitted or produced during application, curing, or exposure of a covered product.
- F. “Trace” level of emission means:
1. A VOC has not been intentionally added to the covered product;
  2. Emission of the covered product does not cause material harm that consumers typically associate with emission, including harm to the environment or human health; and
  3. Emission of the covered product does not result in more than harmless concentrations of any compound higher than would be found under normal conditions in the typical residential home without interior architectural coating.
- G. “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.
- H. “Respondent” means Benjamin Moore & Co., Inc. and its successor and assigns.

**I. Prohibited Misleading and Unsubstantiated Representations Regarding Emission and VOC Level of Covered Product**

**IT IS ORDERED** that Respondent, and Respondent’s officers, agents, employees, and attorneys, and all other persons in

## Decision and Order

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 the emission level of a covered product is zero, or that the VOC level of a covered product is zero, 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:

- A. The covered product's emission is zero micrograms per meter cubed and the covered product's VOC content is zero grams per liter; or
- B. The covered product does not emit or produce more than a trace level of emission.

For purposes of this Provision, "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.

## **II. Prohibited Misleading and Unsubstantiated Representations Regarding Environmental and Health Claims**

**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, including through the use of a product name, regarding:

## Decision and Order

- A. The emission of the covered product;
- B. The VOC level of the covered product;
- C. The odor of the covered product;
- D. Any other health benefit or attribute of, or risk associated with exposure to, the covered product, including those related to VOC, emission, or chemical composition; or
- E. Any other environmental benefit or attribute of the covered product, including those related to VOC, emission, or chemical composition,

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 representation is true. For purposes of this Provision, “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.

### **III. Notice to Dealers and Distributors**

**IT IS FURTHER ORDERED** that Respondent deliver as soon as practicable, but in no event later than 60 days after the effective date of this Order, a notice in the form shown in Attachment A to all of Respondent’s dealers and distributors, and all other entities to which Respondent provided point-of-sale advertising, including product labels, for any covered product identified in Attachment A. The notice required by this paragraph must not include any document or other enclosures other than those referenced in Attachment A.



## Decision and Order

**IV. Prohibited Misleading Certification Marks**

**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 misrepresentation, expressly or by implication, regarding certifications, including:

- A. The fact that, or degree to which, a third party has, evaluated a product, package, service, practice, or program based on its environmental benefits or attributes; or
- B. That a certification is endorsed 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, or sale of any product, package, certification, service, practice, or program, must not make any representation, in any manner, expressly or by implication, about any user or endorser of such product, package, certification, service, practice, or program unless Respondent discloses, clearly and conspicuously, and in close proximity to the representation, any unexpected material connection, when one exists, between such user or 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 or endorsement and that would not reasonably be expected by consumers.

## Decision and Order

**VI. Means and Instrumentalities**

**IT IS FURTHER 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 manufacturing, labeling, advertising, promotion, offering for sale, or sale of any covered product, must not provide to others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false, unsubstantiated, or otherwise misleading representation of material fact, including but not limited to any representation prohibited by Provisions I, II, IV, or V, above. For purposes of this Provision, “means and instrumentalities” shall mean any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any covered product, in or affecting commerce.

**VII. 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 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.

## Decision and Order

- 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.

**VIII. Compliance Report and Notices**

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

- A. Sixty 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 a copy of the notice sent to dealers and distributors; 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.

## Decision and 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 Benjamin Moore, Docket No. C-4646.

**IX. 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;

## Decision and Order

- C. Records of all consumer complaints concerning the subject matter of the Order , including complaints involving representations covered by Parts I, II, 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.

**X. 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.

## Decision and Order

- 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.

**XI. 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 20 years from the date of its issuance (which is stated at the end of this Order, next to the Commission's seal), 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

## Decision and Order

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.

Decision and Order

**Attachment A***Attachment A: Notice to Dealers and Distributors*

[on Respondent letterhead]

[insert date]

IMPORTANT NOTICE ABOUT \_\_\_\_\_  
ADVERTISING AND MARKETING MATERIALS

[insert addressee name]

[insert addressee address used in the ordinary course of business]

Dear Dealer or Distributor,

In response to a complaint from the Federal Trade Commission, Benjamin Moore & Co., Inc. has agreed not to make claims that its paints contain zero VOCs (volatile organic compounds) or other harmful emissions, unless we can substantiate that the level is actually zero or otherwise comply with the settlement terms. We request that you immediately stop using existing \_\_\_\_\_ advertising and marketing materials that represent the emission level of any paint is zero, or that the VOC level of any paint is zero.

In addition, our in-house Green Promise certification mark did not adequately identify it as a self-certification or the specific characteristics of the certification.

We have included placards that you must display clearly and prominently next to the paint containers and at each point of sale to eliminate any misrepresentation to consumers. Enclosed are illustrations of how to properly place the placards. The placards must be displayed until you have sold all paint containers bearing the problematic claims.

We will make revised marketing materials available to you shortly. Should you have any questions about compliance with this notice, please contact [insert contact person]. In addition, you can obtain further information about the settlement by visiting [www.ftc.gov](http://www.ftc.gov) and searching for "Benjamin Moore."

Sincerely,

[name]



Analysis to Aid Public Comment

**LABEL UPDATE:  
Benjamin Moore's "Zero Emission"  
and "Zero VOC" Paints**

Benjamin Moore Natura® Waterborne Interior "Zero Emission" paints emit chemicals during the painting process and while drying. Some of these chemicals can be harmful to sensitive groups such as babies and those suffering from asthma or allergies.

**LABEL UPDATE:  
Benjamin Moore's "Green Promise" Certification**

Benjamin Moore's Green Promise® designation is the Company's assurance that this product meets—and often exceeds—rigorous environmental and performance criteria regarding VOCs, emissions, application, washability, scrubbability, and packaging, while also delivering the premium levels of performance you expect from Benjamin Moore.

**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 Benjamin Moore & Co., Inc. ("respondent").

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

This matter involves respondent's marketing, sale, and distribution of purportedly "emission-free" paints. Emission is any compound emitted from paint during application or thereafter and includes volatile organic compounds (or VOCs). According

## Analysis to Aid Public Comment

to the FTC complaint, respondent made unsubstantiated representations that Natura paints: (1) are emission-free; (2) are emission-free during or immediately after painting; (3) will not emit any chemical or substance, including VOCs, that causes material harm to consumers, including sensitive populations such as babies and allergy and asthma sufferers; and (4) will not emit any chemical or substance, including VOCs, during or immediately after painting, that causes material harm to consumers, including sensitive populations such as babies and allergy and asthma sufferers. The FTC also alleges that respondent used its Green Promise seal without adequately disclosing that respondent awarded the seal to its own product. Consumers likely interpret such seals as a claim that an independent third party certified the product. The FTC further alleges that respondent provided independent retailers with promotional materials containing the same claims it made to consumers. Thus, the complaint alleges that respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains five provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I prohibits emission-free and VOC-free claims unless both content and emission are actually zero or at trace levels. The orders define “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. The order defines “trace level of emission” to mean (1) no intentionally added VOC, (2) emission of the covered product does not cause material harm that consumers typically associate with emission, including harm to the environment or human health, and (3) emission of the covered product does not result in more than harmless concentrations of any compound higher than would be found under normal conditions in the typical residential home without interior architectural coating. Part II prohibits misleading representations regarding emission, VOC levels, odor, and any general environmental and health benefit of paints. The order requires competent and reliable scientific evidence to substantiate these representations. Parts IV and V prohibit

## Analysis to Aid Public Comment

respondent from misrepresenting third-party certifications and failing to adequately disclose a material connection. Part VI prohibits respondent from providing third parties with the means and instrumentalities to make false, unsubstantiated, or otherwise misleading representations of material fact regarding paints, including any representation prohibited by Parts I, II, IV or V.

To correct allegedly existing unsubstantiated zero emission and VOC claims and deceptive certification claims, Part III requires the respondent to send letters to its dealers and distributors, instructing them to place placards next to paint cans and at point of sale.

Parts VII through XI are reporting and compliance provisions. Part VII 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 VIII requires that respondent submit compliance reports to the FTC within sixty (60) days of the order's issuance and submit additional reports when certain events occur. Part IX requires that respondent must create and retain certain records for five (5) years. Part X provides for the FTC's continued compliance monitoring of respondent's activity during the order's effective dates. Part XI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

If the Commission finalizes the agreement's proposed order, it plans to propose harmonizing with this order the consent orders issued in the PPG Architectural Finishes, Inc. (Docket No. C-4385) and The Sherwin-Williams Company (Docket No. C-4386) matters. Specifically, the Commission plans to issue orders to show cause why those matters should not be modified pursuant to Section 3.72(b) of the Commission Rules of Practice, 16 C.F.R. § 3.72(b).

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

**IMPERIAL PAINTS, LLC**  
**D/B/A**  
**LULLABY PAINTS AND ECOS PAINTS**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4647; File No. 162 3080*  
*Complaint, April 24, 2018 – Decision, April 24, 2018*

This consent order addresses Imperial Paints, LLC's marketing, sale, and distribution of purportedly "VOC-free" paints. The complaint alleges that respondent made unsubstantiated representations that its paints: (1) are free of volatile organic compounds ("VOCs"); (2) are VOC-free during or immediately after painting; (3) will not emit any chemical or substance, including VOCs, that causes material harm to consumers, including sensitive populations such as babies, pregnant women, and allergy and asthma sufferers; and (4) will not emit any chemical or substance, including VOCs, during or immediately after painting, that causes material harm to consumers, including sensitive populations such as babies, pregnant women, and allergy and asthma sufferers. The consent order prohibits emission-free and VOC-free claims unless both content and emissions are actually zero or at trace levels.

*Participants*

For the *Commission*: Robert M. Frisby, Megan Gray, Katherine Johnson, and Alejandro Rosenberg.

For the *Respondent*: Ryan Clark and Joan Long, Barnes & Thornburg LLP.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Imperial Paints, LLC, a limited liability company, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Imperial Paints, LLC ("Imperial"), also doing business as, *inter alia*, Lullaby Paints and ECOS Paints is a South Carolina limited liability company with its principal office or

Complaint

place of business at 350 East St. John Street, Spartanburg, South Carolina 29302.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed paint products to consumers, including Lullaby Paints and ECOS Paints.

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.

**Imperial's Lullaby Paints**

4. Respondent distributes Lullaby Paints directly to consumers through its websites, including <http://imperialpaintsllc.com/> and <http://lullabypaints.com/>, and through independent retailers.

5. Respondent and its independent retailers have disseminated or have caused to be disseminated advertisements, packaging, and other promotional materials for Lullaby Paints to consumers, including the attached Exhibits A-M. These materials contain the following statements and depictions:

a.

**How can I safely paint my nursery?**

**What's harmful about paint?**  
PAINT CAN CONTAIN HIGHLY TOXIC CHEMICALS, such as phthalates, solvents, tars, and formaldehyde which are released into the air for up to five years.

**Are all paints harmful?**  
OVER 95% OF PAINTS, INCLUDING MANY LABELED AS ZERO-VOC, LOW-VOC, or GREEN carry the following disclaimer:  
**WARNING:** This product contains chemicals known to cause cancer and birth defects or other reproductive harm.  
In contrast, Lullaby Paints does not contain these toxic chemicals.

**What are the health issues caused by paint chemicals?**  
ASTHMA & ALLERGIES, COGNITIVE, SOCIAL AND DEVELOPMENTAL ISSUES. Pregnant moms, unborn and newborn babies are particularly at risk from these chemicals.

**Why is Lullaby Paints safe?**  
NO TOXINS, NO SOLVENTS, NO ODORS. Lullaby Paints have been formulated to provide pregnant moms and their babies with a safe alternative.

**What is Lullaby Paints committed to making beautiful, safe, non-toxic paints for mothers, babies and their nurseries. We believe our level of safety exceeds the highest industry standards.**

Made in the USA

Safe for use on baby's walls, cribs, and toys. Safe for pregnant mothers

UK Allergy Seal of Approval

EN 71 Certification for use in children's toys

Glaxo Wellcome and Ford Conservation Awards

Paint So Fresh It Feels Like Outdoors

**lullaby PAINTS**

© 2012 Lullaby Paints, LLC. All rights reserved. PO Box 986, Spartanburg, SC 29302  
© 2012 Lullaby Paints, LLC. Callahan and Cooney

(Exhibit G, Brochure.)

## Complaint

b.

**Why Lullaby Paints?**  
*For your baby's health, yours, & the environment.*

**Safe for baby and mom**  
SAFE TO APPLY AND BE AROUND our specially formulated paints provide the highest safety standards without compromising quality.

**Non-toxic, no odor, no VOCs**  
ZERO VOC FORMULA. No toxic chemicals, no odors, no VOC's. We are an environmentally responsible paint company, providing the highest standards for your baby.

**Helps reduce asthma, allergy, MCS**  
PREVENTIVE REASONS. Developed without chemicals which have been shown to cause asthma, allergies and/or irritate children.

Proven and tested. Quality standards for your baby and family. To learn more visit [www.lullabypaints.com](http://www.lullabypaints.com)

**Paint Coverage Per Gallon**

1 Gallon Lullaby Paints	1.5 Gallons Traditional Paints
1 Gallon Lullaby Paints	560 sq. ft.
1 Gallon Traditional Paints	375 sq. ft.

\*Our proprietary technology has been developed to improve coverage and reduce emissions.

**32 Designer Colors & Color Matching**

- 4 Collections Each with 8 Colors  
Designer colors coordinated into perfectly matched collections
- Match Color Strips/Swatches  
We match other paint samples and color swatches.
- Furniture, Bedding and Fabric  
Have a furniture piece that needs to be matched? We can help.

**Safety comes first**

"It's wonderful to be able to use a safe, premium paint to surround my baby. It gives me peace of mind."

(Exhibit F, Brochure.)

- c. The World's Finest Baby Safe Paint! (Exhibit J, [www.lullabypaints.com/](http://www.lullabypaints.com/)).
- d. There's no good reason why a premium quality, hard wearing, beautiful paint needs to contain toxic chemicals. Know how we know that? At Lullaby Paints, after years of development, we have proven it. We are pioneers in paint-making and extremely proud of our final product: the safest paint available. Newborn baby-safe. Pregnant mom-safe. Safe enough for kids to paint with. (Exhibit I, [www.lullabypaints.com/safety](http://www.lullabypaints.com/safety)).
- e. Safe for baby. And the environment. Our award-winning paint is praised as much for its color, coverage and durability, as it is for its safety. Attaining the highest certifications for product purity, Lullaby Paints is known in the industry as the safest paint available. Recognized by consumer advocacy groups and leading environmental organizations, used by hospitals and maternity facilities, lauded by magazines, designers and bloggers and, most of all, enjoyed by moms as pregnancy safe paints. We've

## Complaint

revolutionized how safe and eco-friendly paints can be, for mom, baby, everybody. (Exhibit L, [www.lullabypaints.com/how-it-works](http://www.lullabypaints.com/how-it-works)).

- f. Why Lullaby paints? . . . Tested and proven for over 20 years. These products are safe. (Exhibit G, brochure).

**Imperial's ECOS Paints**

6. Respondent distributes ECOS Paints directly to consumers through its websites, including <http://imperialpaintsllc.com/> and <http://ecospaints.net/>, and through independent retailers.

7. Respondent and its independent retailers have disseminated or have caused to be disseminated advertisements, packaging, and other promotional materials for ECOS Paints to consumers, including the attached Exhibits N-Q. These materials contain the following statements and depictions:

- a. WHAT IS SO DIFFERENT ABOUT ECOS PAINTS?  
Unlike traditional paints, even those labeled as “environmentally friendly”, ECOS Paints are non-toxic and have no odor. Developed twenty five years ago with a unique formulation, our products were originally designed for people with multiple chemical sensitivities, asthma, allergies, and issues with everyday chemicals.

For over two decades, we have provided world class, high quality paints and relief from noxious chemicals to discerning individuals around the world. Today our customers also include people who are focused on the environment and sustainability; healthcare providers; mothers concerned about their baby's health, and companies seeking to protect the health of their employees, guests and visitors. Our paints are zero VOC and do not contain harmful solvents that off gas into the air. Safer for you, your family and the environment. (Exhibit P, [www.ecospaints.net/mcs.html](http://www.ecospaints.net/mcs.html).)

## Complaint

- b. Proven Technology
- 25 Years of Successful Use
  - Award Winning
  - Tested and Certified.

For twenty five years, ECOS and Air Pure Paints have been sought out by people with multiple chemical sensitivities, concerned pregnant mothers, the environmentally conscious, corporations committed to sustainability, and the general public who care. Now manufactured in the US, these products are available for discerning customers who are equally committed to the health of the environment. (Exhibit N, Print Ad.)

**Count I**  
**Unsubstantiated Claims**

8. In connection with the advertising, promotion, offering for sale, or sale of Lullaby and ECOS Paints, Respondent has represented, directly or indirectly, expressly or by implication, that:

- a. Lullaby and ECOS Paints are VOC-free.
- b. Lullaby and ECOS Paints will not emit any chemical or substance, including VOCs, that causes material harm to consumers, including sensitive populations such as babies, pregnant women, and allergy and asthma sufferers.
- c. Lullaby and ECOS Paints have been tested and proven to be safe.

9. The representations set forth in Paragraph 8 were not substantiated at the time the representations were made.

**Count II**  
**Means and Instrumentalities**

10. Respondent has distributed promotional materials, including the statements and depictions contained in Exhibits A



## Complaint

through Q to independent retailers. In so doing, Respondent has provided them with the means and instrumentalities for the commission of deceptive acts or practices.

**Violations of Section 5**

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

**THEREFORE**, the Federal Trade Commission this twenty-fourth day of April, 2018, has issued this Complaint against Respondent.

By the Commission.

## Complaint

**Exhibit A**

Imperial Paints LLC

IMPERIAL PAINTS

Imperial Paints LLC is a holding company for highly engineered and innovative brands of paint.

Sharing a common technology, these products have been proven over a twenty year period, thoroughly tested and accredited. Each brand has been refined to meet the specific needs of a target consumer base, delivering precise performance and aesthetic qualities.

We will continue to expand our portfolio with new technologies over the next twenty years.

**lullaby**  
PAINTS  
Baby Safe

**clinical** paints

**ECOS**  
PAINTS

**WOOD-SHIELD**

**AIR PURE** PAINTS  
CLEAR AIR TECHNOLOGY

**lullaby**  
PAINTS  
chalkboard paint

© 2013 Imperial Paints LLC | PO Box 489 Fairforest, SC 29336 | tel 864.595.3840 | [info@imperialpaintsllc.com](mailto:info@imperialpaintsllc.com)

Complaint

**Exhibit B**



## What is Baby Safe?

Lullaby Paints is committed to making beautiful, safe, non-toxic paints for mothers, babies and their nurseries. We believe our safety levels exceed the highest industry standards.



**100% NON-TOXIC & NO ODOR**  
No Harmful Chemicals



**20 YEARS OF CUSTOMER SATISFACTION**  
Proven Technology and Performance



**INTERNATIONAL RECOGNITION**  
Multiple Awards and Accreditations



**SAFE FOR TOYS AND CRIBS**  
Ideal for Contact



Complaint

Exhibit C

## HIDDEN DANGERS IN YOUR BABY'S NURSERY

**DID YOU KNOW THE AIR IN A NEWLY FURNISHED AND PAINTED NURSERY MAY CONTAIN MORE THAN 100 TOXIC CHEMICALS?** Parents take baby-proofing steps every day to prevent harm to their children. We use car seats, child gates, outlet covers. The list goes on and on, but what about the invisible risks? Wondering what other hidden dangers are lurking in your baby's room? Head on to find out what they are and how to avoid them.

### CRIB

Formaldehyde, a known carcinogen and asthmaogen, is often used in the pressed/composite woods that many cribs and furnishings are made of.

**FIX IT:** Choose solid wood furniture or gently used furniture that's already had a chance to off-gas. (Be sure cribs meet current safety standards.)

### CRIB MATTRESS

72% of crib mattresses are made with potentially dangerous chemicals like formaldehyde, antimicrobials, and waterproofing finishes.

**FIX IT:** Look for all-organic and/or Greenguard Certified mattresses.

### PAINT

Conventional paint can off-gas toxic volatile organic compounds (VOCs) for up to 5 years or more.

**FIX IT:** Use zero-VOC, non-toxic, solvent-free paint (one-step liquid latex or milk paint).

### CHANGING STATION

70% of foam baby products such as changing pads, car seats, and crib/cradle cushions contain toxic flame-retardants.

**FIX IT:** Choose products with wool- or cotton-filled seats with PVC-free waterproof linings.

### TOYS

Polyvinyl chloride (PVC) leads to everything from teething rings to baby bibs, often contains dangerous toxic additives such as phthalates, lead, and cadmium.

**FIX IT:** Choose PVC-free (100% BPA-free) baby bibs and other toys.

### BABY CARE PRODUCTS

In 2009, the Campaign for Safe Cosmetics found 14-dioxane, a chemical linked to cancer, in 87% of products tested.

82% contained formaldehyde, though they were marketed as "gentle" and "pure" on the label.

**FIX IT:** Look for organic care products or try making your own.


Knowledge is power. With it, you can create a healthier home for your family. Start out by choosing a few easy steps and, when they become habit, move on to a few more. No one can do everything, but everyone can do something. Learn more at [HealthyChild.org](http://HealthyChild.org).

Marking: M.J.M.H.R.O.V., S.W.S.O.M.S., T.H.E.R.A.I.Y.S.H.E.N.C.O.M., C.H.I.U.C.O.M., C.L.E.A.N.H.E.A.L.T.H.Y.N.Y.V.O.C.O.M., A.B.C.O.O.M., N.E.C.O.O.M., G.O.M.E.S.T.Y.C.O.M.

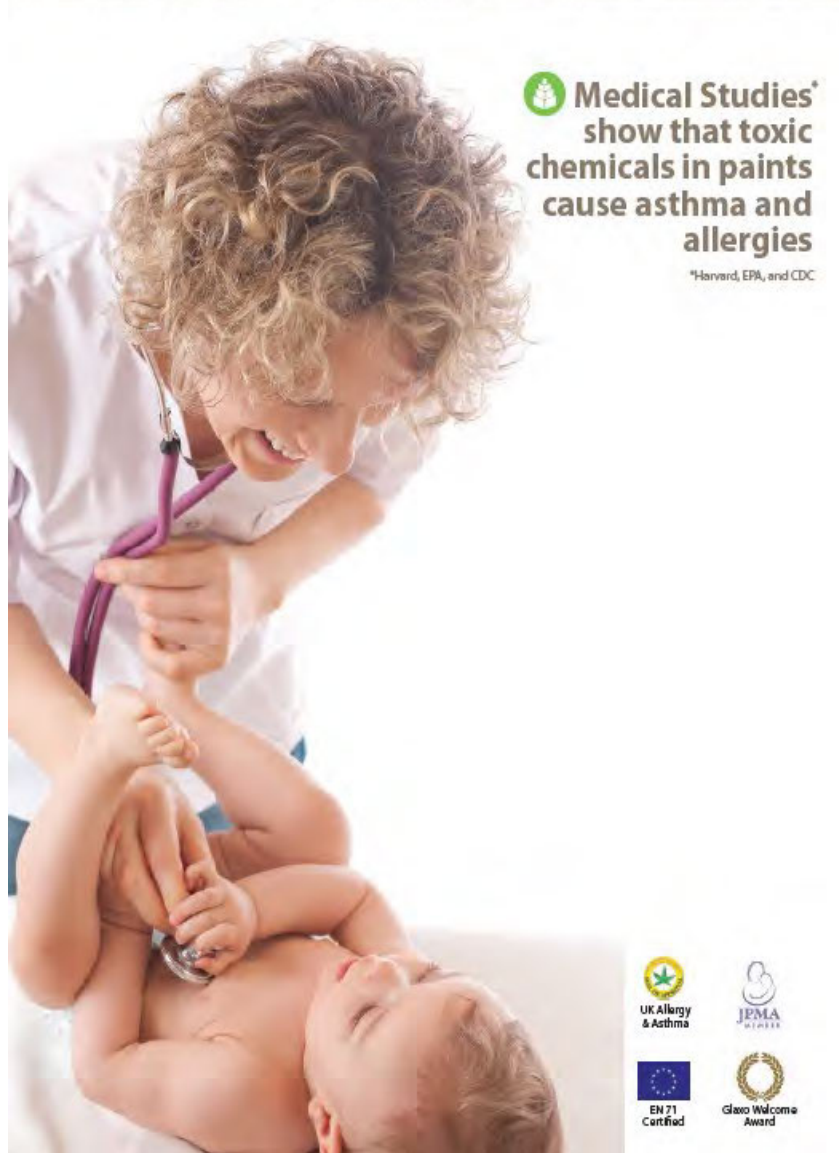
For information and more details, or to help you find the most competitive and lowest price product for the home:

Complaint

**Exhibit D**




**lullaby**  
PAINTS




**Medical Studies\***  
show that toxic  
chemicals in paints  
cause asthma and  
allergies


\*Harvard, EPA, and CDC




UK Allergy  
& Asthma



JEMA



EN 71  
Certified



Glaxo Wellcome  
Award

Complaint

**Exhibit E**





Complaint

Exhibit F

Featured By





Lullaby Paints is committed to making beautiful, safe, non-toxic paints for mothers, babies and their nurseries. We believe our level of safety exceeds the highest industry standards.

-  Made in the USA
-  Safe for use on baby's walls, cribs, and toys. Safe for pregnant mothers.
-  UK Allergy Seal of Approval
-  EN 71 Certification for use in children's toys
-  Glaxo Wellcome and Ford Conservation Awards



baby safe | pregnancy friendly | interior paints | designer colorlines

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© 2013 Lullaby Paints, LLC. COLORISTS AND COLORS.




### Why Lullaby Paints?

For your baby's health, safety & wellness.



**Safe for baby and mom**  
SAFE TO APPLY AND BE AROUND. Our specially formulated paints provide the highest safety standards without compromising quality.



**Non-toxic, no odor, no VOCs**  
THERE'S GOOD STUFF INSIDE. No toxic chemicals, no odor, no VOCs. We are an environmentally responsible paint company, providing the highest standards for your baby.



**Help reduce asthma, allergy, MCS**  
#100% TOXIC FREE. Developed without chemicals which have been shown to cause asthma, allergies and eczema in children.

**Paint Coverage Per Gallon**

 1 Gallon Lullaby Paints	 1.5 Gallons Traditional Paints
1 Gallon Lullaby Paints	560 sq. ft.
1 Gallon Traditional Paints	375 sq. ft.

\*Our proprietary technology has been developed to improve coverage and reduce emissions.

**32 Designer Colors & Color Matching**

-  **8 Collections Each with 4 Colors**  
Designer colors coordinated into perfectly matched collections.
-  **Match Color Strips/Swatches**  
We match other paint samples and color swatches.
-  **Furniture, Bedding and Fabric**  
Have a furniture piece that needs to be matched? We can help.



**Safety comes first**

"It's wonderful to be able to use a safe, premium paint to surround my baby. It gives me peace of mind."

Complaint

Exhibit G



How can I safely paint my nursery?

**Q What's harmful about paint?**  
PAINT CAN CONTAIN HIGHLY TOXIC CHEMICALS, such as phthalates, solvents, texanol, and formaldehydes which are released into the air for up to five years.

**Q Are all paints harmful?**  
OVER 95% OF PAINTS, INCLUDING MANY LABELED AS ZERO-VOC, LOW-VOC, or GREEN carry the following disclaimer:  
**WARNING:** This product contains chemicals known to cause cancer and birth defects or other reproductive harm.

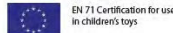
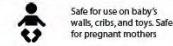
In contrast, Lullaby Paints does not contain these toxic chemicals.

**Q What are the health issues caused by paint chemicals?**  
ASTHMA & ALLERGIES, COGNITIVE, SOCIAL AND DEVELOPMENTAL ISSUES. Pregnant moms, unborn and newborn babies are particularly at risk from these chemicals.

**Q Why is Lullaby Paints safe?**  
NO TOXINS, NO SOLVENTS, NO ODOR. Lullaby Paints have been formulated to provide pregnant moms and their babies with a safe alternative.

**Want to Learn More?**  
See the Harvard, EPA and ATSDR-CDC Studies.  
Go to <http://www.lullabypaints.com/learnmore>

Lullaby Paints is committed to making beautiful, safe, non-toxic paints for mothers, babies and their nurseries. We believe our level of safety exceeds the highest industry standards.



baby safe | premium finishes | interior paints | designer collections

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© 2012 Lullaby Paints, LLC. Colors and Colors.



"It's wonderful to be able to use a safe, premium paint to surround my baby. It gives me peace of mind."

as featured on:



Why Lullaby Paints?

for your baby's health, safety & wellbeing

**Safe for baby and mom**  
SAFE TO APPLY AND BE AROUND. Our specially formulated paints provide the highest safety standards without compromising quality.

**Tested and proven for over 20 years**  
THESE PRODUCTS ARE SAFE. Our products have over 20 years of usage around the world and are manufactured to the most stringent standards.

**Non-toxic, no odor, no VOCs**  
THERE'S GOOD STUFF INSIDE. No toxic chemicals, no odor, no VOCs. We are an environmentally responsible paint company, providing the highest standards for your baby.

**Help reduce asthma, allergy, MCS**  
PREVENTIVE MEASURES. Developed without chemicals which have been shown to cause asthma, allergies and eczema in children.

**Industry leader in coverage**  
LEAD THE MARKET IN COVERAGE. Our paints can cover 560 sq. ft. per gallon, that's 40% more than the industry average.

**Complete line of colors and finishes**  
DISCOVER OUR WIDE SELECTION. 32 colors in 8 designer collections and the ability to color match any shade.

Promote and nurture healthy environments for your baby and family. To Learn More Ask a Sales Associate about Lullaby Paints Today.

Paint Coverage Per Gallon



1 Gallon Lullaby Paints	560 sq. ft.
1 Gallon Traditional Paints	375 sq. ft.

\*Our proprietary technology has been developed to improve coverage and reduce emissions.

Premium Finishes

Durable and long-lasting finishes

Milk/Cottage		Tire Road	
Matt	Eggshell	Soft Sheen	Satin
✓	✓	✓	✓
✓	✓	✓	✓

32 Designer Colors & Color Matching

**8 Collections Each with 4 Colors**  
Designer colors coordinated into perfectly matched collections

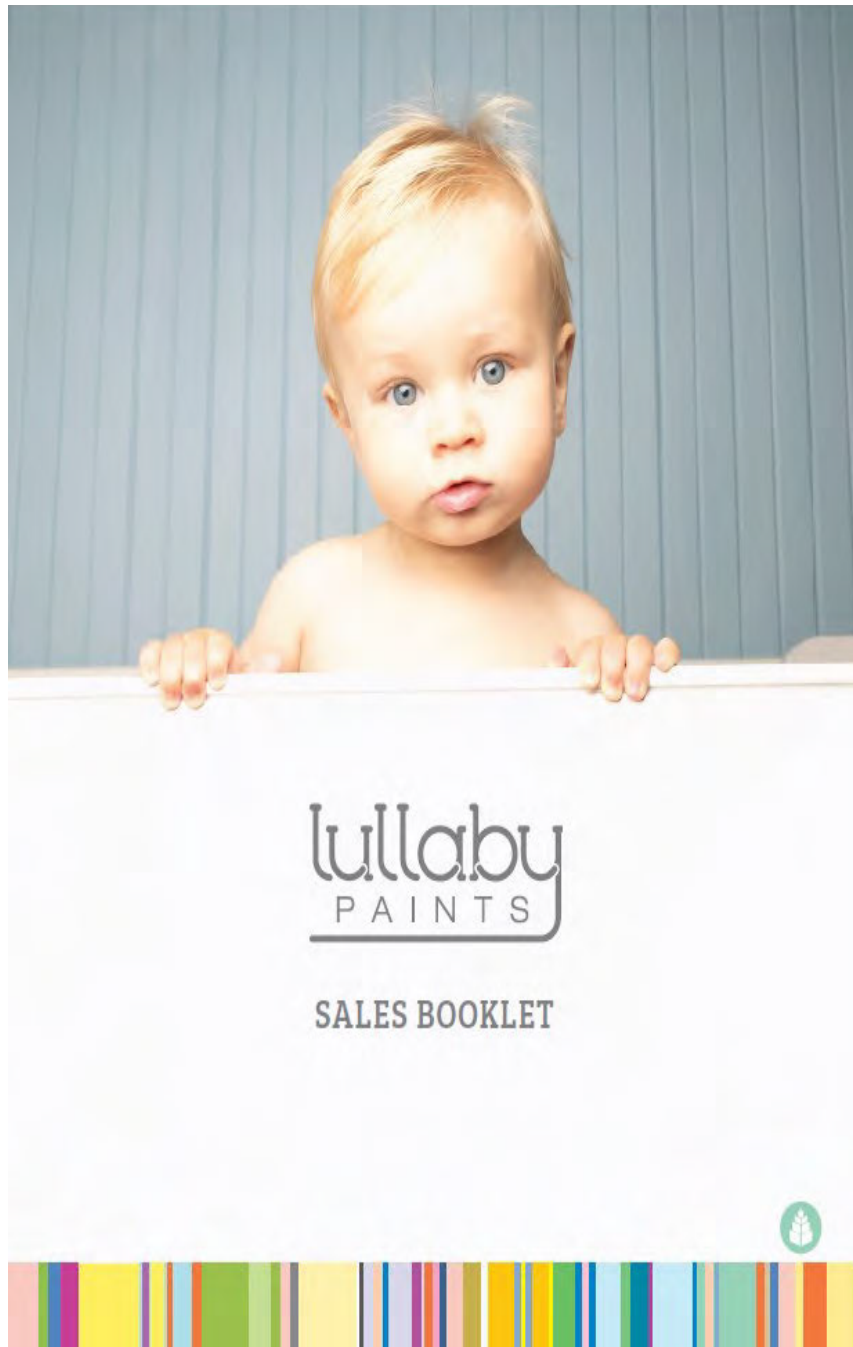
**Match Color Strips/Swatches**  
We match other paint samples and color swatches

**Furniture, Bedding and Fabric**  
Have a furniture piece that needs to be matched? We can help.



Complaint

**Exhibit H**



Complaint



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PAINTS

## Complaint

### About Us

For twenty five years we have been making paints for the chemically sensitive. People who have a hard time coping with everyday chemicals, or those who suffer from common medical conditions like asthma and allergies. We have given them respite, the ability to enjoy their own homes, or a good night's rest.

Today we are bringing our technology to an equally deserving group - everybody else.

There is no good reason why paint needs to contain harmful chemicals. Ingredients that cause asthma and allergies in children, that are carcinogenic, or can cause cognitive development issues. We make durable, colorful, premium paints, that have been used and accredited around the world for over two decades - without the need for toxic ingredients. We invite you to explore our safe world of color.

### Why Lullaby Paints fits in a nursery store?

- Unique nursery décor item
- Designer chic pouches
- New product channel
- Superior value proposition - quality and safety
- Complements existing design services
- No inventory
- No technical expertise needed
- Manufacturer support for all technical, support and paint inquiries

### What's unique about Lullaby Paints?

- Made specifically for pregnant moms and their babies
- Safe (no toxins, no harmful chemicals, no off-gasses, no VOCs)
- No odor
- No compromise - easy to apply, scrubable, durable, vibrant colors, just like you'd expect from a premium paint



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## Complaint



## Our Program

### What do I receive as a retailer upon joining the program?

We offer:

- 1) Designer, ohio sample pouches for sale in the store
- 2) Retail stand for display purposes (if needed)
- 3) Retailer Pack - includes merchandizing & collateral materials

### Do I need to hold any inventory or paint cans?

Your retail store will hold no inventory or paint cans.

### How do I get my store setup to take orders?

We take care of creating your retailer account. You simply get a username and password. From that point, you can send orders via Lullaby Paints Retailer site.

### How do I get paid?

Three ways:

- 1) Selling designer, sample pouches
- 2) Store orders – When a customer purchases paint, the retailer will take payment directly from them and then place/pay for the order through our website using the retailer discount account.
- 3) Online Orders – For orders that are placed online by your customers, they are required to refer the retail store on checkout process. From that point, your retail store will get the appropriate credit for the sale.



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### How does my customer receive the paint?

We will arrange for delivery of the paint either to the store or directly to the customer – according to the retailer's preference. The retailer does not have to stock any paint - other than the sample pouches.

### What if we have technical questions, customer concerns?

We handle the painting and technical support for your customer. They can reach us via email ([info@lullabypaints.com](mailto:info@lullabypaints.com)), phone (1-866-587-3586) or fax (1-864-595-3841).

### What if my customer purchases directly on the website?

Should a customer decide to purchase paint directly through our website, they will be presented with an required option during "Checkout" to refer the retail store where they viewed the product. When they select a store, that retailer will get the appropriate credit for the sales and receive a commission check in the mail the following month.

### When do I get the commission paid to my retailer account?

Payment for the retailer, if earned as a commission, is earned at the point of purchase. The retailer receives the full price of the paint from the consumer and remits only the wholesale price to Lullaby Paints.

### What is the retail and commission pricing for the product?

Sample Pouch:  
Quart Pouch:  
Gallon Pouch:





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## What are the merchandizing options for my retail store?

### Included free as retailer signup:

Starter Pack: (5) Five Posters, Buyer's Guide, Press Kit, USB Drive, Four Sample Pouches, Three Large Pouches (Gallon, Quart, Pint) Trifold Brochures

### Choose a merchandizing option:

Full Sample Set:	32 Sample Pouches
Partial Sample Set:	24 Sample Pouches
Small Sample Set:	6 Sample Pouches
Retail Stand:	96 Sample Pouches



### How does ordering product work?

All orders will be shipped by Lullaby Paints either directly to the customer, or to the retail store, in accordance with Imperial Paints standard delivery terms. Sample pouches for the retail store must be ordered with a minimum quantity of six pouches.

### What are the payment terms?

Orders paid for in full, by credit card, at the time of purchase.



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## Investing In Your Child

### Why is Paint Important?

- Your child will spend up to 16 hours a day in their nursery for the next 3 years.
- Paint fumes from traditional paints include benzene, antimony trioxide, toluene, xylene, ethylene glycol, and texanol. All of these are hazardous to the health of your child.
- Paint offgases for up to 5 years after application. Fumes do not stop when the noxious smell of paint solvents ends.
- Children do not possess an adult's ability to absorb, metabolize and excrete contaminants. They are at risk of developing cognitive and respiratory disorders like asthma and allergies.

### Why should you buy Lullaby Paints?

- Lullaby Paints is the safe paint for a baby's nursery. No chemicals that cause asthma and allergies.

### Why take the risk?

- It only takes 1-100 PPB (parts per billion) of toxic paint chemicals to cause harm in pregnant mothers and babies.
- Paint manufacturers are regulated by third party certifiers, not the EPA or another governmental organization.
- US regulations ban only 11 chemicals used in personal care products, compared with 1,328 chemicals, which are banned in the EU.
- According to the Harvard School of Public Health, paint fumes have been directly linked to the development of asthma and allergies in children.



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## What's Included



### Nursery Wall Paint Eggshell

- Baby Safe - specially formulated for babies' nurseries
- Non-toxic, Zero-VOC, no solvents
- No odor
- No mess packaging



### Sample Pouches

- 2 oz
- No odor, non-toxic, zero VOC
- Try before you buy



### Retailer Kit

- USB, Product Brochures
- 4 In store Posters



### Retail Stand

- Holds 96 Sample Pouches
- Elegant wood construction
- Elegant construction
- Pricing available upon request





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## It's our LULLABY GUARANTEE!

Lullaby Paints 100% baby safe formula are the safe option for you and your child's rooms.

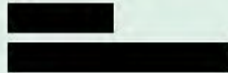
They contain none of the harmful chemicals found in other paints, without compromising quality or longevity of the paint. There are no solvents, turpentine or terpenes, benzene, toluene, xylene, VOCs, essential oils, glycols (even PEG), texanol, coalescents, heavy metals (including lead, cadmium, mercury), formaldehyde, acrolein, vinyl chloride, phthalates, alkylphenol ethoxylates (APEOs), or acrylic softeners. In addition, Lullaby Paints do not contain casein or other animal products. In fact, there is nothing toxic, carcinogenic, or even allergenic in them!

Lullaby Paints are simply the safest paint available. Newborn baby-safe. Pregnant mom-safe. Safe enough for kids to paint with. And, our award winning paints are praised as much for their color, coverage and durability, as they are for their safety. Check out our designer collections today!

Company Inquiries

Julian Crawford

CEO



## Complaint

## Features

<b>SAFETY</b>	<b>INGREDIENTS</b>	Safe paint - there are no toxins, no solvents, no glycols, no phthalates, and no VOCs in our paint
	<b>INDUSTRY</b>	Traditional paints contain toxic chemicals which have been shown to be carcinogenic, cause birth defects and other reproductive harm
	<b>STANDARDS</b>	Current industry standards for paint are no guarantee of product safety, as they allow for the use of harmful chemicals
	<b>TIME FRAME</b>	Harmful chemicals (VOCs) offgas from paints for up to five years after application
	<b>EFFECTS</b>	Chemicals in paints have been directly linked to asthma, allergy and cognitive issues in children
<b>QUALITY</b>	<b>YEARS IN USE</b>	Our paint has been used successfully around the world for over 20 years
	<b>INDUSTRY LEADING</b>	Industry leading performance for color and durability
<b>PERFORMANCE</b>	<b>COVERAGE</b>	1.5x the industry average, with 560 sq. ft. (single coat) per gallon vs 375 sq. ft. industry average
	<b>ODOR</b>	None
	<b>COLORS</b>	32 Designer Colors, 8 Collections
	<b>COLOR MATCHING</b>	Yes. From color swatches, paint samples or fabric. We match all major paint brand colors
	<b>DRY TIME</b>	20 to 30 minutes to touch, generally 1 to 2 hours between applications
	<b>FINISHES</b>	WALL: Eggshell, Soft Sheen, Matt, Semi Gloss TRIM: Satin, Gloss
<b>SHIPPING</b>	<b>SHIPPING COST</b>	Included in the price
	<b>SHIPPING TIME</b>	USPS - typically 2 to 3 business days

Complaint

## Paint Comparison

	TRADITIONAL PAINTS		Lullaby Paints
	Zero-VOC	Low-VOC	
VOCs (g/L)	10-50	50-150	None
Solvents	Yes	Yes	No
Odor	Yes	Yes	No
Coverage per gallon	375 sq. ft.	375 sq. ft.	680 sq. ft.
Toxic Chemicals	formaldehyde, benzene, antimony trioxide, toluene, xylene, ethylene glycol, and tetanol		No toxic chemicals
Off-Gas Duration	3 years	3 years	None
Color Matching	Yes	Yes	Yes
Paint Required for Typical Nursery*	3 gallons	3 gallons	2 gallons

\*Based on 10' x 12" nursery, two coat coverage



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- ZERO VOC
- NO ODOR
- SCRUBBABLE & WASHABLE
- FAST DRYING
- BABY SAFE
- PREGNANT MOM SAFE
- HUNDREDS OF COLORS

At Lullaby paints, we are parents and future parents who are genuinely concerned about the health and safety of babies. We're creating the next evolution of an industry and transforming nurseries across the country into spaces where babies can truly thrive.

**Nursery Wall Paint Eggshell**

**USAGE**

A zero VOC , water based, no odor, eggshell finish for interior use.

**AVAILABILITY**

Quart and Gallon pouches

**COVERAGE**

Purchase the needed amount; 560 sq. ft. per gallon (one coat).

**DRY TIME**

At 77°F and 50% dry time to touch is 30 min. and dry time to re-coat is 2 hours.

**THINNING**

Thinning is *not* recommended.

**HANDLING**

No special precautions necessary. This product contains Titanium Dioxide and Calcium Carbonate in suspension, posing no hazard. Sanding or crushing when dried may produce small quantities of dust.

**SURFACE PREPARATION**

Surfaces should be clean, dry, sound and free from grease. If unsure, clean first with sugar soap and rinse well. Remove all soft, dusty and loose material and abrade

lightly to a feathered edge to provide a key. On bare plaster & plasterboard, prime first with ECOS Plaster Sealer\* Fillers - seal with ECOS Filler Sealer\*

**APPLICATION**

Mix paint thoroughly before use. Keep lid on pouch of unused portion to prevent skinning. Apply with brush to out-in edges and roller to roll wall surfaces. For brushing, use a high-quality brush. For rolling, use 3/8" to 9/16" nap roller cover. For airless sprayer — no thinning is recommended, 2000 – 2500 PSI, tip — .015"–.021". For conventional sprayer and HVLP, reduce up to one half pint per gallon with clean water. Provide adequate ventilation during application and drying time.

**\*\*\* WARNING:** Older buildings may contain lead-based paint, which requires professional remediation if it is disturbed. If in doubt, consult with a professional from a Lead-Safe Certified Firm.

**INGREDIENTS**

Water, acrylic dispersion, vinyl acetate dispersions, titanium dioxide, pigments (various), thickeners – cellulose and polymeric, barytes, limestone, clay, synthetic wax, dispersing aids (various).

**HAZARDOUS COMPONENTS**

None

**VOCs/SOLVENTS**

None

**CLEAN UP**

Remove excess paint from equipment before washing with water.

**TOXICOLOGICAL INFORMATION**

Long term experience of this product type indicates no danger to health when properly handled under normal conditions.

**DISPOSAL**

Waste product should not be discharged directly into drains or

waterways without treatment. Disposal of product and packaging should always comply with local and national regulations. Waste water containing product should be treated in a separation and biological treatment plant.

**PHYSICAL PROPERTIES**

Physical form: Liquid – paste

Color: Variable

Odor: Faint – none

Flash point: Not applicable

Vapor pressure: 23hPa @ 20°C

Relative density: 1.0 – 1.4

Solubility in water: Insoluble but

miscible in all proportion

PH: 8 – 11

Viscosity: Variable

Flammability: Non-flammable

**ECO INFORMATION**

Degradation/elimination:

The product can be virtually eliminated from water by abiotic processes, e.g. adsorption onto activated sludge.

Eco-Toxic Effects:

No long term effects.

Bioaccumulation:

No evidence for bioaccumulation.

**STORAGE**

Store between +5°C and 20°C protected from frost and direct sunlight. Do not use storage vessels or pipe work made of aluminum, copper or their alloys. Detailed advice on storage systems can be provided.

[www.lullabypaints.com](http://www.lullabypaints.com)

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PO Box 489

Fairforest, SC 29336

864.595.3840



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## Paint Coverage

### Room Coverage Calculator:

- **Industry Leading** coverage at 560 sq. ft. per gallon. Dry time - 20-30 minutes to touch, 2 to 3 hours between applications

- **Two Coat Estimates:**

	CEILING HEIGHT	10' Length	12' Length	14' Length	16' Length	
10' Width	8'	1.2 gal	1.4 gal	1.4 gal	1.6 gal	
	10'	1.6 gal	1.6 gal	1.8 gal	2.0 gal	
12' Width	8'	1.4 gal	1.4 gal	1.6 gal	1.6 gal	
	10'	1.6 gal	1.8 gal	2.0 gal	2.0 gal	
14' Width	8'	1.4 gal	1.6 gal	1.6 gal	1.8 gal	
	10'	1.8 gal	2.0 gal	2.0 gal	2.4 gal	
16' Width	8'	1.6 gal	1.6 gal	1.8 gal	2.0 gal	
	10'	2.0 gal	2.0 gal	2.4 gal	2.4 gal	

Typical Nursery Size

#### How much paint do I need?

Standard nursery 10' X 12', 8' ceiling. Two coats coverage.

Traditional Paint	375 sq. ft./gallon	3 gallons
Lullaby Paints	560 sq. ft./gallon	2 gallons



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## Color Collection

TWINKLE COLLECTION	GOLDEN SLUMBERS
 STARLIGHT  MOONSTONE	 BENGT  STRAW SACK
 ALABASTER  LUMINOUS	 ANTIQUE WHITE  FRENCH BLUE
SLEEP BABY SLEEP	OLD KING COLE
 COTTON CANDY  SNOWY FLEECE	 ROYAL BLUE  KING'S RED
 CELADON  HYDRANGEA	 ARMY BLANKET  SALTIRE
BAA BAA BLACK SHEEP	ITSY BITSY
 SHEEP'S WOOL  PORTOBELLO	 CITRON  BLACK
 PAVOTTI  THATCH	 AZURE SEA  TANGERINE
PRETTY LITTLE HORSES	HUSH LITTLE BABY
 WAKE  EQUINE	 WICKER CRIB  DAWN MIST
 SAVINO  BLAZE	 FLAX  LILAC

**Color Matching:**

We can color match color samples, color cards, fabric samples, bedding, etc. at no extra charge.



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PAINTS

## Complaint

### Safety

**What are VOCs?**

This process does not just occur when the paint is applied ("the new paint smell"), but continues to release for up to three years.

**What's in the paint fumes?**

Chemicals released include known carcinogens (cancer causing chemicals) and toxic chemicals such as glycols, toluenes, formaldehyde, texanol or phthalates.

**Do all paints contain these chemicals?**

Over 99% of paints, including many labeled as Zero-VOC, Low-VOC, and green contain these chemicals.

**Doesn't the Government regulate paint and these chemicals?**

The EPA does not provide standards for paints, but leaves the responsibility up to paint manufacturers or third party certifiers.

**What do paint companies provide as a warning?**

Paint manufacturers provide an MSDS sheet with their paint, similar to a Nutrition Information Label. The EPA allows paints manufacturers to call their product zero-VOC even if it contains off-gasing chemicals.

**What about the third party certifications?**

All third party certifications including the highest levels of certification allow for at least 2 teaspoons (~50 g/L) of these chemicals as part of their standards in their testing guidelines.

**What amount of chemicals can cause damage?**

1-5 ppm (parts per million) cause damage ranging from acute skin and eye irritation to long-term damage to the kidney, neural, respiratory, and cognitive functions.

**Who is most at risk?**

Unborn babies, newborn babies and children are at the greatest risk due to their ongoing cognitive, neural and respiratory development.





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## Complaint

**EGGSHELL WALL PAINT APPLICATION NOTES****Description**

- Lullaby Paints Eggshell gives a washable low-sheen finish

**Storage**

- Protect from frost/freezing

**Where to Use**

- Interior walls and ceilings
- Particularly kitchens, bathrooms, and other areas where steam and condensation are a problem.
- Not ideally suited for use directly on lining paper. A coat of soft sheen to seal first is needed.

**Preparation**

- Surfaces should be clean, dry, sound and free from grease. If unsure, clean first with sugar soap and rinse well.
- Remove all soft, dusty and loose material and abrade lightly to a feathered edge to provide a key.
- On bare plaster/plasterboard, prime first with ECOS Plaster Sealer.\*
- Fillers - seal with ECOS Filler Sealer\* Interior walls and ceilings.

**Application**

- DO NOT THIN
- Stir gently and thoroughly before use.
- Apply where possible using narrow (6 to 7 inch) foam or fine pile "gloss" roller.
- Do not layoff. Do not go back over painted areas. Do not spread.
- May be sprayed using an airless spray system.
- Best results are normally achieved with two coats.
- Allow six hours between coats.

- Avoid applying below 41°F (5°C) and above 88°F (20°C).
- Clean equipment with water, as soon as you have finished painting.
- At 77°F and 50% dry time to touch is 30 min. and dry time to re-coat is 2 hours.

**Coverage**

Varies with surface porosity, but on hard non-porous surfaces estimate:

- 140 sq. ft. per quart (single coat)
- 560 sq. ft. per gallon (single coat)

**Health and Safety**

Avoid contact with skin and eyes. Wash off splashes with water. Do not ingest. WARNING: Older buildings may contain lead-based paint, which requires professional remediation if it is disturbed. If in doubt, consult with a professional from a Lead-Safe Certified Firm.

**Getting the Most Out of Your Pouch**

Twist and squeeze pouch for full use. In addition, the pouch can be cut open using scissors. Squeeze out air before resealing.

**Discarding Paint Pouches**

Let dry in an air cooled place and discard in accordance with local ordinance.

Help us to provide a healthy, safe environment for moms and babies.

\*Where to Find ECOS Paints <http://www.ecospaints.net>



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## Accreditations

**Facts:**

- \* Our product is defined by what it doesn't contain, rather than what it does. Lullaby Paints contain no toxins, no glycols, and no harmful chemicals. There is no current industry standard which measures this level of purity sufficiently to adequately differentiate our product.

**Accreditations:**



**Awards:**



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Notes:



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Notes:



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**Exhibit J**



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Exhibit K

The screenshot shows the Lullaby Paints website with a Q&A section featuring Dr. Elizabeth A. McLeod, M.D. The page includes a navigation menu, a sidebar with categories like 'About Us', 'FAQs', and 'Paints', and a main content area with a list of questions and answers. At the bottom, there is a sign-up form for email updates and social media icons for Facebook, Twitter, and Instagram.

**lullaby PAINTS**

home shop why lullaby free color chips custom colors blog

Q&A WITH ELIZABETH A. MCLEOD, M.D.

**Dr. Elizabeth A. McLeod, M.D.**  
Senior Director, American Board of Pediatric  
Pediatric Associates, Cincinnati Hospital System, Children's Hospital

Here's a series of questions we asked Dr. McLeod:

Q: **What are the health risks with newborn paint?**

A: Many studies link formaldehyde and VOCs from production paints with health problems like asthma, allergies, cognitive impacts and even cancer. It should really come as no surprise that conventional paints when combined with other chemicals such as formaldehyde (carcinogen), benzene (carcinogen), 7-nitrotoluene (carcinogen), tri-n-butylamine (irritant), and formaldehyde (irritant), when inhaled commonly affect both less serious impacts, such as respiratory issues, irritation and burning, and potentially an array of other ailments and a baby's well-being.

Q: **Why are babies more at risk?**

A: Babies and toddlers breathe are going through critical stages of development that make them uniquely vulnerable to toxic exposures. In fact, some data indicates that they are exposed to 10x the volume, but could have 10x the impact for your kid. (Consider what a child's example daily program can do in a plastic, especially in the first months of life, babies' respiratory and immune systems are especially less capable of dealing with toxic exposure. And, because infants have more years of life to live, that adds up, they have more time to develop those diseases that they are triggered by their exposures.

Q: **Why is this so scary for a parent or pregnant? baby?**

A: Babies spend up to 16 hours a day in their parents' bedrooms. Of course, as you can guess, during the time they're sleeping in any airborne materials, such as paint fumes.

Q: **Are there any health issues in newborn that I should watch?**

A: Parents, they often concern me but, as a pediatrician, I'm seeing a very concerning issue in newborns and if it is not being addressed, it can have a long-term impact. One of the most common causes of infant death is SIDS (Sudden Infant Death Syndrome). One of the most common causes of SIDS is the fact that babies are often sleeping in a room with a new paint job. There is a growing body of evidence linking asthma to a variety of environmental factors. For example, a child that has a history of asthma death may have had a job with high concentrations of paint fumes given the growing concern about the health of newborns that a major mechanism of health asthma, chronic, there is much we can do to prevent this.

Q: **What can parents do?**

A: Don't let, realize, and most of all, we are the building blocks of health. You can't control jewelry, and you're already being exposed to that, but don't forget about the last factor. Creating a safe, healthy environment is important for giving your baby the best possible start in life. Using Lullaby Paints is one simple way to eliminate the proven health risks associated with traditional paints. Welcome your baby at home, and protect your little bundle of joy.

WANT TO GET AHEAD WITH YOUR HOME? SIGN UP FOR OUR NEWSLETTER AND WE'LL SEND YOU A FREE COLOR CHIP KIT.

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## Complaint

**Exhibit L**

Why Lullaby

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live toll-free (866) 587-3588 | help


**lullaby**  
PAINTS

home shop  why lullaby free color chips custom colors blog

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**NEW! LULLABY PAINTS**  
Shop for paint from the convenience of your own home. Browse, sample, choose, relax...

**FREE SAMPLE CARDS**  
**DELIVERY TO YOUR DOOR**  
**ALL-IN-ONE PAINTING KITS**



1 → 2 → 3 → done.


**Get Inspired**  
Browse our designer collections and inspiration boards to find the perfect colors for your baby's nursery. From whimsical, to chic, to elegant - and everything in between.

**Try Before You Buy**  
Order free paint chips, color cards, or 2 oz. sample pouches - all from the comfort of your own home. Perfect for reviewing your color choices on your nursery walls.

**Fast Shipping**  
Order your favorite colors using our easy-to-use website and we'll drop ship your paint right to your doorstep. Delightful design delivered directly!

**It Couldn't Be Easier**  
Try the All-In-One-Kit for extreme convenience. It comes with everything you'll need to get the job done right. Relax, we've got you covered.

## Features



**The World's Best Nursery Paint**  
Made from the finest ingredients, our baby safe paints are carefully selected for their safety and performance. In fact, our paints are so safe they include food grade ingredients. Our rich, deep pigments are imported from Europe and meet the highest environmental and safety standards. And because our resins are not diluted with cheap solvents, they're thicker and cover your walls with ease.

**SHOP NOW**

Safe for baby. And the environment.

<http://lullabypaints.com/how-it-works.html>[4/12/2016 11:54:43 AM]



## Complaint

### Why Lullaby



Our award-winning paint is praised as much for its color, coverage and durability, as it is for its safety. Attaining the highest certifications for product purity, Lullaby Paints is known in the industry as the safest paint available. Recognized by consumer advocacy groups and leading environmental organizations, used by hospitals and maternity facilities, lauded by magazines, designers and bloggers and, most of all, enjoyed by moms as pregnancy safe paints. We've revolutionized how safe and eco-friendly paints can be, for mom, baby, everybody.

[SHOP NOW](#)



### Expert Help

Colors for your baby's nursery are nearly as important as what you put in it. That's why we have a whole team of experts standing by to guide you as you design, decide, and create. View our collections of how-to posts, DIY articles, inspirational nurseries, and safety advice so you can choose the very best paint for your baby's room. Let us help you with technical questions that you might have concerning coverage, finish, application, or maintenance. Give us a call, send us an email - we're here for you!

[SHOP NOW](#)



### Designer Inspiration

Trend-setting designers, world class brands, boutique retailers and inspired moms all lend their creative expertise to the development of our nursery color collections and design inspiration. Browse our site for DIY ideas, expert advice, and recommendations for accessories and furniture to complete the perfect baby's room and create a beautiful home. LullabyPaints.com is the canvas that brings it all together.

[SHOP NOW](#)



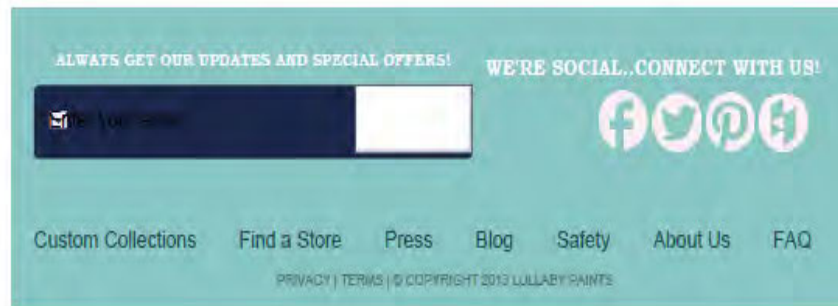
### Shop From Home

Create the perfect nursery with our sensational nursery colors! Browse our website for the perfect colors for your baby's nursery and have samples shipped to your door. Want something different? We can even match a color of your choice. Then order Lullaby Paints through our simple check out process. For the complete "shop from home experience" buy an All-In-One-Kit, which comes with everything that you will need to paint your room, including a brush, roller, tray tape and more. Painting has never been easier or safer.

[SHOP NOW](#)

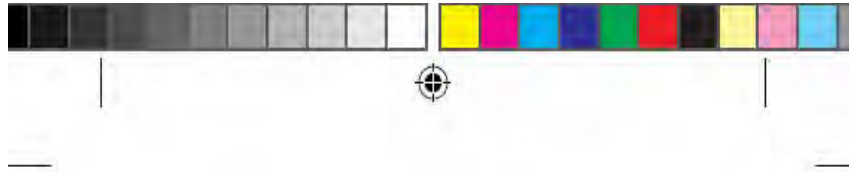
Complaint

Why Lullaby



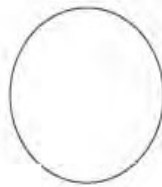
Complaint

**Exhibit M**



**lullaby**  
P A I N T S

**PREGNANCY & NEWBORN**  
Baby Safe Paints



1/2 US GAL (64 Fl. Oz.)



## Complaint

**Nursery Wall Paint**

Pouch Size 1/2 Gallon (64 Fl. Oz.)  
Coverage Area 280 Sq. Ft.

VOCs	None
Solvents	None
Odor	None
Flammability	None
Hazardous Ingredients	None

**INGREDIENTS:** Water, acrylic dispersion, vinyl acetate dispersion, titanium dioxide, pigments (various), thickeners cellulosic and polymeric, barytes, limestone, clay, synthetic wax, dispersing aids (various).

**FIRST AID:** Eye contact: May cause temporary irritation. Flush with water for fifteen minutes, holding eyelid open. Skin contact: Prolonged contact may cause irritation. Wash thoroughly with soap and water. Do not ingest.

Lullaby Paints offers the world's only decorator's grade, non-toxic wall paint. Traditional paints contain harmful chemicals, and alternative eco-friendly paints do not match the durability and coverage of Lullaby Paints. Used successfully around the world for over twenty years, Lullaby Paints promises performance, without environmental compromise.

**lullaby**  
PAINTS

Questions or Comments?

1-866-587-3586 • [www.lullabypaints.com](http://www.lullabypaints.com)

**Nursery Wall Paint**

• Eggshell Finish, Scrubbable,  
Premium, Hard Wearing

• Safe for Mom, Baby + Kids

• Always Non-Allergenic &  
Asthma Friendly

• Zero-VOC, No Odor, Fast Drying

• Non-Toxic

**DRY TIME:** At 77° F and 50% humidity, dry to touch in 20 minutes, recoat in 2 hours.

**THINNING:** Thinning is not recommended.

**SURFACE PREPARATION:** Surfaces should be clean, dry, sound and free from grease, dust and dirt. If unsure, clean first with mild detergent and rinse well.

**APPLICATION:** Shake paint thoroughly before use. Intermix pouches first to ensure uniform color. Apply with a brush to cut-in edges and a roller for wall surfaces. We recommend two coats.

**BRUSHING:** Use a high-quality synthetic brush.

**ROLLING:** Use a 3/8" to 1/2" tight woven, shed resistant cover.

**STORAGE:** Store between 41° F and 77° F, protected from frost and direct sunlight. To keep touch-up paint, force excess air out of a pouch containing any unused paint and screw cap back on to avoid skimming.

**Dispose of in accordance with local ordinance.**

Please Recycle



Complaint



**Nursery Trim/Door /Furniture Paint**

Pouch Size 1/2 Gallon (64 Fl. Oz.)  
Coverage Area 215 Sq. Ft.

VOCs	None
Solvents	None
Odor	None
Flammability	None
Hazardous Ingredients	None

**INGREDIENTS:** Water, acrylic dispersion, vinyl acetate dispersion, titanium dioxide, pigments (various), thickeners cellulosic and polymeric, barytes, limestone, clay, synthetic wax, dispersing aids (various), and polymeric, barytes, limestone, clay, synthetic wax, dispersing aids (various).

**FIRST AID:** Eye contact: May cause temporary irritation. Flush with water for fifteen minutes, holding eyelid open. Skin contact: Prolonged contact may cause irritation. Wash thoroughly with soap and water. Do not ingest.

Lullaby Paints offers the world's only decorator's grade, non-toxic paint. Traditional paints contain harmful chemicals, and alternative eco-friendly paints do not match the durability and coverage of Lullaby Paints. Used successfully around the world for over twenty years, Lullaby Paints promises performance, without environmental compromise.



Questions or Comments?  
1-866-587-3586 • www.lullabypaints.com

**Nursery Trim/Door / Furniture Paint**

• Premium, Hard Wearing Finish

• Safe for Mom, Baby + Kids

- Always Non-Allergenic & Asthma Friendly
- Zero-VOC, No Odor, Fast Drying
- Non-Toxic

**DRY TIME:** At 77° F and 50% humidity; dry to touch in 20 minutes, recoat in 2 hours.

**THINNING:** Thinning is not recommended.

**SURFACE PREPARATION:** Surfaces should be clean, dry, sound and free from grease, dust and dirt. If unsure, clean first with mild detergent and rinse well.

**APPLICATION:** Shake paint thoroughly before use. Intermix pouches first to ensure uniform color. Apply with a brush. We recommend two coats.

**BRUSHING:** Use a high-quality synthetic brush.

**STORAGE:** Store between 41° F and 77° F, protected from frost and direct sunlight. To keep touch-up paint, force excess air out of a pouch containing any unused paint and screw cap back on to avoid skimming.

**Dispose of in accordance with local ordinance.**





## Complaint

**Nursery Wall Primer**

Pouch Size 1/2 Gallon (64 Fl. Oz.)  
Coverage Area 215 Sq. Ft.

VOCs	None
Solvents	None
Odor	None
Flammability	None
Hazardous Ingredients	None

**INGREDIENTS:** Water, acrylic dispersion, vinyl acetate dispersion, titanium dioxide, pigments (various), thickeners cellulosic and polymeric, barytes, limestone, clay, synthetic wax, dispersing aids (various).

**FIRST AID:** Eye contact: May cause temporary irritation. Flush with water for fifteen minutes, holding eyelid open. Skin contact: Prolonged contact may cause irritation. Wash thoroughly with soap and water. Do not ingest.

Lullaby Paints offers the world's only decorator's grade, non-toxic wall primer. Traditional primers contain harmful chemicals, and alternative eco-friendly primers do not match the durability and coverage of Lullaby Paints. Used successfully around the world for over twenty years, Lullaby Paints promises performance, without environmental compromise.

**lullaby**  
PAINTS

Questions or Comments?

1-866-587-3586 • www.lullabypaints.com

**Nursery Wall Primer**

For bare, hard plaster and drywall

Safe for Mom, Baby + Kids

- Always Non-Allergenic & Asthma Friendly
- Zero-VOC, No Odor, Fast Drying
- Non-Toxic

**DRY TIME:** At 77° F and 50% humidity; dry to touch in one hour, paint after four hours.

**THINNING:** Thinning is not recommended.

**SURFACE PREPARATION:** Surfaces should be clean, dry, sound and free from grease, dust and dirt. If unsure, clean first with mild detergent and rinse well.

**APPLICATION:** Shake primer thoroughly before use. Apply with a brush to cut-in edges and a roller for wall surfaces. Ensure primer is completely dry before painting.

**BRUSHING:** Use a high-quality synthetic brush.

**ROLLING:** Use a 3/8" to 1/2" tight woven, shed resistant cover.

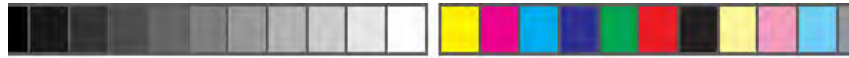
**STORAGE:** Store between 41° F and 77° F, protected from frost and direct sunlight. To keep excess primer, force excess air out of a pouch containing any unused primer and screw cap back on to avoid skimming.

**Dispose of in accordance with local ordinance.**

Please Recycle 



Complaint



**Nursery Wood Primer**  
 Pouch Size 1/2 Gallon (64 Fl. Oz.)  
 Coverage Area 260 Sq. Ft.

VOCs	None
Solvents	None
Odor	None
Flammability	None
Hazardous Ingredients	None

**INGREDIENTS:** Water, acrylic dispersion, vinyl acetate dispersion, titanium dioxide, pigments (various), thickeners cellulosic and polymeric, barytes, limestone, clay, synthetic wax, dispersing aids (various).

**FIRST AID:** Eye contact: May cause temporary irritation. Flush with water for fifteen minutes, holding eyelid open. Skin contact: Prolonged contact may cause irritation. Wash thoroughly with soap and water. Do not ingest.

Lullaby Paints offers the world's only decorator's grade, non-toxic wood primer. Traditional primers contain harmful chemicals, and alternative eco-friendly primers do not match the durability and coverage of Lullaby Paints. Used successfully around the world for over twenty years, Lullaby Paints promises performance, without environmental compromise.



Questions or Comments?  
 1-866-587-3586 • www.lullabypaints.com

**Nursery Wood Primer**

- For dry, bare wood
- Safe for Mom, Baby + Kids
- Always Non-Allergenic & Asthma Friendly
- Zero-VOC, No Odor, Fast Drying
- Non-Toxic

**DRY TIME:** At 77° F and 50% humidity; dry to touch in one hour, paint after four hours.

**THINNING:** Thinning is not recommended.

**SURFACE PREPARATION:** Surfaces should be clean, dry, sound and free from grease, dust and dirt. If unsure, clean first with mild detergent and rinse well.

**APPLICATION:** Shake primer thoroughly before use. Apply with a brush. Ensure primer is completely dry before painting.

**BRUSHING:** Use a high-quality synthetic brush.

**STORAGE:** Store between 41° F and 77° F, protected from frost and direct sunlight. To keep excess primer, force excess air out of a pouch containing any unused primer and screw cap back on to avoid skimming.

**Dispose of in accordance with local ordinance.**



Complaint

**Exhibit N****Proven Technology**

- 25 Years of Successful Use
- Award Winning
- Tested and Certified



For twenty five years, ECOS and Air Pure Paints have been sought out by people with multiple chemical sensitivities, concerned pregnant mothers, the environmentally conscious, corporations committed to sustainability, and the general public who care.

Now manufactured in the US, these products are available for discerning customers who are equally committed to the health of the environment.

**IMPERIAL PAINTS**ECOS PAINTS  
AIR PURE PAINTS



Complaint

**Exhibit O**

# ECOS Organic Paints



The World's best selling water based, VOC Free paint

- **ULTIMATE PURITY, ABSOLUTELY NO**  
VOCs, glycol, solvent, pesticides, and herbicides.
- **7000x PURER THAN THE LATEST EUROPEAN STANDARDS**
- **ALL INGREDIENTS DECLARED**
- **QUALITY WITHOUT COMPROMISE**  
Odorless, non-yellowing, non-toxic, and non-allergenic

## Complaint

OUR STORY

*ECOS Paints were created in England in the early 1980s. Originally, they were formulated for two groups of people: primarily for those with allergies and conditions like MCS (Multiple Chemical Sensitivity). Secondly, for those at risk of developing these conditions.*

Naturally, this means our paints have to be completely safe for everyone, so that's our benchmark - nothing gets an ECOS Paints logo unless it is truly zero VOC, zero solvent, zero glycol, and non-allergenic!

Every paint manufacturer now realizes that they have to stop selling products that are killing people. What they are finding though is that they cannot do this by simply "improving" their traditional products. You can only go so far with that approach before the paint stops working as a paint! Long before you get that far, quality also drops dramatically. ECOS Paints are proud to have a world-unique range of formulations that are both safe and top quality.

Of course when a product is 100% safe for your indoor environment, it is inherently safe for the wider environment. We are not going to jump on the green bandwagon, but we might brag a little about having been safe for the environment before anyone was even thinking about it.

There is no substitute for time to ensure a product is tested and developed properly. We are years ahead of anyone in the world and are using our experience to educate people of the dangers they face from traditional paints and finishes. We also strive to change the way the industry works and encourage every manufacturer to stop poisoning the world. That's where you come in and we can work together - as a team, we can make a difference! Don't settle for anything less than the health and safety of yourself and your family.

Old fashioned values are important to us and we think that shows in the relationships we build with you over time. Thank you for taking the time to find out a little about ECOS Paints. We look forward to helping you with your next project but, more importantly, to serving you right.

Thank you!

*The ECOS Paints Family*

## Complaint

## PAINTS FOR STANDARD APPLICATIONS

*ECOS Paints offer a completely unique range of decorative finishes. It's the only range of totally solvent-free paints available anywhere in the world today and has been independently tested to reveal zero VOCs (Volatile Organic Compounds), even when colored.*

VOCs are a major contributor to atmospheric pollution and lead to global warming. In addition, the use of solvent-based paints is a major cause of Sick Building Syndrome, Danish Painter's Syndrome, Asthma, Allergies, Chemical Sensitivities and the general Flu-like symptoms reported by many people using conventional paints, including flat and silk wall paints!

Most paints currently on sale, contain solvents and VOCs. ECOS Paints contain none. As a result they are ideal for children's bedrooms, nurseries, kitchens and anywhere in the home, especially if you or a member of your family is chemically sensitive or suffers from asthma or allergies.

Using ECOS paints means that rooms are safe and pleasant to live in, play in, sleep in, and eat in!

We have a full range of finishes for walls and trim, including all the primers you might need for the perfect finish. For walls, we have the traditional Matt finish as well as a more contemporary Soft Sheen. For humid areas (like bathrooms) and places that might need more frequent cleaning (kitchens, for example), our Eggshell is ideal. It is less glossy than a semi-gloss, so far more attractive.

For woodwork and trim, we have Gloss or Satin (semi-gloss) finishes.

Our floor paints will revive old floors, and protect them for years to come. Tough enough for factory floors (we run a fork-lift truck over it!).

All our paints are available in our wide range of standard colors, or can be matched to a color of your choosing if you have something very specific in mind. Call or email us for a free color chart, or to ask about our color-matching service.

PAINTS FOR STANDARD APPLICATIONS



## Complaint

## AIR PURE PAINTS

*The air in your home can be 70x more polluted than outdoors - a cocktail of solvents and chemicals like formaldehyde\* from sources such as carpets, furnishings, MDF, some paints and lacquers, cleaning products, personal products, aerosols etc.*

### Better than Zero-VOC

These allow ultimate air purity and are ideal for asthmatics and those with ME, allergies or chemical sensitivities. They go beyond simply not adding harmful chemicals to the environment - they actually remove them. By a unique application of molecular sieve technology, we actively remove VOCs like formaldehyde from the environment. This is perfect if you have existing paints that are off-gassing as it is stopped before it even reaches the air in your building. It also catches them from the air in your room, provided air-flow carries them to the surface of the paint. We currently have four products in this range for specific applications.

### Air Purifying Paint (APP)

This revolutionary Matt-finish wall paint absorbs 98-99% of volatile pollutants, chemicals, solvents and VOCs from the atmosphere in your home down to around one part per million. The air purifier ingredient in APP neutralizes those pollutants permanently.

### MDF Passivating Primer (MDFP)

For interior MDF, chipboard, particle board, and plywood, all of which can outgas formaldehyde\* and other VOCs into the indoor atmosphere for many months or years. This can be one of the main causes of poor indoor air quality and a variety of medical problems, as well as affecting allergies and conditions such as asthma.

### Anti-Formaldehyde Radiator Paint (AFR)

Conventional hot-water radiators can off-gas large amounts of formaldehyde\* and can easily be the largest source of formaldehyde in the home! The active ingredient in AFR paint absorbs approx 98-99% formaldehyde before it can off-gas into your home or office environment.

### Deodorizing Satin Paint for Wood (DSP)

This does for woodwork and trim, what APP does for walls. It neutralizes smells, solvents, VOCs, etc. where other (smelly) paints have been used. Suitable for interior woodwork and previously painted metal, MDF, radiators, etc.

\*Formaldehyde is a carcinogen with mutagenic effects (causes birth defects). Other solvents have many effects including brain, liver, nerve and kidney damage, and respiratory problems.

## Complaint

## VARNISHES

*Not every surface needs to be painted. The beauty of wood can be preserved with a protective coating of Clear Varnish, or enhanced with a woodstain varnish.*

Get creative and try a Woodwash, to accentuate the grain and create a whole new look.

For exterior woodwork, you need protection from the sun too, so our Exterior Woodstain Varnish includes an effective UV inhibitor to prevent the wood being bleached/grayed and damaged by the sun's rays.

Like everything with an ECOS Paints label, these are all completely non-toxic and non-allergenic, and have none of that offensive chemical smell you associate with traditional clear and colored finishes.

## CHALKBOARD - IN ANY COLOR

*The days of chalkboards in school are all but gone, but the wonderful character of them remains and is seeing a huge resurgence in interest.*

A surface you can write or draw on and wipe clean as often as you like is still an opportunity to expand your mind.

Chalkboard paint can be applied to almost any hard surface so don't limit yourself. Try a notice door, customizable office storage, a children's desk-top, a shopping list side to your refrigerator, or a whole wall in a child's room!

Better yet, you are no longer limited to black. Make the chalkboard any color that fits your room or application. We've seen it used for office walls in all sorts of shades, and white produce-boards in supermarkets, with colored chalk. This is not your old school chalkboard but, naturally, it's 100% safe.





## Complaint

## SPECIALIST PAINTS

*Some applications need something special. We have developed a wide range of very specialized finishes and treatments, whilst adhering to our stringent standards of safety. These are some of the most unique finishes available in the world!*

### Nursery Paints

Some of the most vulnerable people to chemicals are babies and expectant mothers. At the same time, when we find out there's a new addition to the family on the way, it's only natural to want to prepare a space for them. Our Nursery Paint has been certified to the EN71:3 standard for use on children's toys, and is fully washable, so it will stay looking great until long after they've decided they want their own color scheme.

### Firewall Paints

This matt flame-retardant paint attains a Class 1(A) rating to ASTM E-84. This is the best possible rating achievable and makes this paint suitable for the most demanding applications including use in enclosed vertical exit-ways.

### ANTI-EMR (radiation shielding) Paint

This permanent wall treatment uses non-toxic nickel flake to give up to 99% shielding\* against electro-magnetic radiations and needs no special equipment or expertise to apply. It is perfect for home use, or industrial applications such as computer rooms, hospital IC units and other facilities where EMR from mobile phones etc. is problematic. (\*Independently tested to give 99% shielding of microwave energy on mobile phone bands frequencies)

### Insulating Paints

This energy-saving super-matt paint insulates the walls and ceilings in your home, saving you money on energy bills - year on year, every day, 24 hours per day. Cooler in summer and warmer in winter!

### Radiator Paints

Our Radiator Paints are designed for previously painted or primed domestic central heating hot-water radiators.

### Designer Paints

You're looking for a particular style but why should you have to compromise on safety or quality? Super-Chalky wall paint recreates the Mediterranean feel, and Feng Shui is a multi-surface coating which lends a uniquely harmonious feel to the home.

Complaint

## ACCESORIES & FINISHING TOUCHES

*Any craftsman will tell you that preparation is the key to a good finish. When you need to complete the job properly, you need primers, fillers, and sealers too, but not at the expense of safety and your health. So, of course, we have these too, all meeting our exacting standards.*

Clay Paint	A super-dry, soft and mellow chalky clay paint for interior walls
Concrete Sealer	Anti-dusting, consolidating, washable interior sealer for concrete floors
Cover-up Paint	An ultra-flat paint to hide minor to moderate surface imperfections, by eradicating reflectance
Distemper	Super-matt, non-dusting wipeable resin-bound Distemper for Interior Walls & Ceilings
Filler Sealer	Prevents cracking and peeling on fillers that normally reject painting
Knotting Compound	A white, solvent-free, solution for sealing resinous knots on bare wood
Masonry Paint	Superior quality smooth paint for exterior walls
Multi-Purpose Filler	Super-quality filler for cracks, joints, and holes • even deep holes up to 1" in a single application
Plaster Sealer	A non-toxic, odorless sealer for new/bare plaster
Shed & Fence	Decorative treatment for exterior woodwork
Stabilizing Solution	Reduces crumbling and flaking on concrete, masonry, brick, mortar, etc.
Stainblock	Highly concealing primer for difficult stains
Stone & Tile Sealer	Protect stone and tile floors, and similar surfaces, from staining
Stormseal	Solvent-free silicone water repellent for porous exterior concrete, etc.
Undercoat	VOC-free undercoat for primed bare wood and previously painted metal
Wall Primer	For sealing interior bare plaster and drywall, prior to painting
Wood Glue	Multi-purpose glue, free of solvents, VOCs, formaldehyde, ideal for priming bare wood, ply and wood fiber products
Wood Primer	Decorative limed-style interior wood finish for an antique/designer look
Woodwash	

This list is not exhaustive • space will not allow that. In a brief form such as this brochure, we cannot cover all the possible scenarios and problems you may need to deal with. So, if you don't see what you need, or want advice, we're here to help. Email or call us and we'll do all we can to solve your problem.

ACCESORIES & FINISHING TOUCHES



## Complaint

## Contact Info

ECOS Paints  
PO Box 489  
Fairforest SC 29336  
Tel: 864.595.3840

For general information or for help with ordering, you can email us at:  
[enquiries@ecospaints.net](mailto:enquiries@ecospaints.net)

For more technical queries, contact our technical team at:  
[technical@ecospaints.net](mailto:technical@ecospaints.net)

We look forward to your call, and to serving you!

## Office Hours

Monday - Friday  
9:00 am - 5:00 pm (EST)

## Shipping Terms

We have partnered with FedEx for our general shipping needs. Because of the volume we ship, they give us an excellent rate which we pass straight on to you.

There are no hidden costs and we do not mark-up on shipping. The standard rate is for Ground shipping but, if you have a rush job, we can also ship using express methods - ask us for details.

If you place your order by 2:00pm (EST), we will almost always ship it to you the same day. After that, we will strive to do so but, in order to maintain quality control, we would rather ship it the next day, than rush something to you without following our QC procedures. Our reputation is founded on quality!



## A Note about Our Packaging & the Environment

### A note about our packaging and the environment:

We use containers which are 100% post-consumer recycled, and 100% recyclable. Our shipping boxes are also recycled and recyclable.



We use recycled materials wherever possible and recycle whatever we can.

We strongly encourage everyone, including you, our friends and neighbors, to do the same.



Complaint

**Exhibit P**

MCS Safe Paint | Chemical Sensitivity Safe Paint | ECOS Paints

The header features the ECOS PAINTS logo on the left, a search bar, and utility links for 'My Account', 'Cart', 'Toll-free 866 587 3586', 'Contact', 'FAQ', and a 'Checkout' button. Below this is a dark navigation bar with links for 'SHOP', 'BROWSE', 'LEARN', 'BLOG', and 'PROFESSIONAL'.

Home / Discussion Papers / Chemical Sensitivity Safe

WHY ECOS

- Air Purifying Paint
- Architects & Contractors
- Chalkboard Paint
- Concrete Stain & Sealer
- Eco Friendly Paints
- Floor Paints
- Free Samples
- Green Lodging
- Houzz
- Healthcare
- Latex Free
- MCS Safe
- No VOC Paints
- Organic Paints
- Pet Paints
- Poly Varnish
- Self Priming Paint
- Shop By color
- Sustainable Materials
- The ECOS Color Experience
- What's in it?
- WoodShield Stain

## Why do many people need special paint?

Everybody knows that some people are much more sensitive to smells, chemicals and pollutants than others. With paint, while we all notice the fumes and strong odors (which often cause headaches, breathing issues and nausea) for certain individuals the reaction is so severe it can lead to hospitalization.

What to do? A freshly painted home looks wonderful, but if the consequence is having to leave it for days, or weeks until the worst of the fumes pass, then this simply is not an option. There is a solution – ECOS Paints. Imagine having multiple chemical sensitivities and being able to paint a room yourself. We have many customers who have experienced just this, sending us comments like “I have never been able to be around liquid paint before and now, here I am painting my own house”.

**BUY NOW**  
Doorstep Delivery



## WHAT IS SO

## Complaint

MCS Safe Paint | Chemical Sensitivity Safe Paint | ECOS Paints

**DIFFERENT ABOUT  
ECOS PAINTS?**

Unlike traditional paints, even those labeled as "environmentally friendly", ECOS Paints are non-toxic and have no odor. Developed twenty five years ago with a unique formulation, our products were originally designed for people with multiple chemical sensitivities, asthma, allergies, and issues with everyday chemicals.

For over two decades, we have provided world class, high quality paints and relief from noxious chemicals to discerning individuals around the world. Today our customers also include people who are focused on the environment and sustainability; healthcare providers; mothers concerned about their baby's health, and companies seeking to protect the health of their employees, guests and visitors. Our paints are zero VOC and do not contain harmful solvents that off gas into the air. Safer for you, your family and the environment.

If you care about the planet, ECOS Paints are the best choice for all your design and renovation needs! Check out all of our environmentally friendly paints, coatings, and products.



SHOP NOW &gt;

BROWSE &gt;

COLOR SAMPLES &gt;

Newsletter

Enter email addresses & new art 

## Complaint

[MCS Safe Print](#) | [Chemical Sensitivity Safe Print](#) | [ECOS Prints](#)

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### ECOS

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### Shipping

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### Safety

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## Complaint

## Exhibit Q

VOC Free Paint | Low VOC Paint | No VOC Paint | ECOS Paints



ECOS PAINTS

USA  My Account  Cart

Toll-free 866 587 3586 Contact FAQ

Checkout

SHOP BROWSE LEARN BLOG PROFESSIONAL

Home / Discussion Papers / No VOC Paints

## WHY ECOS

Air Purifying Paint  
Architects & Contractors  
Chalkboard Paint  
Concrete Stain & Sealer  
Eco Friendly Paints  
Floor Paints  
Free Samples  
Green Lodging  
Houzz  
Healthcare  
Latex Free  
MCS Safe  
No VOC Paints  
Organic Paints  
Pet Paints  
Poly Varnish  
Self Priming Paint  
Shop By color  
Sustainable Materials  
The ECOS Color Experience  
What's in it?  
WoodShield Stain

## What is zero VOC paint?

Zero VOC paint does not necessarily mean non-toxic, healthy, or safe.

Also, the EPA allows paint to be called Zero VOC\* even if the VOC content in it is not actually zero.

In addition, zero VOC paints can contain harmful chemicals, like highly toxic formaldehyde, which is not always required to be identified on the label.

Finally, the Zero VOC certification may only refer to the base paint - not the color tint.

## WHAT THIS MEANS

Painting a single room with a "Zero VOC" product (containing five grams per liter of VOCs) will produce about the same mass of volatiles as if you sprayed out the entire contents of a can of deodorant. (There would be ten times this amount with low VOC paints).

**BUY NOW**  
Doorstep Delivery



### Complaint

VOC Free Paint | Low VOC Paint | No VOC Paint | ECOS Paints

The problem is that VOCs from paint can cause serious health effects including skin and eye irritation, kidney damage, cancer, reproductive disruption, respiratory issues and impaired cognitive functions.

At ECOS, we have striven to go above and beyond common industry standards and green certifications to create the best Zero VOC paint. Our products do not contain the solvents, white spirit, turpentine, terpenes, etheral oils, glycols, coalescents, vinyl chloride, acrolein, formaldehyde and formaldehyde donors, heavy metals, phthalates, APEOs and acrylic softeners found in many traditional paints. Instead, we offer a water based, zero VOC, glycol free, toxic solvent free, and odor free alternative.

So, whether you're looking for zero VOC paint, zero VOC varnish, zero VOC primer, or zero VOC stain - consider going one step further with ECOS Paints.

\*EPA Method 24 allows for up to 5g/L of VOCs



- SHOP NOW >
- BROWSE >
- COLOR SAMPLES >

Newsletter

Complaint

VOC Free Paint | Low VOC Paint | No VOC Paint | ECOS Paints

<a href="#">ECOS</a>	<a href="#">Shipping</a>	<a href="#">Help</a>	<a href="#">Safety</a>
<a href="#">Contact us</a>	<a href="#">Shipping Information</a>	<a href="#">Hints &amp; Tips</a>	<a href="#">Testing and Certifications</a>
<a href="#">Terms</a>	<a href="#">UPS Access Point</a>	<a href="#">Site Map</a>	<a href="#">FAQ</a>
<a href="#">Privacy Policy</a>	<a href="#">Return Policy</a>	<a href="#">About Us</a>	

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## Decision and Order

**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 (“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 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. The Respondent is Imperial Paints, LLC, d/b/a Lullaby Paints and ECOS Paints, a South Carolina limited liability company with its principal office or place of business at 350 East St. John Street, Spartanburg, South Carolina 29302.

## Decision and Order

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. “Covered product” means any architectural coating applied to stationary structures, portable structures, and their appurtenances.
- B. “Volatile Organic Compound” (“VOC”) means any compound of carbon that participates in atmospheric photochemical reactions, but excludes carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate, and specific compounds that the EPA has determined are of negligible photochemical reactivity, which are listed at 40 C.F.R. Section 51.100(s).
- C. “Emission” means any compound that is emitted or produced during application, curing, or exposure of a covered product.
- D. “Trace” level of emission means:
  1. A VOC has not been intentionally added to the covered product;
  2. Emission of the covered product does not cause material harm that consumers typically associate with emission, including harm to the environment or human health; and
  3. Emission of the covered product does not result in more than harmless concentrations of any compound higher than would be found under



## Decision and Order

normal conditions in the typical residential home without interior architectural coating.

- E. “Respondent” means Imperial Paints, LLC, d/b/a Lullaby Paints and ECOS Paints, and its successor and assigns.

**I. Prohibited Misleading and Unsubstantiated Representations Regarding Emission and VOC Level of Covered Product**

**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, that the emission level of a covered product is zero, or that the VOC level of a covered product is zero, 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:

- A. The covered product’s emission is zero micrograms per meter cubed and the covered product’s VOC content is zero grams per liter; or
- B. The covered product does not emit or produce more than a trace level of emission.

For purposes of this Provision, “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.

## Decision and Order

**II. Prohibited Misleading and Unsubstantiated Representations Regarding Environmental and Health Claims**

**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, including through the use of a product name, regarding:

- A. The emission of the covered product;
- B. The VOC level of the covered product;
- C. The odor of the covered product;
- D. Any other health benefit or attribute of, or risk associated with exposure to, the covered product, including those related to VOC, emission, or chemical composition; or
- E. Any other environmental benefit or attribute of the covered product, including those related to VOC, emission, or chemical composition,

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 representation is true. For purposes of this Provision, "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.

## Decision and Order

**III. Notice to Dealers and Distributors**

**IT IS FURTHER ORDERED** that Respondent deliver as soon as practicable, but in no event later than 60 days after the effective date of this Order, a notice in the form shown in Attachment A to all of Respondent's dealers and distributors, and all other entities to which Respondent provided point-of-sale advertising, including product labels, for any covered product identified in Attachment A. The notice required by this paragraph must not include any document or other enclosures other than those referenced in Attachment A.

**IV. Means and Instrumentalities**

**IT IS FURTHER 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 manufacturing, labeling, advertising, promotion, offering for sale, or sale of any covered product, must not provide to others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false, unsubstantiated, or otherwise misleading representation of material fact, including but not limited to any representation prohibited by Provision I or by Provision II above. For purposes of this Provision, "means and instrumentalities" shall mean any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any covered product, in or affecting commerce.

**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.

## Decision and 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 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.

**VI. Compliance Report and Notices**

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

- A. Sixty 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 a copy of the notice sent to dealers and distributors; and (5) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

## Decision and Order

- 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: In re Imperial Paints, Docket No. C-4647.

**VII. 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:

## Decision and Order

- 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 or II 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.

## Decision and Order

**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 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 April 24, 2038, 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:

## Decision and Order

- 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.



Decision and Order

**Attachment A: Notice to Dealers and Distributors**

[on Respondent letterhead]

[insert date]

**IMPORTANT NOTICE ABOUT \_\_\_\_\_  
ADVERTISING AND MARKETING MATERIALS**

[insert addressee name] [insert addressee address used in the ordinary course of business]

Dear Dealer or Distributor,

In response to a complaint from the Federal Trade Commission, Imperial Paints, LLC, d/b/a Lullaby Paints and ECOS Paints, has agreed to qualify its claims that its paints contain zero VOCs (volatile organic compounds) or other harmful emissions, to ensure that retailers and dealers avoid misleading consumers. We request that you immediately replace existing \_\_\_\_\_ advertising and marketing materials with revised versions which include these qualifications. We have included appropriate materials for this purpose to affix to each can of \_\_\_\_\_ paint in your possession. Enclosed are illustrations of how to properly place the stickers.

The requirement to affix stickers is only needed if you currently have our product in your inventory. Please note that you will not have to add any stickers to any paint ordered or shipped after the date of this letter.

We will make revised marketing materials available to you shortly. Should you have any questions about compliance with this notice, please contact [insert contact person]. In addition, you can obtain further information about the settlement by visiting [www.ftc.gov](http://www.ftc.gov) and searching for "Imperial Paints."

Sincerely, [name]

[title]

## Analysis to Aid Public Comment

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Imperial Paints, LLC, a limited liability company (“respondent”), doing business as Lullaby Paints and Ecos Paints.

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

This matter involves respondent’s marketing, sale, and distribution of purportedly “VOC-free” paints. “VOC” is the abbreviation for volatile organic compounds. VOC-free includes claims such as “zero VOCs,” “0 VOCs,” and “No VOCs.” According to the FTC complaint, respondent made unsubstantiated representations that its paints: (1) are VOC-free; (2) are VOC-free during or immediately after painting; (3) will not emit any chemical or substance, including VOCs, that causes material harm to consumers, including sensitive populations such as babies, pregnant women, and allergy and asthma sufferers; and (4) will not emit any chemical or substance, including VOCs, during or immediately after painting, that causes material harm to consumers, including sensitive populations such as babies, pregnant women, and allergy and asthma sufferers. The FTC further alleges that respondent provided independent retailers with promotional materials containing the same claims it made to consumers. Thus, the complaint alleges that respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains three provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I prohibits emission-free and VOC-free claims unless both content and emissions are actually zero or at trace levels. The orders define “emission” to include all

## Analysis to Aid Public Comment

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. The order defines "trace level of emission" to mean (1) no intentionally added VOC, (2) emission of the covered product does not cause material harm that consumers typically associate with emission, including harm to the environment or human health, and (3) emission of the covered product does not result in more than harmless concentrations of any compound higher than would be found under normal conditions in the typical residential home without interior architectural coating. Part II prohibits misleading representations regarding emission, VOC levels, odor, and any general environmental and health benefit of paints. The order requires competent and reliable scientific evidence to substantiate these representations. Part IV prohibits respondent from providing third parties with the means and instrumentalities to make false, unsubstantiated, or otherwise misleading representations of material fact regarding paints, including any representation prohibited by Parts I or II.

To correct existing unsubstantiated zero emission and VOC claims, Part III requires the respondent to send letters to its dealers and distributors, instructing them to put stickers on paint cans to obscure allegedly unsubstantiated emission and VOC claims.

Part V through IX are reporting and compliance provisions. Part V 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 VI requires that respondent submit compliance reports to the FTC within sixty (60) days of the order's issuance and submit additional reports when certain events occur. Part VII requires that respondent must create and retain certain records for five (5) years. Part VIII provides for the FTC's continued compliance monitoring of respondent's activity during the order's effective dates. Part IX is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

## Analysis to Aid Public Comment

If the Commission finalizes the agreement's proposed order, it plans to propose harmonizing with this order the consent orders issued in the PPG Architectural Finishes, Inc. (Docket No. C-4385) and The Sherwin-Williams Company (Docket No. C-4386) matters. Specifically, the Commission plans to issue orders to show cause why those matters should not be modified pursuant to Section 3.72(b) of the Commission Rules of Practice, 16 C.F.R. § 3.72(b).

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

**ICP CONSTRUCTION INC.  
F/K/A  
CALIFORNIA PRODUCTS CORP.  
D/B/A  
MURALO PAINTS**

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

*Docket No. C-4648; File No. 162 3081  
Complaint, April 24, 2018 – Decision, April 24, 2018*

This consent order addresses ICP Construction Inc.’s marketing, sale, and distribution of purportedly “VOC-free” paints. The complaint alleges that respondent made unsubstantiated representations that its paints: (1) are free of volatile organic compounds (“VOCs”); (2) are VOC-free during or immediately after painting; (3) will not emit any chemical or substance, including VOCs, that causes material harm to consumers, including sensitive populations such as babies; and (4) will not emit any chemical or substance, including VOCs, during or immediately after painting, that causes material harm to consumers, including sensitive populations such as babies. The consent order prohibits emission-free and VOC-free claims unless both content and emission are actually zero or at trace level, and requires the respondent to send letters to its dealers and distributors, instructing them to post placards next to paint cans and at point of sale.

*Participants*

For the *Commission*: Robert M. Frisby, Megan Gray, Katherine Johnson, and Alejandro Rosenberg.

For the *Respondent*: Christopher Cole and Peter Miller, Crowell & Moring LLP.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that ICP Construction, Inc., formerly known as California Products Corporation, doing business as Muralo Paints, (ICP or “Respondent”) has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

## Complaint

1. Respondent ICP Construction, Inc., formerly known as California Products Corp., doing business as Muralo Paints, is a Massachusetts corporation with its principal office or place of business at 150 Dascomb Road, Andover, Massachusetts 01810-5873.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed paint products to consumers, including BreatheSafe paints.

3. The acts and practices of Respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

**Respondent’s BreatheSafe Paints**

4. Respondent distributes BreatheSafe paints to consumers through a network of authorized, independent retailers.

5. Respondent and its independent retailers have disseminated or have caused to be disseminated advertisements, packaging, and other promotional materials for BreatheSafe Paints to consumers, including the attached Exhibits A-F. These materials contain the following statements and depictions:

a.



(Exhibit D, Brochure.)

## Complaint

- b. Muralo BreatheSafe is a virtually odorless high-performance water-based latex, formulated with no harmful solvents and based on a sustainable chemistry technology, for interior use. Ideal for nursing homes, schools, babies' rooms and health care facilities.... Specified for space that is occupied during painting.

(Exhibit A, [www.muralo.com/products/breathesafematte.php](http://www.muralo.com/products/breathesafematte.php)).

**Respondent's Eco Assurance Logo**

6. Respondent distributes, or has caused its independent retailers to distribute several paint products bearing the following "Eco Assurance" logo, including BreatheSafe paints.

a.



(Exhibit E, paint can label).

**Count I  
Unsubstantiated Claims**

7. In connection with the advertising, promotion, offering for sale, or sale of BreatheSafe Paints, Respondent has represented, directly or indirectly, expressly or by implication, that:

- a. BreatheSafe Paints are VOC-free;

## Complaint

- b. BreatheSafe Paints are VOC-free during or immediately after painting;
- c. BreatheSafe Paints will not emit any chemical or substance, including VOCs, that causes material harm to consumers, including sensitive populations such as babies; and
- d. BreatheSafe Paints will not emit any chemical or substance including VOCs, during or immediately after painting, that causes material harm to consumers, including sensitive populations such as babies.

8. The representations set forth in Paragraph 7 were not substantiated at the time the representations were made.

**Count II****Deceptive Failure to Disclose—Material Connection with Eco Assurance**

9. In connection with the advertising, promotion, offering for sale, or sale of its paints, such as through the use of its Eco Assurance seal, Respondent has represented, directly or indirectly, expressly or by implication, that these paints have been endorsed or certified by an independent third party.

10. Respondent has failed to disclose or adequately disclose that Respondent has a material connection to Eco Assurance, such as the fact the Eco Assurance seal is Respondent's own designation. This fact would be material to consumers in their purchase or use decisions regarding Respondent's paints.

11. Respondent's failure to disclose or adequately disclose the material information described in Paragraph 10, in light of the representation set forth in Paragraph 9, is a deceptive act or practice.



## Complaint

**Count III**  
**Means and Instrumentalities**

12. Respondent distributed promotional materials, including the statements and depictions contained in Exhibits A through G to independent retailers. In so doing, Respondent has provided them with the means and instrumentalities for the commission of deceptive acts or practices.

**Violations of Section 5**

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

**THEREFORE**, the Federal Trade Commission this twenty-fourth day of April, 2018, has issued this Complaint against Respondent.

By the Commission.

Complaint

Exhibit A

The screenshot shows a web browser window displaying the Muroto Paint website. The browser's address bar shows 'murotopaint.com'. The website header includes a navigation menu with 'Home', 'About', 'Products', 'Projects', 'Specialty', 'Products', and 'Color Substrs'. The main content area is titled 'Interior Paint: BreathSafe™' and features a large image of a paint can labeled 'BreathSafe'. Below the can are two smaller images: 'Terminal Care Wood' and 'Sinks, Cans, Tiles'. To the right of the can is a text block with the heading 'BreathSafe INTERIOR WATER-BASED ZERO VOC MATTE FINISH' and a sub-heading 'ZERO VOC'. The text describes the product as a high-performance water-based finish with no harmful solvents, suitable for use in schools, hospitals, and homes. A list of features includes: 'Fast & Easy to Use', 'Virtually odorless', 'Crystalline Silica Free', 'Clean stripping', 'Available in a wide range of colors', and 'Available white and bases'. At the bottom right, there is a small image of a woman's face.

Complaint

**Exhibit B**

**Good for the environment & Great for your walls**

**Breathe Safe™ Finishes**



- ZERO VOC formula, based on a sustainable chemistry technology
- Meet or exceed LEED green building requirements
- High hide
- Virtually odorless
- Clean spraying
- Superior touch-up
- Fast drying with easy water clean-up
- Crystalline Silica free
- Available in Interior White Primer, Ceiling White Paint and in Flat, Eggshell, Semi-Gloss finishes (in over 1200 colors)

**Ideal for:**

- Health care facilities
- Business offices, conference centers
- Retail stores, malls
- Hotels, motels
- Restaurants
- Schools, libraries, universities

**MOHAWK**  
Manufactured with windpower

Printed on Mohawk Via Smooth, which is manufactured entirely with Green-e certified renewable wind-generated electricity.



Printed on 100% post consumer use recycled paper.

The Murala Company Inc.  
Bayonne, NJ Chicago, IL  
simplygreenpaint.com  
murala.com elderandjenks.com  
1-800-631-3440

10/11 M99400

Complaint

**Exhibit C**

# BreatheSafe™

INTERIOR WATER-BASED  
ZERO VOC FINISHES



## Good for the environment & Great for your walls



**Breathe Safe™ Finishes**

- ZERO VOC formula, based on a sustainable chemistry technology
- Meet or exceed LEED green building requirements
- High hide
- Paint & Primer in one
- Virtually odorless
- Clean spraying
- Superior touch-up
- Fast drying with easy water clean-up
- Crystalline Silica free
- Available in Interior White Primer, Ceiling White Paint and in Matte, Flat, Eggshell, Semi-Gloss finishes (in over 1200 colors)

FINISH	PRODUCT #	RECOMMENDED USES	VOC*	GREEN SEAL COMPLIANT	LEED COMPLIANT
 Matte	60XX	Higher traffic areas, where durability is required	0		
 Flat	20XX	Low traffic areas, walls & ceilings	0		
 Eggshell	40XX	Higher traffic areas, where durability is required	0		
 Semi-Gloss	70XX	High traffic areas, cabinets, doors, trim	0		
 Ceiling Paint	2048	Ceilings	0		
 Primer	2235	Walls & Ceilings	0		

\* Calculated

Complaint

**Exhibit D**







Complaint

**Exhibit F**



For over 115 years, Muralo Paints has engineered innovative products to satisfy the most discriminating customers. Muralo's Breathe Safe™ line is no different. It is virtually odorless and free of VOC's, while still keeping the high performance properties you've come to expect from a Muralo product.

*Simply green*

FINISH	PRODUCT #	RECOMMENDED USES	VOC*	GREEN SEAL COMPLIANT	LEED COMPLIANT
 Matte	60XX	Higher traffic areas, where durability is required	0		
 Flat	20XX	Low traffic areas, walls & ceilings	0		
 Eggshell	40XX	Higher traffic areas, where durability is required	0		
 Semi-Gloss	70XX	High traffic areas, cabinets, doors, trim	0		
 Ceiling Paint	2048	Ceilings	0		
 Primer	2235	Walls & Ceilings	0		

## Decision and Order

**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 (“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 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. The Respondent is ICP Construction Inc., formerly known as California Products Corp., d/b/a Muralo Paints, a Massachusetts corporation with its principal office or place of business at 150 Dascomb Road, Andover, Massachusetts 01810-5873.



## Decision and Order

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. “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.

## Decision and Order

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.
- B. “Close proximity” means that the disclosure is very near the triggering representation. In an interactive electronic medium (such as a mobile app or other computer program), a visual disclosure that cannot be viewed at the same time and in the same viewable area as the triggering representation, on the technology used by ordinary consumers, is not in close proximity. A disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering representation. A disclosure made on a different printed page than the triggering representation is not in close proximity.
- C. “Covered product” means any architectural coating applied to stationary structures, portable structures, and their appurtenances.
- D. “Volatile Organic Compound” (“VOC”) means any compound of carbon that participates in atmospheric

## Decision and Order

photochemical reactions, but excludes carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate, and specific compounds that the EPA has determined are of negligible photochemical reactivity, which are listed at 40 C.F.R. Section 51.100(s).

- E. “Emission” means any compound that is emitted or produced during application, curing, or exposure of a covered product.
- F. “Trace” level of emission means:
  - 1. A VOC has not been intentionally added to the covered product;
  - 2. Emission of the covered product does not cause material harm that consumers typically associate with emission, including harm to the environment or human health; and
  - 3. Emission of the covered product does not result in more than harmless concentrations of any compound higher than would be found under normal conditions in the typical residential home without interior architectural coating.
- G. “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.
- H. “Respondent” means ICP Construction Inc., formerly known as California Products Corp., d/b/a Muralo Paints, and its successors and assigns.

## Decision and Order

**I. Prohibited Misleading and Unsubstantiated Representations  
Regarding Emission and VOC Level of Covered Product**

**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, that the emission level of a covered product is zero, or that the VOC level of a covered product is zero, 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:

- A. The covered product's emission is zero micrograms per meter cubed and the covered product's VOC content is zero grams per liter; or
- B. The covered product does not emit or produce more than a trace level of emission.

For purposes of this Provision, "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.

**II. Prohibited Misleading and Unsubstantiated Representations  
Regarding Environmental and Health Claims**

**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

## Decision and Order

product must not make any representation, expressly or by implication, including through the use of a product name, regarding:

- A. The emission of the covered product;
- B. The VOC level of the covered product;
- C. The odor of the covered product;
- D. Any other health benefit or attribute of, or risk associated with exposure to, the covered product, including those related to VOC, emission, or chemical composition; or
- E. Any other environmental benefit or attribute of the covered product, including those related to VOC, emission, or chemical composition,

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 representation is true. For purposes of this Provision, “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.

### **III. Notice to Dealers and Distributors**

**IT IS FURTHER ORDERED** that Respondent deliver as soon as practicable, but in no event later than 60 days after the effective date of this Order, a notice in the form shown in Attachment A to all of Respondent’s dealers and distributors, and all other entities to which Respondent provided point-of-sale advertising, including product labels, for any covered product identified in Attachment A. The notice required by this paragraph

## Decision and Order

must not include any document or other enclosures other than those referenced in Attachment A.

**IV. Prohibited Misleading Certification Marks**

**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 misrepresentation, expressly or by implication, regarding certifications, including:

- A. The fact that, or degree to which, a third party has, evaluated a product, package, service, practice, or program based on its environmental benefits or attributes; or
- B. That a certification is endorsed 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, or sale of any product, package, certification, service, practice, or program, must not make any representation, in any manner, expressly or by implication, about any user or endorser of such product, package, certification, service, practice, or program unless Respondent discloses, clearly and conspicuously, and in close proximity to the representation any unexpected material connection, when one exists, between such user or endorser and (1) 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

## Decision and Order

the weight or credibility of the testimonial or endorsement and that would not reasonably be expected by consumers.

**VI.Means and Instrumentalities**

**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 provide to others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false, unsubstantiated, or otherwise misleading representation of material fact, including but not limited to any representation prohibited by Provisions I, II, IV, or V above. For purposes of this Provision, "means and instrumentalities" means any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any covered product, in or affecting commerce.

**VII.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 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

## Decision and Order

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.

**VIII. Compliance Report and Notices**

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

- A. Sixty 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 Respondent made to comply with the Order and a copy of the notice sent to dealers and distributors; 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



## Decision and Order

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 ICP Construction, Docket No. C4648.

### **IX. 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

## Decision and Order

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, 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.

### **X.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

## Decision and Order

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.

**XI. Order Effective Dates**

**IT IS FURTHER ORDERED** that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on April 24, 2038, 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.

## Decision and Order

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.

**Attachment A: Notice to Dealers and Distributors**

[on Respondent letterhead]

[insert date]

**IMPORTANT NOTICE ABOUT \_\_\_\_\_  
ADVERTISING AND MARKETING MATERIALS**

[insert addressee name]

[insert addressee address used in the ordinary course of business]

Dear Dealer or Distributor,

In response to a complaint from the Federal Trade Commission, ICP Construction Inc., formerly known as California Products Corp., d/b/a Muralo Paints, has agreed not to make claims that its paints contain No VOCs (volatile organic compounds) or other harmful emissions, unless we can substantiate that the level is actually zero or otherwise comply with the settlement terms. We request that you immediately stop using existing \_\_\_\_\_ advertising and marketing materials that represent the emission level of any paint is zero, or that the VOC level of any paint is zero.

## Decision and Order

In addition, our in-house ECO ASSURE certification mark did not adequately identify it as a self-certification or the specific characteristics of the certification.

We have included placards that you must display clearly and prominently next to the paint containers and at the point of sale to eliminate any misrepresentation to consumers. Enclosed are illustrations of how to properly place the placards. The placards must be displayed until you have sold all paint containers bearing the problematic claims.

We will make revised marketing materials available to you shortly. Should you have any questions about compliance with this notice, please contact \_\_\_\_\_. In addition, you can obtain further information about the settlement by visiting [www.ftc.gov](http://www.ftc.gov) and searching for “ICP Construction.”

Sincerely,  
[name]  
[title]

**(first placard)****LABEL UPDATE:  
ICP Construction’s “ZERO VOC” Paints**

All “Zero VOC” (volatile organic compound) paints emit chemicals during the painting process and while drying. Some of these chemicals can be harmful to people, especially to sensitive groups such as babies, pregnant women, and those suffering from asthma or allergies. \_\_\_\_\_ paints emit chemicals for at least two weeks. Inside a home, these chemicals can stay in the air for even longer.

Analysis to Aid Public Comment

**(second placard)**  
**LABEL UPDATE:**  
**ICP Construction's "Eco Assurance" Certification**

ICP Construction's Eco Assurance seal is our company's promise that this product meets or exceeds certain industry environmental standards, including Green Seal and LEED Green Building requirements, while still keeping the highest performance properties you've come to expect from our products.

**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 ICP Construction Inc., formerly known as California Products Corp., d/b/a/ Muralo Paints, a corporation ("respondent").

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

This matter involves respondent's marketing, sale, and distribution of purportedly "VOC-free" paints. "VOC" is the abbreviation for volatile organic compounds. VOC-free includes claims such as "zero VOCs," "0 VOCs," and "No VOCs." According to the FTC complaint, respondent made unsubstantiated representations that its paints: (1) are VOC-free; (2) are VOC-free during or immediately after painting; (3) will not emit any chemical or substance, including VOCs, that causes material harm to consumers, including sensitive populations such

## Analysis to Aid Public Comment

as babies; and (4) will not emit any chemical or substance, including VOCs, during or immediately after painting, that causes material harm to consumers, including sensitive populations such as babies. The FTC also alleges that respondent used its ECO ASSURANCE seal without adequately disclosing that respondent awarded the seal to its own product. Consumers likely interpret the seal as a claim that an independent third party certified the product. The FTC further alleges that respondent provided independent retailers with promotional materials containing the same claims it made to consumers. Thus, the complaint alleges that respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains five provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I prohibits emission-free and VOC-free claims unless both content and emission are actually zero or at trace level. The orders define “emission” to include all emissions (not just VOC that causes 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 emission found in indoor air, not just VOC that affect outdoor air quality. The order defines “trace level of emission” to mean (1) no intentionally added VOC, (2) emission of the covered product does not cause material harm that consumers typically associate with emission, including harm to the environment or human health, and (3) emission of the covered product does not result in more than harmless concentrations of any compound higher than would be found under normal conditions in the typical residential home without interior architectural coating. Part II prohibits misleading representations regarding emission, VOC level, odor, and any general environmental and health benefit of paints. The order requires competent and reliable scientific evidence to substantiate these representations. Parts IV and V prohibit respondent from misrepresenting third-party certifications and failing to adequately disclose a material connection. Part VI prohibits respondent from providing third parties with the means and instrumentalities to make false, unsubstantiated, or otherwise misleading representations of material fact regarding paints, including any representation prohibited by Parts I, II, IV, or V.

## Analysis to Aid Public Comment

To correct existing unsubstantiated zero-VOC claims and deceptive certification claims, Part III requires the respondent to send letters to its dealers and distributors, instructing them to post placards next to paint cans and at point of sale.

Parts VII through XI are reporting and compliance provisions. Part VII 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 VIII requires that respondent submit compliance reports to the FTC within sixty (60) days of the order's issuance and submit additional reports when certain events occur. Part IX requires that respondent must create and retain certain records for five (5) years. Part X provides for the FTC's continued compliance monitoring of respondent's activity during the order's effective dates. Part XI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

If the Commission finalizes the agreement's proposed order, it plans to propose harmonizing with this order the consent orders issued in the PPG Architectural Finishes, Inc. (Docket No. C-4385) and The Sherwin-Williams Company (Docket No. C-4386) matters. Specifically, the Commission plans to issue orders to show cause why those matters should not be modified pursuant to Section 3.72(b) of the Commission Rules of Practice, 16 C.F.R. § 3.72(b).

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

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

*Docket No. C-4649; File No. 162 3082*  
*Complaint, April 24, 2018 – Decision, April 24, 2018*

This consent order addresses YOLO Colorhouse, LLC's marketing, sale, and distribution of purportedly "VOC-free" paints. The complaint alleges that respondent made unsubstantiated representations that its paints: (1) are free of volatile organic compounds ("VOCs"); (2) are VOC-free during or immediately after painting; (3) will not emit any chemical or substance, including VOCs, that causes material harm to consumers, including sensitive populations such as children; and (4) will not emit any chemical or substance, including VOCs, during or immediately after painting, that causes material harm to consumers, including sensitive populations such as children. The consent order prohibits emission-free and VOC-free claims unless both content and emissions are actually zero or at trace levels, and requires the respondent to send letters to its dealers and distributors, instructing them to put stickers on paint cans to obscure allegedly unsubstantiated emission and VOC claims.

*Participants*

For the *Commission: Robert M. Frisby, Megan Gray, Katherine Johnson, and Alejandro Rosenberg.*

For the *Respondent: Michael Cohen and Anne M. Talcott, Schwabe Williamson & Wyatt.*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that YOLO Colorhouse, LLC, a limited liability company, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent YOLO Colorhouse, LLC ("YOLO") is a limited liability company with its principal office or place of business at 519 NE Hancock St. # B, Portland, Oregon 97212.

## Complaint

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed paint products to consumers, including Colorhouse Paints.

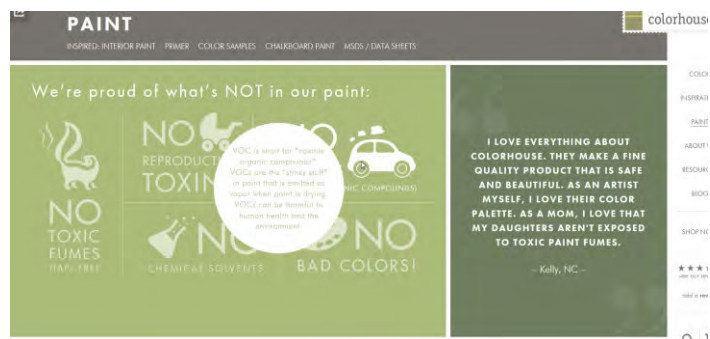
3. The acts and practices of Respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

### YOLO’s Colorhouse Paints

4. Respondent distributes Colorhouse Paints directly to consumers through its showroom and website (<http://www.colorhousepaint.com>), and through independent retailers.

5. Respondent and its independent retailers have disseminated or have caused to be disseminated advertisements, packaging, and other promotional materials for Colorhouse Paints to consumers, including the attached Exhibits A-B. These materials contain the following statements and depictions:

- a. “Our products have NO VOCs, NO toxic fumes/HAPs-free, NO reproductive toxins, and No chemical solvents or other stinky stuff.”
- b. “We’re proud of what is not in our paint – NO VOCs. VOCs are the ‘stinky stuff’ in paint that is emitted as vapor when paint is drying. VOCs can be harmful to human health and the environment.”



(website material, Exhibit A)

## Complaint

- c. A video entitled “Paint for the People and the Planet,” showing a community of people, including a toddler, painting together and on each other. (Exhibit B)

**Count I**  
**Unsubstantiated Claims**

6. In connection with the advertising, promotion, offering for sale, or sale of Colorhouse Paints, Respondent has represented, directly or indirectly, expressly or by implication, that:

- a. Colorhouse Paints are VOC-free;
- b. Colorhouse Paints are VOC-free during or immediately after painting;
- c. Colorhouse Paints will not emit any chemical or substance, including VOCs, that causes material harm to consumers, including sensitive populations such as children; and
- d. Colorhouse Paints will not emit any chemical or substance, including VOCs, during or immediately after painting, that causes material harm to consumers, including sensitive populations such as children.

7. The representations set forth in Paragraph 6 were not substantiated at the time the representations were made.

**Count II**  
**Means and Instrumentalities**

8. Respondent has distributed promotional materials, including the statements and depictions contained in Exhibits A-B to independent retailers. In so doing, Respondent has provided them with the means and instrumentalities for the commission of deceptive acts or practices.

**Violations of Section 5**

## Complaint

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

**THEREFORE**, the Federal Trade Commission, this twenty-fourth day of April 2018, has issued this Complaint against Respondent.

By the Commission.

Complaint

Exhibit A

The screenshot displays the Colorhouse website interface. At the top, a navigation bar includes 'PAINT' and sub-links for 'INSPIRED: INTERIOR PAINT', 'PRIMER', 'COLOR SAMPLES', 'CHALKBOARD PAINT', and 'MUGS / DATA SHEETS'. The Colorhouse logo is in the top right corner. A sidebar on the right contains a vertical menu with links: 'COLOR', 'INFORMATION', 'ABOUT US', 'RESOURCES', 'BLOG', 'SHOP NOW', a star rating, and a 'VIEW THIS PAGE' button. The main content area features a green header with the text 'We're proud of what's NOT in our paint:' followed by six icons representing 'NO TOXIC FUMES', 'NO REPRODUCTIVE TOXINS', 'NO VOCs', 'NO CHEMICAL SOLVENTS', and 'NO BAD COLORS!'. A testimonial from Kaly, NC, praises the product's safety and quality. Below this is a section for 'INSPIRED: INTERIOR PAINT' with a detailed description of its features and an image of a paint can. A table of benefits follows, including 'DRY TIME', 'COVERAGE', 'CLEAN UP', and 'STORAGE'. The bottom section features another testimonial and a 'SHOW ME MORE' link.

**PAINT**  
INSPIRED: INTERIOR PAINT | PRIMER | COLOR SAMPLES | CHALKBOARD PAINT | MUGS / DATA SHEETS

**colorhouse**

color  
information  
about us  
resources  
blog  
shop now  
★★★★★  
100% customer satisfaction

**We're proud of what's NOT in our paint:**

- NO TOXIC FUMES (ZERO VOC)
- NO REPRODUCTIVE TOXINS
- NO VOCs (Volatile Organic Compounds)
- NO CHEMICAL SOLVENTS
- NO BAD COLORS!

**I LOVE EVERYTHING ABOUT COLORHOUSE. THEY MAKE A FINE QUALITY PRODUCT THAT IS SAFE AND BEAUTIFUL. AS AN ARTIST MYSELF, I LOVE THEIR COLOR PALETTE. AS A MOM, I LOVE THAT MY DAUGHTERS AREN'T EXPOSED TO TOXIC PAINT FUMES.**

- Kaly, NC -

**INSPIRED: INTERIOR PAINT**

Colorhouse Inspired interior paints are low-odor, have superior coverage and durability, and are 100% acrylic. Our paints are available in 3 sheens: Flat, Eggshell, and Semi-Gloss. Colorhouse paints contain NO VOCs (volatile organic compounds), NO toxic fumes/odors free, NO reproductive toxins, and NO chemical solvents. For more information on application and ingredients, view Colorhouse FDS.

[VIEW OUR COLORS](#)

**DRY TIME**  
Dry to touch in 30-60 minutes; recoat after 2-4 hours.

**COVERAGE**  
Covers 250-400 square feet per gallon.

**CLEAN UP**  
Wash tools with warm soapy water. Scrape excess paint before washing.

**STORAGE**  
Store in a dry area. Protect from freezing.

**AWESOME! I CAN'T WAIT TO PAINT SOMETHING ELSE! PAINT CHIPS WERE EXCELLENT GUIDES, AND THE PAINT WAS SO LOW-ODOR I NEVER ONCE GOT A HEADACHE EVEN IN A SMALL ENCLOSED ROOM. THE COLORS ARE MAGNIFICENT AND ALL WE HAD HOPED FOR.**

[SHOW ME MORE](#)

Complaint

### COLORHOUSE PRIMER

Colorhouse Inspired Multi-Purpose Primer has excellent hide and adhesion. Our Primer is designed for many surfaces like new wallboard, raw wood, cured masonry and galvanized metal. For more application info click [here](#).

Colorhouse Multi-Purpose Primer contains NO VOCs (volatile organic compounds), NO toxic fumes/HAPs-free, NO reproductive toxins, and NO chemical solvents.

Qty:  Value: \$5.00

### FAN DECKS

colorhouse

ADD TO CART

### COLORSPOT 8 OZ. SAMPLES

EXPLORE COLORS

BRING THE WORLD MORE COLORFUL AND LESS VOLATILE

### CHALKBOARD PAINT

Colorhouse Chalkboard paint turns any interior surface into a chalkboard! We encourage you to write on your walls with our durable chalkboard finish. Like all Colorhouse paint, there are NO VOCs (volatile organic compounds), NO toxic fumes/HAPs-free, NO reproductive toxins, and NO chemical solvents. Available in 10 striking Colorhouse hues. For more information, [View Colorhouse Chalkboard PDS](#).

### PRODUCT AND MSDS DATA SHEETS

Technical information about our primer and paints.

### WARRANTY

Colorhouse Inspired zero VOC paint and primer warranty.

### FAQS

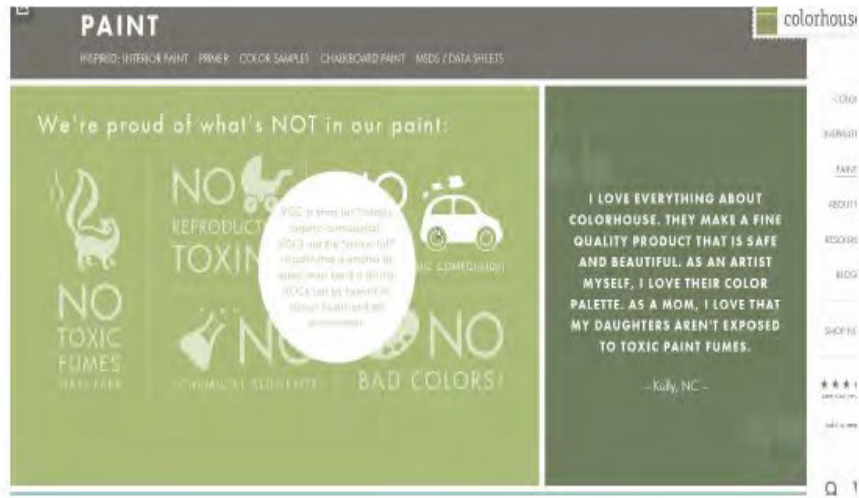
Find answers to all your questions.

Home | Contact | Privacy Policy | Sitemap

Connect with us:

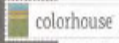
Join our ColorCommunity!\*

Complaint



Complaint

RESOURCES



PAINT CALCULATOR
FREE COLOR HELP
FAQS


## FAQS

All our answers to all your questions.

- [Where can I buy Colorhouse paint?](#)
- [What sheens does Colorhouse have and where do I use them?](#)
- [Do you have a primer?](#)
- [How can I sample your colors?](#)
- [What makes your paint environmentally-friendly?](#)
- [What is a VOC? Why are they bad? Why choose a Zero VOC paint?](#)
- [What makes Colorhouse different from other low or zero VOC paints?](#)
- [Colorhouse paints are formulated with you and the environment in mind. We restrict over a 1000 chemical compounds. Our products have NO VOCs, NO toxic fumes/HAPs-free, NO reproductive toxins, and No chemical solvents or other stinky stuff!](#)
- [Why were VOCs added to paints in the first place? Why aren't VOCs in Colorhouse paint?](#)
- [What is LEED? Does Colorhouse paint qualify for LEED Green Building points?](#)
- [Why do you put mildewcide in Colorhouse paint?](#)
- [Does Colorhouse paint work for chemically sensitive people?](#)
- [What does "No Toxic Fumes" mean?](#)
- [No toxic fumes means that Colorhouse paints do not contain any hazardous air pollutants. These toxic chemicals are pollutants that can cause serious health effects and have adverse impact on our environment.](#)
- [Is Colorhouse a natural paint?](#)
- [Is Colorhouse tested on animals/animal ingredients?](#)
- [What ingredients are in Colorhouse?](#)
- [How do I store or dispose of my leftover paint?](#)
- [Does Colorhouse seal in VOCs?](#)
- [Is Colorhouse primer a stain-blocking primer?](#)
- [I am pregnant — can I paint?](#)
- [Our paints are zero VOC and are absent of the common toxic chemicals and toxic fumes found in conventional paints, such as: mutagens, hazardous air pollutants, ozone-depleting compounds, formaldehyde and phthalates. Our paints are a healthier option for the home, but if you have specific health concerns we always recommend speaking with your doctor.](#)
- [Can I paint with Colorhouse on the following surfaces: drywall, wood, concrete, furniture, floors, cabinetry and metal?](#)
- [Does the color add VOCs?](#)
- [Can another company's colors be mixed in Colorhouse?](#)
- [Does Colorhouse offer color-choosing help?](#)

[Home](#)  
[Contact](#)  
[Privacy Policy](#)  
[Sitemap](#)

Connect with us



Join our Color Community!

[COLOUR](#)  
[FORMATION](#)  
[PAINT](#)  
[ABOUT US](#)  
[RESOURCES](#)  
[BLOG](#)  
[SHOP NOW](#)

★★★★★  
See full reviews

100 reviews

🔍 🛒

🏠 📞

Live Help  
1-800-368-2244



Complaint

**Exhibit B**

# Exhibit B

(video entitled "Paint for the People and the Planet")

## Decision and Order

**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 (“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 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. The Respondent is YOLO Colorhouse, LLC, a limited liability company with its principal office or place of business at 519 NE Hancock St. # B, Portland, Oregon 97212.

## Decision and Order

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. “Covered product” means any architectural coating applied to stationary structures, portable structures, and their appurtenances.
- B. “Volatile Organic Compound” (“VOC”) means any compound of carbon that participates in atmospheric photochemical reactions, but excludes carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate, and specific compounds that the EPA has determined are of negligible photochemical reactivity, which are listed at 40 C.F.R. Section 51.100(s).
- C. “Emission” means any compound that is emitted or produced during application, curing, or exposure of a covered product.
- D. “Trace” level of emission means:
  1. A VOC has not been intentionally added to the covered product;
  2. Emission of the covered product does not cause material harm that consumers typically associate with emission, including harm to the environment or human health; and
  3. Emission of the covered product does not result in more than harmless concentrations of any compound higher than would be found under

## Decision and Order

normal conditions in the typical residential home without interior architectural coating.

- E. “Respondent” means YOLO Colorhouse, LLC, and its successors and assigns.

**I. Prohibited Misleading and Unsubstantiated Representations  
Regarding Emission and VOC Level of Covered Product**

**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, that the emission level of a covered product is zero, or that the VOC level of a covered product is zero, 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:

- A. The covered product’s emission is zero micrograms per meter cubed and the covered product’s VOC content is zero grams per liter; or
- B. The covered product does not emit or produce more than a trace level of emission.

For purposes of this Provision, “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.

## Decision and Order

**II. Prohibited Misleading and Unsubstantiated Representations  
Regarding Environmental and Health Claims**

**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, including through the use of a product name, regarding:

- A. The emission of the covered product;
- B. The VOC level of the covered product;
- C. The odor of the covered product;
- D. Any other health benefit or attribute of, or risk associated with exposure to, the covered product, including those related to VOC, emission, or chemical composition; or
- E. Any other environmental benefit or attribute of the covered product, including those related to VOC, emission, or chemical composition,

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 representation is true. For purposes of this Provision, "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.

## Decision and Order

**III. Notice to Dealers and Distributors**

**IT IS FURTHER ORDERED** that Respondent deliver as soon as practicable, but in no event later than 60 days after the effective date of this Order, a notice in the form shown in Attachment A to all of Respondent's dealers and distributors, and all other entities to which Respondent provided point-of-sale advertising, including product labels, for any covered product identified in Attachment A. The notice required by this paragraph must not include any document or other enclosures other than those referenced in Attachment A.

**IV. Means and Instrumentalities**

**IT IS FURTHER 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 manufacturing, labeling, advertising, promotion, offering for sale, or sale of any covered product, must not provide to others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false, unsubstantiated, or otherwise misleading representation of material fact, including but not limited to any representation prohibited by Provision I or by Provision II above. For purposes of this Provision, "means and instrumentalities" shall mean any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any covered product, in or affecting commerce.

**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.

## Decision and 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 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.

**VI. Compliance Report and Notices**

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

- A. Sixty 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 a copy of the notice sent to dealers and distributors; and (5) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

## Decision and Order

- 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: In re YOLO Colorhouse, Docket No. C4649.

**VII. 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:



## Decision and Order

- 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 or II 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.

## Decision and Order

**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 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 April 24, 2038, 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:

## Decision and Order

- 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.

Decision and Order

**Attachment A: Notice to Dealers and Distributors**

[on Respondent letterhead]

[insert date]

**IMPORTANT NOTICE ABOUT COLORHOUSE  
ADVERTISING AND MARKETING MATERIALS**

[insert addressee name]

[insert addressee address used in the ordinary course of business]

Dear Dealer or Distributor,

In response to a complaint from the Federal Trade Commission, YOLO Colorhouse, LLC has agreed to qualify its claims that its paints contain zero VOCs (volatile organic compounds) or other harmful emissions, to ensure that retailers and dealers avoid misleading consumers. We request that you immediately replace existing Colorhouse advertising and marketing materials with revised versions which include these qualifications. We have included appropriate materials for this purpose to affix to each can of Colorhouse paint in your possession. Enclosed are illustrations of how to properly place the stickers.

The requirement to affix stickers is only needed if you currently have our product in your inventory. Please note that you will not have to add any stickers to any paint ordered or shipped after the date of this letter.

We will make revised marketing materials available to you shortly. Should you have any questions about compliance with this notice, please contact [insert contact person]. In addition, you can obtain further information about the settlement by visiting [www.ftc.gov](http://www.ftc.gov) and searching for “YOLO Colorhouse.”

Sincerely,  
[name]  
[title]

## Analysis to Aid Public Comment

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from YOLO Colorhouse, LLC, a limited liability company (“respondent”).

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

This matter involves respondent’s marketing, sale, and distribution of purportedly “VOC-free” paints. “VOC” is the abbreviation for volatile organic compounds. VOC-free includes claims such as “zero VOCs,” “0 VOCs,” and “No VOCs.” According to the FTC complaint, respondent made unsubstantiated representations that its paints: (1) are VOC-free; (2) are VOC-free during or immediately after painting; (3) will not emit any chemical or substance, including VOCs, that causes material harm to consumers, including sensitive populations such as children; and (4) will not emit any chemical or substance, including VOCs, during or immediately after painting, that causes material harm to consumers, including sensitive populations such as children. The FTC further alleges that respondent provided independent retailers with promotional materials containing the same claims it made to consumers. Thus, the complaint alleges that respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains three provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I prohibits emission-free and VOC-free claims unless both content and emissions are actually zero or at trace levels. The orders define “emission” to include all emissions (not just VOCs that cause smog). This definition reflects the Commission’s Enforcement Policy Statement and

## Analysis to Aid Public Comment

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. The order defines “trace level of emission” to mean (1) no intentionally added VOC, (2) emission of the covered product does not cause material harm that consumers typically associate with emission, including harm to the environment or human health, and (3) emission of the covered product does not result in more than harmless concentrations of and compound higher than would be found under normal conditions in the typical residential home without interior architectural coating. Part II prohibits misleading representations regarding emission, VOC levels, odor, and any general environmental and health benefit of paints. The order requires competent and reliable scientific evidence to substantiate these representations. Part IV prohibits respondent from providing third parties with the means and instrumentalities to make false, unsubstantiated, or otherwise misleading representations of material fact regarding paints, including any representation prohibited by Parts I or II.

To correct existing unsubstantiated zero emission and VOC claims, Part III requires the respondent to send letters to its dealers and distributors, instructing them to put stickers on paint cans to obscure allegedly unsubstantiated emission and VOC claims.

Parts V through IX are reporting and compliance provisions. Part V 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 VI requires that respondent submit compliance reports to the FTC within sixty (60) days of the order’s issuance and submit additional reports when certain events occur. Part VII requires that respondent must create and retain certain records for five (5) years. Part VIII provides for the FTC’s continued compliance monitoring of respondent’s activity during the order’s effective dates. Part IX is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

If the Commission finalizes the agreement’s proposed order, it plans to propose harmonizing with this order the consent orders

*Analysis to Aid Public Comment*

issued in the PPG Architectural Finishes, Inc. (Docket No. C-4385) and The Sherwin-Williams Company (Docket No. C-4386) matters. Specifically, the Commission plans to issue orders to show cause why those matters should not be modified pursuant to Section 3.72(b) of the Commission Rules of Practice, 16 C.F.R. § 3.72(b).

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

**AIR MEDICAL GROUP HOLDINGS, INC.,  
KKR NORTH AMERICA FUND XI (AMG) LLC,  
AND  
AMR HOLDCO, 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-4642; File No. 171 0217  
Complaint, March 6, 2018 – Decision, April 24, 2018*

This consent order addresses the \$2.4 billion acquisition by Air Medical Group Holdings, Inc., a wholly owned subsidiary of KKR North America Fund XI (AMG) LLC, of certain assets of AMR Holdco, Inc., a wholly-owned subsidiary of Envision Healthcare. 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 for the provision of inter-facility air ambulance transport services in Hawaii. The consent order requires AMR to sell its inter-facility air ambulance transport services business, including the assets that support that business, to AIRMD, LLC d/b/a LifeTeam.

*Participants*

For the *Commission*: Sylvia Kundig and Joe Lipinsky.

For the *Respondents*: Peter Guryan and Richard Jamgochian,  
*Simpson Thacher & Bartlett*.

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Air Medical Group Holdings, Inc. has entered into a transaction with Respondent AMR Holdco, Inc.; that such transaction, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and that a proceeding in respect thereof would be in the public



## Complaint

interest, hereby issues this Complaint, stating its charges as follows:

**I. RESPONDENTS****AMGH**

1. Respondent Air Medical Group Holdings, Inc. (“AMGH”) is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its principal place of business located at 209 State Highway 121 Bypass, Suite 21, Lewisville, Texas 75067. Respondent AMGH’s ultimate parent company is KKR North America Fund XI (AMG) LLC, located c/o Kohlberg Kravis Roberts & Co. LP, 9 West 57th Street, Suite 4200, New York, New York 10019.

2. Respondent AMGH is one of the largest providers of air ambulance services in the United States, providing those services through a number of subsidiaries.

3. Respondent AMGH 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 Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

4. Hawaii Life Flight Corporation (“HLF”) is a corporation organized, existing, and doing business under, and by virtue of, the laws of Hawaii, with its principal place of business located at 150 Lagoon Drive, Honolulu, Hawaii 96819. HLF is a subsidiary of Respondent AMGH and provides inter-facility air ambulance transport services in the State of Hawaii.

5. HLF 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 Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

**KKR North America Fund XI (AMG) LLC**

6. Respondent KKR North America Fund XI (AMG) LLC (“KKR”), is a limited liability company organized, existing, and

## Complaint

doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located, c/o Kohlberg Kravis Roberts & Co. LP, at 9 West 57th Street, Suite 4200, New York, New York 10019. Respondent KKR is the ultimate parent company of Respondent AMGH.

7. Respondent KKR 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 Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

**AMR Holdco, Inc.**

8. Respondent AMR Holdco, Inc. (“AMR”) is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its principal place of business located at 6363 S. Fiddlers Green Circle, 14th Floor, Greenwood Village, Colorado 80111. Respondent AMR is a subsidiary of Envision Healthcare Corporation, a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its principal place of business located at 6363 S. Fiddlers Green Circle, 14th Floor, Greenwood Village, Colorado 80111.

9. Respondent AMR is one of the largest providers of ground ambulance services in the United States, providing those services through a number of subsidiaries.

10. Respondent AMR operates American Medical Response (“AMRH”) in Hawaii. In addition to ground ambulance services, AMRH provides inter-facility air medical transport services in competition with HLF.

11. Respondent AMR 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.

## Complaint

**II. THE PROPOSED ACQUISITION**

12. Respondent AMGH entered into a Stock Purchase Agreement (“Acquisition Agreement”) with Respondent AMR, dated August 7, 2017, pursuant to which AMGH would acquire the stock of AMR. The Agreement’s total estimated dollar value was \$2.4 billion.

13. The Proposed Acquisition to be effected through the Acquisition Agreement is subject to 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.

**III. THE RELEVANT MARKETS**

14. The relevant product market in which to analyze the effects of the Proposed Acquisition is inter-facility air ambulance transport services. Inter-facility air ambulance transport services involve the provision of air transportation services from one medical facility to another for medical and surgical care.

15. The relevant geographic market in which to analyze the effects of the proposed Acquisition is the State of Hawaii. In Hawaii, inter-facility air ambulance transport services involve transporting patients from one island to another, generally to Oahu.

**IV. MARKET STRUCTURE**

16. In the State of Hawaii, the market for inter-facility air ambulance transport services is highly concentrated. AMGH and AMRH are currently the only providers of the relevant services, and the combined firm would become the only provider following the proposed acquisition. Thus, the proposed acquisition would substantially increase concentration.

**V. ENTRY CONDITIONS**

17. New entry or expansion by existing firms in adjacent businesses would not be likely, timely, and sufficient, to defeat a post-acquisition price increase. Inter-facility air ambulance

## Complaint

transport services rely on reimbursement from third party payers, such as health maintenance organizations, preferred provider organizations, or government health care providers, such as the Veteran's Administration. A new entrant would require a guarantee of a sufficient volume of referrals and payments from third party payers to justify the economic risk of new entry. Sufficient guarantees are unlikely in the face of a small but significant and non-transitory increase in price. As a result, de novo or sponsored entry is unlikely.

**VI. EFFECTS OF THE MERGER**

18. The effects of the Proposed Acquisition, if consummated, may be substantially to lessen competition and tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by increasing the likelihood that Respondent AMGH and its subsidiary HLF would unilaterally exercise market power in the relevant market to raise prices and lower quality.

**VII. VIOLATIONS CHARGED**

19. 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.

20. The Acquisition Agreement entered into by Respondent AMGH and Respondent AMR 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 sixth day of March, 2018, issues its complaint against Respondents.

By the Commission.

## Order to Maintain Assets

**ORDER TO MAINTAIN ASSETS**  
**[Public Record Version]**

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent Air Medical Group Holdings, Inc. (“AMGH”), controlled by Respondent KKR North America Fund XI (AMG) LLC (“KKR”), of Respondent AMR Holdco, Inc. (“AMR”) (collectively, “Respondents”). The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Order” or “Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission’s Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

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 AMGH is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its corporate office and principal place of business located at 209

## Order to Maintain Assets

State Highway 121 Bypass, Suite 21, Lewisville, Texas 75067.

2. Respondent AMR is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its corporate office and principal place of business located at 6363 S. Fiddlers Green Circle, 14th Floor, Greenwood Village, Colorado 80111.
3. Respondent KKR North America Fund XI (AMG) LLC, is a limited liability company organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 9 West 57th Street, Suite 4200, New York, New York 10019.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

**I.**

**IT IS ORDERED** that, as used in this Order to Maintain Assets, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, which are incorporated herein by reference and made a part hereof, shall apply:

- A. “Assets To Be Divested” means the Air Ambulance Assets and Ground Ambulance Assets.
- B. “Decision and Order” means the:
  1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and

## Order to Maintain Assets

2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- C. “Orders” means the Decision and Order in this matter and this Order to Maintain Assets.

**II.**

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

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of any of the Assets To Be Divested. Respondents shall not cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber, or otherwise impair the viability, marketability, or competitiveness of the Assets To Be Divested.
- B. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course of business, in accordance with past practice (including regular repair and maintenance efforts) and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the regular and ordinary course of business, in accordance with past practice, making all payments required to be paid under any contract or lease, and providing sufficient working capital to operate at least at current rates of operation to meet all capital calls with respect to the Assets To Be Divested.
- C. Respondents shall not terminate the operation of any of the Assets To Be Divested and shall maintain the

## Order to Maintain Assets

books and Records of each of the Assets To Be Divested.

- D. Respondents shall continue to maintain the operation, inspection and maintenance schedule of each of the Assets To Be Divested at levels and intervals in the regular and ordinary course of business, in accordance with past practice, including: (1) providing funds sufficient to perform all routine maintenance and maintenance necessary to, and all replacements of, any assets related to the operation of the Assets To Be Divested; (2) providing support services at least at the level as was being provided as of the date the Consent Agreement was signed by Respondents; and (3) maintaining, and not terminating or permitting the lapse of, any permit or license necessary for the operation of any Asset To Be Divested.
- E. Respondents shall maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with each of the Assets To Be Divested, including:
1. Providing 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;
  2. Using reasonable best efforts to retain employees at each of the Assets To Be Divested;
  3. When vacancies occur, replacing the employees in the regular and ordinary course of business, in accordance with past practice; and
  4. Not transferring any employees from any of the Assets To Be Divested.



## Order to Maintain Assets

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

- A. Respondents shall (i) not disclose (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Information received or maintained by Respondents relating to the Air Ambulance Business; *provided, however*, that Respondents may disclose or use such Confidential Information in the course of:
1. Performing its obligations or as permitted under the Orders or any Divestiture Agreement; or
  2. Complying with financial, regulatory, or other legal obligations, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Air Ambulance Assets or Ground Ambulance Assets, or as required by law.
- B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph III.A. of this Order to Maintain Assets, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph III.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.
- C. Respondents shall enforce the terms of this Paragraph III. as to their employees or any other Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph III., including implementation of access and data controls, training of its employees, and all other actions that Respondents would take to

## Order to Maintain Assets

protect their own trade secrets and proprietary information.

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

- A. Rex Fujichaku shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix A (“Monitor Agreement”) and Non-Public Appendix B (“Monitor Compensation”). The Monitor is appointed to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order.
- B. No later than one day after the Acquisition Date, Respondents shall transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Order and consistent with the purposes of the Order.
- C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
  - 1. The Monitor shall (i) monitor Respondents’ compliance with the obligations set forth in this Order and (ii) act in a fiduciary capacity for the benefit of the Commission;
  - 2. Respondents shall (i) insure that the Monitor has full and complete access to all Respondents’ personnel, books, records, documents, and facilities relating to compliance with this Order or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform her duties pursuant to this Order;

## Order to Maintain Assets

3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
  4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct; and
  5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.
- D. The Monitor shall report in writing to the Commission (i) every 30 days after the Acquisition Date for a period of one year, (ii) every 90 days thereafter until Respondents have completed all obligations required by Paragraph II. of this Order (including a final report when Respondents have completed all such obligations), and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order.

## Order to Maintain Assets

- E. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:
  - 1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within 5 days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
  - 2. Respondents shall, no later than 5 days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform her duties and responsibilities pursuant to this Order on the same terms and conditions as provided in this Paragraph V.
- G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

## Order to Maintain Assets

**V.**

**IT IS FURTHER ORDERED** that within 30 days after the date this Order to Maintain Assets is issued by the Commission, and every 30 days thereafter until Respondents have fully complied with this Order to Maintain Assets, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Order. Each Respondent shall submit at the same time a copy of its report concerning compliance with the Order to the Monitor. Each Respondent shall include in its reports, among other things that are required from time to time, a detailed description of its efforts to comply with the relevant paragraphs of the Orders, including:

- A. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all of the Assets To Be Divested, (ii) the maintenance of the Assets To Be Divested, and (iii) transitional services being provided by the relevant Respondent to the Acquirer; and
- B. a detailed description of the timing for the completion of such obligations.

*provided, however,* that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the reports required to be submitted by Respondents pursuant the Decision and Order.

**VI.**

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

- A. Any proposed dissolution of Respondents KKR North America Fund XI (AMG) LLC or Air Medical Group Holdings, Inc.;

## Order to Maintain Assets

- B. Any proposed acquisition, merger, or consolidation of Respondents KKR North America Fund XI (AMG) LLC or Air Medical Group Holdings, Inc.; or
- C. Any other change in Respondents, including 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 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 earlier of:

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the

## Order to Maintain Assets

provisions of Commission Rule 2.34, 16 C.F.R. § 2.34;  
or

- B. The later of:
1. the day after the divestitures pursuant to Paragraph II of the Decision and Order are accomplished, or
  2. three (3) days after the related Decision and Order becomes final.

By the Commission.

## Order to Maintain Assets

**Appendix A****Monitor Agreement****MONITOR AGREEMENT**

This Monitor Agreement (this "Agreement"), entered into this 16 day of February, 2018, by and among Bronster Fujichaku Robbins, A Law Corporation by its director, Rex Fujichaku (the "Monitor") and Air Medical Group Holdings, Inc. ("AMGH") (the Monitor and AMGH together, the "Parties") provides as follows:

WHEREAS the Federal Trade Commission (the "Commission"), in the Matter of Air Medical Group Holdings, Inc.'s proposed Acquisition of American Medical Response ("AMR"), File No. 171-0217, has accepted or will shortly accept for public comment an Agreement Containing Consent Orders incorporating a Decision and Order and an Order to Hold Separate and Maintain Assets (collectively, the "Orders"), which, among other things, requires AMGH to divest AMR's Hawaii fixed wing air ambulance business and certain related assets (the "AMR Assets"), as defined in the Orders, and contemplates the appointment of a Monitor to monitor AMGH's compliance with its obligations under the Orders;

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

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

WHEREAS, this Agreement, although executed by Monitor and AMGH, is not effective for any purpose, including but not limited to imposing rights and responsibilities on AMGH or Monitor under the Orders, except for those obligations under the confidentiality provisions herein, until it has been approved by the Commission; and

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

NOW, THEREFORE, the Parties agree as follows:

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

**ARTICLE I**

1.1 Powers of the Monitor. Monitor shall have all of the powers and responsibilities conferred upon Monitor by the Orders, including but not limited to monitoring AMGH's compliance with the divestiture, asset maintenance obligations, and other related requirements of the Orders.

1.2 Access to Relevant Information and Facilities. Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to AMGH's personnel,



## Order to Maintain Assets

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 AMGH's compliance with the obligations of AMGH under the Orders in this matter. Documents, records and other relevant information are to be provided in an electronic format if they exist in that form. AMGH shall cooperate with any reasonable request of Monitor. Monitor shall give AMGH 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 AMGH's operations. At the request of the Monitor, AMGH shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of AMGH who have knowledge relevant to the proper discharge of its responsibilities under the Orders.

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

1.4 Confidentiality. Monitor shall:

(a) maintain the confidentiality of all confidential information provided to the Monitor by AMGH, the acquirer of the AMR Assets, any supplier or customer of AMGH, or the Commission ("Confidential Information"), 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. Monitor may disclose Confidential Information only to (i) persons employed by or working with Monitor pursuant to the Orders or (ii) persons employed at the Commission;

(b) require any consultants, accountants, attorneys, and any other representatives and/or assistants retained by Monitor to assist in carrying out the duties and responsibilities of Monitor to execute a confidentiality agreement, which AMGH will provide if requested, 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;

(c) act in a fiduciary capacity for the benefit of the Commission;

(d) maintain a record and inform the Commission of all third parties (other than representatives of the Commission) to whom Confidential Information has been disclosed;

(e) for a period of five (5) years after the termination of this Agreement, maintain the confidentiality of all other aspects of the performance of its duties under this Agreement and not disclose any Confidential Information relating thereto; and

(f) upon the termination of the Monitor's duties under this Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that AMGH 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

## Order to Maintain Assets

the staff. In response to a request by AMGH to return or destroy materials that AMGH 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 AMGH's request. Notwithstanding the foregoing, the Monitor shall not be required to return or destroy confidential information contained in an archived computer back-up system for its disaster recovery and/or security purposes, and it may retain a copy of confidential information, subject to the terms of this Agreement, in accordance with its internal record retention procedures for legal or regulatory purposes. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor for ten (10) years after termination of this Agreement. For the avoidance of doubt, the expiration of the ten year period following the termination of this Agreement shall not abrogate the duties under this Section 1.4 which prevent the Monitor's disclosure of any Confidential Information.

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, AMGH, or any director, officer, employee, agent, consultant or affiliate of the Monitor or AMGH, when such source was not known to recipient after due inquiry to be restricted from making such disclosure to such recipient.

**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 AMGH, such attorneys, consultants, accountants, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities pursuant to the Orders. Prior to engaging any such parties and prior to commissioning additional work to be performed by a party who has already been so engaged, Monitor shall notify AMGH of its intention to do so, and provide an estimate of the anticipated costs.

2.2 Monitor Compensation. AMGH shall pay Monitor in accordance with the fee schedule and procedure attached as Confidential Appendix A for all reasonable time spent in the performance of the Monitor's duties, including all monitoring activities related to the efforts of the acquirer of the AMR Assets, all work in connection with the negotiation and preparation of this Agreement, and all reasonable and necessary travel time.

(a) In addition, AMGH shall pay: (i) all out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the Orders; and (ii) all reasonable fees of, and disbursements reasonably incurred by, any advisor appointed by Monitor pursuant to the first paragraph in Article II.

(b) The Monitor shall have full and direct responsibility for compliance with all applicable laws, regulations and requirements pertaining to work permits, income and social



### Order to Maintain Assets

security taxes, unemployment insurance, worker's compensation, disability insurance, and the like.

2.3 Monitor's Indemnification; Limitation on Liability. AMGH shall indemnify and hold harmless Monitor and its employees and agents 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 Monitor's gross negligence or willful misconduct. Monitor shall not be liable hereunder for any amount in excess of the fees paid to it, except in the event of Monitor's gross negligence, willful misconduct or fraud. Monitor shall not be liable hereunder for any incidental, consequential, special or punitive damages, regardless of whether it has been informed of the possibility thereof.

2.4 Disputes. In the event of a disagreement or dispute between AMGH and Monitor concerning AMGH's obligations under the Orders, and, in the event that such disagreement or dispute cannot be resolved by the Parties, either party may seek the assistance of the individual in charge of the Commission's Compliance Division.

2.5 Conflicts of Interest. In the event that, during the term of this Agreement, Monitor becomes aware it has or may have a conflict of interest that may affect, or could have the appearance of affecting, performance by Monitor or persons employed by, or working with, Monitor, of any of its duties under this Agreement, Monitor shall promptly inform AMGH and the Commission of any such conflict or potential conflict.

### ARTICLE III

3.1 Termination. This Agreement shall terminate the earlier of: (a) the expiration or termination of the Orders; (b) AMGH'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 AMGH and to the Commission, upon resignation of the Monitor; or (d) when the Monitor completes its Final Report pursuant to the Decision and Order; provided, however, that the Commission may require that AMGH extend this Agreement as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force, as will the provisions of Articles 2.2 and 2.3 of this Agreement.

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

3.3 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

## Order to Maintain Assets

Agreement and any provisions herein which conflict or are inconsistent with the Orders may be declared null and void by the Commission and any provision not in conflict shall survive and remain a part of this Agreement.

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

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

3.6 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 Commission. Any such amendment, modification, termination, or waiver shall be consistent with the terms of the Orders.

3.7 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission, other than the Parties' obligations under the confidentiality provisions herein.

3.8 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.

3.9 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.

3.10 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.

Order to Maintain Assets


**MONITOR**

Bronster Fujichaku Robbins, A Law Corporation

\_\_\_\_\_  
Rex Fujichaku  
Director

**Respondent**

Air Medical Group Holdings, Inc.

  
\_\_\_\_\_  
Frederick Buttrell  
CEO

Order to Maintain Assets

**MONITOR**

**Respondent**

Bronster Fujichaku Robbins, A Law Corporation

Air Medical Group Holdings, Inc.



\_\_\_\_\_  
Rex Fujichaku  
Director

\_\_\_\_\_  
Frederick Buttrell  
CEO

Decision and Order

**Non-Public  
Appendix B**

**Monitor Compensation Agreement**

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

**DECISION**

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent Air Medical Group Holdings, Inc. (“AMGH”), controlled by Respondent KKR North America Fund XI (AMG) LLC (“KKR”), of Respondent AMR Holdco, Inc. (“AMR”) (collectively, “Respondents”). The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Order” or “Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission’s Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

## Decision and Order

The Commission considered the matter and 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. The Commission accepts the executed Consent Agreement and places 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 jurisdictional findings, and issues the following Decision and Order (“Order”):

1. Respondent AMGH is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its corporate office and principal place of business located at 209 State Highway 121 Bypass, Suite 21, Lewisville, Texas 75067.
2. Respondent AMR is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its corporate office and principal place of business located at 6363 S. Fiddlers Green Circle, 14<sup>th</sup> Floor, Greenwood Village, Colorado 80111.
3. Respondent KKR North America Fund XI (AMG) LLC is a limited liability company organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 9 West 57<sup>th</sup> Street, Suite 4200, New York, New York 10019.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.



## Decision and Order

**ORDER****I.**

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

- A. “AMGH” means Air Medical Group Holdings Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by Air Medical Group Holdings, Inc. (including AMR, after the Acquisition), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “AMR” means AMR Holdco, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by AMR Holdco, Inc., including but not limited to Air Hawaii, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “AirMD” means AirMD, LLC, a limited liability company organized, existing, and doing business under, and by virtue of, the laws of the State of Kansas, with its corporate office and principal place of business located at 3445 N. Webb Road, Wichita, Kansas 67226.
- D. “KKR” means KKR North America Fund XI (AMG) LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by KKR North America Fund XI (AMG) LLC, including but not limited to AMGH, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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- E. “Commission” means the Federal Trade Commission.
- F. “Acquirer” means (i) AirMD or (ii) any other Person that acquires the Air Ambulance Assets and Ground Ambulance Assets pursuant to this Order.
- G. “Acquisition” means the proposed acquisition described in the Stock Purchase Agreement by and among Air Medical Group Holdings, Inc., and AMR Holdco Inc., dated August 7, 2017.
- H. “Acquisition Date” means the date the Acquisition is consummated.
- I. “Air Ambulance Assets” means all of Respondents’ right, title, and interest in and to all property and assets, wherever located, relating to the Air Ambulance Business, including, but not limited to:
  - 1. the AMR Aircraft;
  - 2. the AMR Air Property Leases;
  - 3. 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;
  - 4. all Equipment;
  - 5. all consents, licenses, registrations, or permits issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, if any, and all pending applications therefor or renewals thereof, to the extent assignable;
  - 6. all data and Records, including client and customer lists and Records, referral sources, research and development reports and Records, production reports and Records, service and warranty Records,

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equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, notices, orders, inquiries, correspondence, and other similar documents and Records; and

## 7. Business Records.

*Provided, however,* that Air Ambulance Assets does not include Excluded Assets.

- J. “Air Ambulance Business” means the business conducted by Respondent AMR related to fixed wing inter-facility air medical transports originating and terminating in the State of Hawaii, including ground ambulances used in support of such fixed wing inter-facility air medical transports.
- K. “Air Ambulance Employee” means any individual (i) employed by Respondent AMR on a full-time, part-time, or contract basis at any time as of, and after, August 8, 2017, the date of the announcement of the Acquisition and, (ii) whose job responsibilities relate primarily to the Air Ambulance Business.
- L. “AirMD Acquisition Agreement” means the asset purchase agreement between AMR Holdco, Inc., and AirMD, LLC, dated February 23, 2018, including related ancillary agreements, amendments, schedules, exhibits, and attachments, thereto, that have been approved by the Commission to accomplish the requirements of this Order.
- M. “AMR Aircraft” means all of Respondent AMR’s right, title, and interest in the 3 airplanes bearing registration numbers:
  - 1. N911ZC;
  - 2. N911ZD; and

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## 3. N911ZE.

- N. “AMR Air Property Leases” mean (i) Rental Agreement, dated as of March 14, 2013, for the property located at 35 Kolopua Place, Wailuku, Hawaii 96793, (ii) Parking Permit No. PP-14-M003, dated May 21, 2014, by and between the State of Hawaii Department of Transportation, Airports Division and Air Ambulance Specialists, Inc., (iii), Parking Permit No. PP-14-M001, dated January 3, 2014, by and between the State of Hawaii Department of Transportation, Airports Division and Air Ambulance Specialists, Inc., (iv) Parking Permit No. PP-15-S292, dated June 30, 2015, by and between the State of Hawaii Department of Transportation, Airports Division and Air Ambulance Specialists, Inc., (v) Rental Agreement, dated as of July 7, 2014, by and between Lori Hara and Jordan Hara and AMR, (vi) Sublease, dated as of February 1, 2014, by and between Castle & Cooke Homes Hawaii, Inc. d/b/a Castle & Cooke Aviation Honolulu and International Life Support, Inc. d/b/a AMR Air Hawaii, as amended by the First Amendment, effective as of July 1, 2015, the Second Amendment, effective as of July 1, 2016, the Third Amendment, effective as of February 14, 2017, and the Fourth Amendment, effective as of July 1, 2017, (vii) Parking Permit No. PP-14-M004, dated September 22, 2014, by and between the State of Hawaii Department of Transportation, Airports Division and Air Ambulance Specialists, Inc., (viii) Indenture of Sublease, dated June 1, 2014, by and between Pacific Aviation Services, Inc. and AMR Air Ambulance.
- O. “AMR Non-Air Business” means all businesses conducted by Respondent AMR, including the business conducted by Respondent AMR related to 911 and private ground ambulance-related services in the State of Hawaii (excluding the Air Ambulance Business and Ground Ambulance Assets).

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- P. “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, 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.
- Q. “CON” means a certificate of need reviewed by the Hawaii State Health Planning and Development Agency, or any other agency in the State of Hawaii.
- R. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondents, that is not in the public domain and that is related to the Air Ambulance Assets or Ground Ambulance Assets. For avoidance of doubt, Confidential Business Information does not include any information related to any Excluded Assets.
- S. “Contract” means any agreement, contract, lease, license agreement, consensual obligation, promise or undertaking (whether written or oral and whether express or implied), whether or not legally binding with third parties.
- T. “Direct Cost” means cost not to exceed the cost of labor, material, travel, and other expenditures to the

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extent the costs are directly incurred to provide Support 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.

- U. "Divestiture Agreement" means (i) the AirMD Acquisition Agreement or (ii) any other agreement between Respondents (or a Divestiture Trustee) and an Acquirer that receives the prior approval of the Commission to divest the Air Ambulance Assets and Ground Ambulance Assets, including all related ancillary agreements, schedules, exhibits, and attachments thereto that have received the Commission's prior approval.
- V. "Divestiture Date" means the date on which Respondents (or the Divestiture Trustee) close the transaction to divest the Air Ambulance Assets to an Acquirer.
- W. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Paragraph VI. of this Order.
- X. "Equipment" means all tangible personal property of every kind owned or leased by Respondents in connection with the operation of the Air Ambulance Assets, including, but not limited to all: support vehicles, medical equipment, computers, office furniture, office supplies, parts, tools, supplies, and all other items of equipment or tangible personal property of any nature or other systems used in the operation of the Air Ambulance Assets, 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.

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- Y. “Excluded Assets” means:
1. working capital, including cash, prepaid expenses and accounts receivable accrued or prepaid by or owned by Respondents prior to the date of completion of the Acquisition;
  2. real property (excluding the AMR Air Property Leases);
  3. Equipment relating to and used predominantly by the AMR Non-Air Business prior to the Acquisition;
  4. Business Records relating to both the operation of the Air Ambulance Business and the AMR Non-Air Business prior to the Acquisition; provided however, that Respondents shall provide copies of those portions of Business Records that relate to the Air Ambulance Business;
  5. patient care records;
  6. sales and marketing materials relating to both the operation of the Air Ambulance Business and the AMR Non-Air Business prior to the Acquisition; *provided, however,* Respondents shall provide copies of those portions of sales and marketing materials that relate to the Air Ambulance Business;
  7. Intellectual Property owned or licensed (as licensor or licensee), including all trademarks;
  8. AMR’s electronic medical records charting hardware and software infrastructure;
  9. inventory of medical supplies;
  10. all National Provider Identifier, Medicare, Medicaid, and other provider billing numbers; and

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## 11. State of Hawaii aeromedical license.

- Z. “Ground Ambulance Assets” means the following 4 ground ambulances, or other ambulances of similar type and in the same condition as each existed on the Acquisition Date:
1. Ford Type II Ambulance 2013 VIN No. 1FDSS3ES7DDA75187;
  2. Ford Type II Ambulance 2007 VIN. No. 1FDSS34P47DA94877;
  3. Ford Type III Ambulance 2002 VIN. No. 1FDWE35F92HA61194; and
  4. Ford Type III Ambulance 2009 VIN No. 1FDWE35P89DA66946.
- AA. “Intellectual Property” means all intellectual property, including (i) all patents, patent applications and inventions and discoveries that may be patentable; (ii) all registered and unregistered copyrights in both published works and unpublished works; (iii) all know-how, trade secrets, and confidential or proprietary information in customer lists, software, technical information, data, process technology, plans, drawings, and blue prints; and (iv) all rights in internet web sites and internet domain names.
- BB. “Monitor” means the Person appointed by the Commission pursuant to Paragraph V. of this Order.
- 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, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust,



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unincorporated association, joint venture or other entity or a governmental body.

- EE. “Record” means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium.
- FF. “Support Services” means administrative and technical services and training related to the operation of the Air Ambulance Business as of the Divestiture Date, including but not limited to, such services and training relating to call in-take and dispatch services, integration of billing and collection systems, any integration of Intellectual Property, and mechanical and maintenance support.

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

- A. No later than 10 days after the Acquisition Date, Respondents shall divest: (1) the Air Ambulance Assets, and (2) an option to acquire the Ground Ambulance Assets, absolutely and in good faith, to AirMD pursuant to the AirMD Acquisition Agreement.
- B. No later than 4 years from the Divestiture Date, at the option of AirMD, Respondents shall divest up to 4 of the Ground Ambulance Assets, absolutely and in good faith, to AirMD pursuant to the AirMD Acquisition Agreement.

*Provided, however,* if, in consultation with the Monitor, the Acquirer reasonably determines that any of the Ground Ambulance Assets identified in this Order has been altered or its condition deteriorated in any material way, Respondents shall substitute the ambulance with, and transfer to the Acquirer, any other ground ambulance of Respondents, located in the State of Hawaii, that is in the same condition and

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equivalent in type, make, model, age, mileage, and wear and tear, as the substituted ambulance identified in Paragraph I.Z., as of the Acquisition Date.

- C. If Respondents have divested the Air Ambulance Assets and Ground Ambulance Assets to AirMD prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
1. AirMD is not acceptable as the acquirer of the Air Ambulance Assets and Ground Ambulance Assets, then Respondents shall immediately rescind the AirMD Acquisition Agreement, and shall divest the Air Ambulance Assets and Ground Ambulance Assets, no later than 120 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or
  2. The manner in which the divestiture of the Air Ambulance Assets and Ground Ambulance Assets to AirMD 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 Air Ambulance Assets and Ground Ambulance Assets as the Commission may determine are necessary to satisfy the requirements of this Order.
- D. No later than the Divestiture Date, Respondents shall secure all consents, assignments, and waivers from all Persons that are necessary for the divestiture of the Air Ambulance Assets; *provided, however*, that Respondents may satisfy this requirement by certifying that the Acquirer has executed appropriate agreements directly with each of the relevant Persons; and *provided further* that in the event Respondents are unable to obtain any consent, assignment, or waiver required by this Paragraph, Respondents shall (i)

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provide such assistance as the Acquirer may reasonably request in its efforts to obtain the consent or (ii) with the acceptance of the Acquirer and the prior approval of the Commission, Respondents may substitute equivalent assets or arrangements.

- E. For a period of 4 years after the Divestiture Date, Respondents shall:
1. Not file or include in any communication, or influence any other party to file or include in any communication, formally or informally, directly or indirectly, objections to or negative comments about, any application or appeals therefrom, filed by Acquirer, for a ground ambulance CON in Hawaii, *provided, however*, that any such CON application is for the purpose of providing ground ambulance services in connection with and in support of inter-facility air medical transports relating to the Air Ambulance Assets;
  2. In any filing, submission, or communication by Respondents, formally or informally, directly or indirectly, in response to any request for information or other communication relating to Acquirer's CON Application, Respondents shall support any such CON Application described in Paragraph II.E.1.; and
  3. Provide reasonable assistance to, and a letter in support of, Acquirer, with respect to the CON application process and the submission by Acquirer of any such CON Application described in Paragraph II.E.1.
- F. Respondents shall:
1. At the request of Acquirer and in a manner that receives the prior approval of the Commission, for a period of 12 months from the Divestiture Date, provide Support Services sufficient to enable the

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Acquirer to operate the Air Ambulance Assets in substantially the same manner that Respondents have operated such assets prior to the Acquisition;

2. At the request of Acquirer and in a manner that receives the prior approval of the Commission, for a period of 12 months from the date Respondents divest any or all of the Ground Ambulance Assets to Acquirer, provide Support Services sufficient to enable the Acquirer to operate the Ground Ambulance Assets in substantially the same manner that Respondents have operated such assets prior to the Acquisition; and
3. Provide the Support Services required by this Paragraph at substantially the same level and quality as such services were provided by Respondents prior to the Acquisition.

*Provided, however,* that Respondents shall not require any Acquirer to pay compensation for Support Services that exceeds the Direct Cost of providing such goods and services.

- G. Notwithstanding any provision of this Order, Respondents shall permit any trademarks owned by Respondents, any abbreviation thereof, or any name, logo, or lettering which is similar, which are affixed on an aircraft on the Divestiture Date, to remain so affixed in the operation of the Air Ambulance Assets by the Acquirer for a period of up to 6 months from the Divestiture Date.
- H. Notwithstanding any provision of this Order, Respondents shall permit any trademarks owned by Respondents, any abbreviation thereof, or any name, logo, or lettering which is similar, which are affixed on the Ground Ambulance Assets at the time of divestiture of each of the Ground Ambulance Assets, to remain so affixed in the operation of the Ground Ambulance Assets for a period of up to 6 months from the date

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Respondents divest each of the Ground Ambulance Asset(s).

- I. Respondents shall cooperate with and assist Acquirer to evaluate and retain any and all Air Ambulance Employees necessary to operate the Air Ambulance Business in substantially the same manner as Respondents prior to the divestiture, including but not limited to:
  1. Not later than 20 days after Respondents sign the Consent Agreement, Respondents shall (i) identify all Air Ambulance Employees, (ii) allow Acquirer to inspect the personnel files and other documentation of all Air Ambulance Employees, to the extent permissible under applicable laws, and (iii) allow Acquirer an opportunity to interview any Air Ambulance Employee;
  2. Respondents shall (i) not offer any incentive to any Air Ambulance Employee to decline employment with Acquirer, (ii) remove any contractual impediments that may deter any Air Ambulance Employee from accepting employment with Acquirer, including but not limited to, any non-compete or confidentiality provision of employment or other contracts with Respondents that would affect the ability of such employee to be employed by Acquirer, and (iii) not otherwise interfere with the recruitment, hiring, or employment of any Air Ambulance Employee by Acquirer;
  3. Respondents shall (i) vest all current and accrued pension benefits as of the date of transition of employment with Acquirer for any Air Ambulance Employee who accepts an offer of employment from Acquirer and (ii) provide each Air Ambulance Employee with reasonable financial incentive as necessary to accept offers of employment with Acquirer; and

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4. For a period of 2 years after the Air Ambulance Assets are divested, Respondents shall not solicit the employment of any employee that is employed by Acquirer; *provided, however*, that a violation of this provision will not occur if: (i) the individual's employment has been terminated by Acquirer, (ii) Respondents hire an individual who responds to an advertisement for employees in newspapers, trade publications, or other media not targeted specifically at the employees, or (iii) Respondents hire employees who apply for employment with Respondents, so long as such employees were not solicited by Respondents in violation of this paragraph.
- J. The purpose of the divestiture is to ensure the continuation of the Air Ambulance Business as an ongoing viable business 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:

- A. From the date Respondents sign the Consent Agreement until the Respondents divest the Air Ambulance Assets and Ground Ambulance Assets to Acquirer, Respondents shall:
  1. Maintain each of the Air Ambulance Assets and Ground Ambulance Assets in substantially the same condition (except for normal wear and tear) as they existed at the time Respondents signed the Consent Agreement;
  2. Take such actions that are consistent with the past practices of Respondent AMR in connection with

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each Air Ambulance Asset and Ground Ambulance Asset, and that are taken in the ordinary course of business and in the normal day-to-day operations of the Air Ambulance Assets and Ground Ambulance Assets;

3. Keep available the services of the current officers, employees, and agents of Respondent AMR; and maintain the relations and goodwill with suppliers, payors, physicians, landlords, patients, employees, agents, and others having business relations with the Air Ambulance Assets and Ground Ambulance Assets;
  4. Preserve the Air Ambulance Assets and Ground Ambulance 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 Air Ambulance Assets or Ground Ambulance Assets would be diminished; and
  5. Not object to sharing with the Acquirer the payor and supplier contract terms relating to the Air Ambulance Assets and Ground Ambulance Assets: (i) if the payor or supplier consents in writing to such disclosure upon a request by the Acquirer, and (ii) if the Acquirer enters into a confidentiality agreement with Respondents not to disclose the information to any third party.
- B. The purposes of this Paragraph III is to: (1) preserve the Air Ambulance Assets and Ground Ambulance Assets as viable, competitive, and ongoing businesses until they are transferred to Acquirer, (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.

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

- A. Respondents shall (i) keep confidential (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Business Information received or maintained by Respondents relating to the Air Ambulance Assets; *provided, however,* that Respondents may disclose or use such Confidential Business Information in the course of:
1. Performing its obligations or as permitted under this Order, or the Divestiture Agreement; or
  2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Air Ambulance Business, or as required by law.
- B. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A. of this Order, Respondents and Respondents' employees shall not use or share, directly or indirectly, any Confidential Business Information with any of Respondent's employees who operate, manage, or market, Respondents' air ambulance business that competes with the divested assets and business and shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.



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

- A. Rex Fujichaku shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix B (“Monitor Agreement”) and Non-Public Appendix C (“Monitor Compensation”). The Monitor is appointed to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order.
- B. No later than one day after the Acquisition Date, Respondents shall transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Order and consistent with the purposes of the Order.
- C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
  - 1. The Monitor shall (i) monitor Respondents’ compliance with the obligations set forth in this Order and (ii) act in a fiduciary capacity for the benefit of the Commission;
  - 2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents’ personnel, books, records, documents, and facilities relating to compliance with this Order or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform her duties pursuant to this Order;
  - 3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on

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such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct; and
  5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.
- D. The Monitor shall report in writing to the Commission (i) every 30 days after the Acquisition Date for a period of one year, (ii) every 90 days thereafter until Respondents have completed all obligations required by Paragraph II. of this Order (including a final report when Respondents have completed all such obligations), and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order.
- E. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a

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confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

- F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:
1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within 5 days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
  2. Respondents shall, no later than 5 days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform her duties and responsibilities pursuant to this Order on the same terms and conditions as provided in this Paragraph V.
- G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

**VI.**

**IT IS FURTHER ORDERED** that:

- A. If Respondents have not fully complied with the divestiture and other obligations as required by

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Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the Air Ambulance Assets and Ground Ambulance Assets and perform Respondents' other obligations in a manner that satisfies the requirements 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 the Respondents to comply with this Order.
- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 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 10 days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to

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effect the relevant divestiture or other action required by the Order.

- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Divestiture Assets.
  2. The Divestiture Trustee shall have 12 months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve 12 month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court.
  3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall

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cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph VI in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

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

## Decision and Order

Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a Commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph VI.E.6., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph VI.E.5. of this Order.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 60 days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

## Decision and Order

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- F. The Commission may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.
- H. The Divestiture Trustee appointed pursuant to this Order may be the same Person appointed as the Monitor pursuant to the relevant provisions of this Order.
- I. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

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

- A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms



## Decision and Order

of the Divestiture Agreement shall constitute a violation of this Order; provided, however, that the Divestiture Agreement shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

- B. Respondents shall not modify, replace, or extend the terms of the Divestiture Agreement after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

**VIII.**

**IT IS FURTHER ORDERED** that:

- A. Respondents shall:
1. notify Commission staff via email at [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov) of the Acquisition Date no later than 5 days after the Acquisition Date, and;
  2. submit the complete Divestiture Agreement to the Commission at [ElectronicFilings@ftc.gov](mailto:ElectronicFilings@ftc.gov) and [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov) no later than 30 days after the Divestiture Date.
- B. Respondents shall submit verified written reports (“compliance reports”) in accordance with the following:
1. Respondents shall submit:
    - a. an interim compliance report 30 days after the Order is issued, every 30 days thereafter until Respondents have fully complied with the provisions of Paragraph II.A. of this Order, and

## Decision and Order

every 60 days thereafter until Respondents have fully complied with the provisions of Paragraph II.B. of this Order;

- b. an annual compliance report one year after the date this Order is issued, and annually for the next 3 years on the anniversary of that date; and
  - c. additional compliance reports as the Commission or its staff may request;
2. Each compliance report shall set forth in detail the manner and form in which Respondents intend to comply, are complying, and has complied with this Order, including, as applicable:
- a. the status of the divestiture and transfer of the required assets; and
  - b. a description of all substantive contacts regarding any CON application by Acquirer.
- C. Respondents shall verify each compliance report with a notarized signature or sworn statement of the Chief Executive Officer or other officer or employee specifically authorized to perform this function, or self-verified in the manner set forth in 28 U.S.C. § 1746. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at [ElectronicFilings@ftc.gov](mailto:ElectronicFilings@ftc.gov) and to the Compliance Division at [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

## Decision and Order

**IX.**

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

- A. Any proposed dissolution of Respondents KKR North America Fund XI (AMG) LLC or Air Medical Group Holdings, Inc.;
- B. Any proposed acquisition, merger, or consolidation of Respondents KKR North America Fund XI (AMG) LLC or Air Medical Group Holdings, Inc.; or
- C. Any other change in Respondents, including assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

**X.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and five days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of Respondents related to compliance with this Order, which copying services shall be provided by Respondents at the request of the authorized representative of the Commission and at the expense of Respondents; and

## Decision and Order

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

**XI.**

**IT IS FURTHER ORDERED** that this Order shall terminate on April 24, 2028.

By the Commission.

**Non-Public Appendix A  
Divestiture Agreement**

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

Decision and Order

## **Appendix B Monitor Agreement**

### **MONITOR AGREEMENT**

This Monitor Agreement (this "Agreement"), entered into this 16 day of February, 2018, by and among Bronster Fujichaku Robbins, A Law Corporation by its director, Rex Fujichaku (the "Monitor") and Air Medical Group Holdings, Inc. ("AMGH") (the Monitor and AMGH together, the "Parties") provides as follows:

WHEREAS the Federal Trade Commission (the "Commission"), in the Matter of Air Medical Group Holdings, Inc.'s proposed Acquisition of American Medical Response ("AMR"), File No. 171-0217, has accepted or will shortly accept for public comment an Agreement Containing Consent Orders incorporating a Decision and Order and an Order to Hold Separate and Maintain Assets (collectively, the "Orders"), which, among other things, requires AMGH to divest AMR's Hawaii fixed wing air ambulance business and certain related assets (the "AMR Assets"), as defined in the Orders, and contemplates the appointment of a Monitor to monitor AMGH's compliance with its obligations under the Orders;

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

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

WHEREAS, this Agreement, although executed by Monitor and AMGH, is not effective for any purpose, including but not limited to imposing rights and responsibilities on AMGH or Monitor under the Orders, except for those obligations under the confidentiality provisions herein, until it has been approved by the Commission; and

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

NOW, THEREFORE, the Parties agree as follows:

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

### **ARTICLE I**

1.1 Powers of the Monitor. Monitor shall have all of the powers and responsibilities conferred upon Monitor by the Orders, including but not limited to monitoring AMGH's compliance with the divestiture, asset maintenance obligations, and other related requirements of the Orders.

1.2 Access to Relevant Information and Facilities. Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to AMGH's personnel,

## Decision and Order

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 AMGH's compliance with the obligations of AMGH under the Orders in this matter. Documents, records and other relevant information are to be provided in an electronic format if they exist in that form. AMGH shall cooperate with any reasonable request of Monitor. Monitor shall give AMGH 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 AMGH's operations. At the request of the Monitor, AMGH shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of AMGH who have knowledge relevant to the proper discharge of its responsibilities under the Orders.

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

1.4 Confidentiality. Monitor shall:

(a) maintain the confidentiality of all confidential information provided to the Monitor by AMGH, the acquirer of the AMR Assets, any supplier or customer of AMGH, or the Commission ("Confidential Information"), 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. Monitor may disclose Confidential Information only to (i) persons employed by or working with Monitor pursuant to the Orders or (ii) persons employed at the Commission;

(b) require any consultants, accountants, attorneys, and any other representatives and/or assistants retained by Monitor to assist in carrying out the duties and responsibilities of Monitor to execute a confidentiality agreement, which AMGH will provide if requested, 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;

(c) act in a fiduciary capacity for the benefit of the Commission;

(d) maintain a record and inform the Commission of all third parties (other than representatives of the Commission) to whom Confidential Information has been disclosed;

(e) for a period of five (5) years after the termination of this Agreement, maintain the confidentiality of all other aspects of the performance of its duties under this Agreement and not disclose any Confidential Information relating thereto; and

(f) upon the termination of the Monitor's duties under this Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that AMGH 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



## Decision and Order

the staff. In response to a request by AMGH to return or destroy materials that AMGH 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 AMGH's request. Notwithstanding the foregoing, the Monitor shall not be required to return or destroy confidential information contained in an archived computer back-up system for its disaster recovery and/or security purposes, and it may retain a copy of confidential information, subject to the terms of this Agreement, in accordance with its internal record retention procedures for legal or regulatory purposes. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor for ten (10) years after termination of this Agreement. For the avoidance of doubt, the expiration of the ten year period following the termination of this Agreement shall not abrogate the duties under this Section 1.4 which prevent the Monitor's disclosure of any Confidential Information.

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, AMGH, or any director, officer, employee, agent, consultant or affiliate of the Monitor or AMGH, when such source was not known to recipient after due inquiry to be restricted from making such disclosure to such recipient.

## 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 AMGH, such attorneys, consultants, accountants, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities pursuant to the Orders. Prior to engaging any such parties and prior to commissioning additional work to be performed by a party who has already been so engaged, Monitor shall notify AMGH of its intention to do so, and provide an estimate of the anticipated costs.

2.2 Monitor Compensation. AMGH shall pay Monitor in accordance with the fee schedule and procedure attached as Confidential Appendix A for all reasonable time spent in the performance of the Monitor's duties, including all monitoring activities related to the efforts of the acquirer of the AMR Assets, all work in connection with the negotiation and preparation of this Agreement, and all reasonable and necessary travel time.

(a) In addition, AMGH shall pay: (i) all out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the Orders; and (ii) all reasonable fees of, and disbursements reasonably incurred by, any advisor appointed by Monitor pursuant to the first paragraph in Article II.

(b) The Monitor shall have full and direct responsibility for compliance with all applicable laws, regulations and requirements pertaining to work permits, income and social

## Decision and Order

security taxes, unemployment insurance, worker's compensation, disability insurance, and the like.

2.3 Monitor's Indemnification; Limitation on Liability. AMGH shall indemnify and hold harmless Monitor and its employees and agents 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 Monitor's gross negligence or willful misconduct. Monitor shall not be liable hereunder for any amount in excess of the fees paid to it, except in the event of Monitor's gross negligence, willful misconduct or fraud. Monitor shall not be liable hereunder for any incidental, consequential, special or punitive damages, regardless of whether it has been informed of the possibility thereof.

2.4 Disputes. In the event of a disagreement or dispute between AMGH and Monitor concerning AMGH's obligations under the Orders, and, in the event that such disagreement or dispute cannot be resolved by the Parties, either party may seek the assistance of the individual in charge of the Commission's Compliance Division.

2.5 Conflicts of Interest. In the event that, during the term of this Agreement, Monitor becomes aware it has or may have a conflict of interest that may affect, or could have the appearance of affecting, performance by Monitor or persons employed by, or working with, Monitor, of any of its duties under this Agreement, Monitor shall promptly inform AMGH and the Commission of any such conflict or potential conflict.

**ARTICLE III**

3.1 Termination. This Agreement shall terminate the earlier of: (a) the expiration or termination of the Orders; (b) AMGH'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 AMGH and to the Commission, upon resignation of the Monitor; or (d) when the Monitor completes its Final Report pursuant to the Decision and Order; provided, however, that the Commission may require that AMGH extend this Agreement as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force, as will the provisions of Articles 2.2 and 2.3 of this Agreement.

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

3.3 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



### Decision and Order

Agreement and any provisions herein which conflict or are inconsistent with the Orders may be declared null and void by the Commission and any provision not in conflict shall survive and remain a part of this Agreement.

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

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

3.6 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 Commission. Any such amendment, modification, termination, or waiver shall be consistent with the terms of the Orders.

3.7 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission, other than the Parties' obligations under the confidentiality provisions herein.

3.8 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.

3.9 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.

3.10 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.

Decision and Order

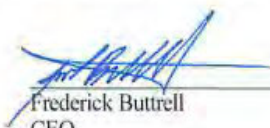
**MONITOR**

Bronster Fujichaku Robbins, A Law Corporation

\_\_\_\_\_  
Rex Fujichaku  
Director

**Respondent**

Air Medical Group Holdings, Inc.

  
\_\_\_\_\_  
Frederick Buttrell  
CEO

Decision and Order

**MONITOR**

**Respondent**

Bronster Fujichaku Robbins, A Law Corporation

Air Medical Group Holdings, Inc.



\_\_\_\_\_  
Rex Fujichaku  
Director

\_\_\_\_\_  
Frederick Buttrell  
CEO

Analysis to Aid Public Comment

**Non-Public Appendix C**  
**Monitor Compensation 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, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) with KKR North America Fund XI (AMG), LLC, Air Medical Group Holdings, Inc., (“AMGH”), and AMR Holdco, Inc. (“AMR”). The Consent Agreement is intended to remedy the anticompetitive effects that likely would result from AMGH’s proposed acquisition of AMR (the “Acquisition”). Under the terms of the Consent Agreement, AMR must sell its inter-facility air medical transport services business in Hawaii. The Acquisition, if consummated, would result in the consolidation of the only two inter-facility air medical transport service providers in Hawaii.

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

## Analysis to Aid Public Comment

**II. The Parties****A. AMGH**

AMGH is wholly owned by KKR North America Fund XI (AMG) LLC. It is likely the largest provider of air ambulance services in the United States with 270 operating locations in 38 states. AMGH operates as Hawaii Life Flight in Hawaii.

**B. AMR**

AMR is a wholly-owned subsidiary of Envision Healthcare and is the largest national ground ambulance provider in the United States, but also provides air ambulance services in several locations. In Hawaii, it provides both ground ambulance services and inter-facility air ambulance transport services. To provide inter-facility air ambulance transport services, AMR partners with LifeTeam, an air ambulance provider located in the Midwest, which has the necessary FAA licenses and certifications, and provides the pilots and maintenance for the fixed-wing aircraft. AMR handles the marketing, medical personnel, and billing for the services provided.

**III. The Proposed Acquisition**

Under an agreement executed on August 7, 2017, AMGH will acquire 100 percent of the voting stock of AMR in a deal valued at approximately \$2.4 billion.

The Commission's Complaint alleges that the Acquisition, if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by substantially lessening competition for the provision of inter-facility air ambulance transport services in Hawaii.

**IV. The Relevant Market and Structure of the Markets**

The Commission's Complaint alleges that the relevant product market in which to analyze the Acquisition is the provision of inter-facility air ambulance transport services. These services

## Analysis to Aid Public Comment

consist of air ambulance services that transfer patients between medical facilities on different islands, including from medical facilities with low acuity or limited patient treatment capabilities to those that can provide the appropriate medical and surgical care. The Commission's Complaint alleges that the relevant geographic market in which to analyze the effects of the Acquisition is the State of Hawaii.

The Commission's Complaint alleges that the Acquisition will increase concentration in an already highly concentrated market. AMGH and AMR are the only two providers of inter-facility air ambulance transport services in Hawaii.

**V. Effects of the Transaction**

According to the Commission, the effect of the Acquisition, if consummated, may be substantially to lessen competition and tend to create a monopoly in inter-facility air ambulance transport services, and increase the likelihood of the unilateral exercise of market power. The Acquisition would increase the likelihood that consumers, third-party payers, or government health care providers would be forced to pay higher prices or experience degradation in service or quality.

**VI. Entry Conditions**

The Commission's Complaint alleges that entry into the relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. The primary barrier to entry is the lack of sufficient volume of referrals and payments from third party payers to justify the economic risk of new entry, even if the parties imposed a small but significant non-transitory increase in price (SSNIP).

**VII. The Proposed Consent Agreement**

The proposed Consent Agreement remedies the anticompetitive concerns raised by the Acquisition by requiring AMR to sell its inter-facility air ambulance transport services business, including the assets that support that business, to AIRMD, LLC, dba LifeTeam. LifeTeam is a large, established

## Analysis to Aid Public Comment

company with experience in the industry. It is also the current operator of the FAA certified aircraft used by AMR for inter-facility air ambulance transport services in Hawaii, and thus very familiar with AMR's assets and operations in Hawaii. Under the proposed Consent Agreement, AMR will divest to LifeTeam the four-fixed wing aircraft it uses to fly patients inter-island, support LifeTeam's application for a Certificate of Need with the State of Hawaii to operate ground ambulances, and offer LifeTeam the option to purchase up to four ground ambulances from AMR. LifeTeam would use the ground ambulances to support its air ambulance transport service to transfer patients to and from medical facilities and the aircraft it operates.

The proposed Consent Agreement also contains an Order to Maintain Assets that will issue at the time the proposed Consent Agreement is accepted for public comment. The Order to Maintain Assets requires Respondents to operate and maintain the divestiture assets in the normal course of business through the date that the Respondents complete divestiture of the assets, thereby maintaining the economic viability, marketability, and competitiveness of the assets. The Order to Maintain Assets also 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 purpose of this analysis is to facilitate public comment on the proposed Consent agreement, and 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

**IMPAX LABORATORIES, INC.**COMPLAINT AND INITIAL DECISION IN REGARD TO ALLEGED  
VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION  
ACT*Docket No. 9373; File No. 141 0004*  
*Complaint, January 19, 2017 – Initial Decision, May 11, 2018*

This case addresses Impax Laboratories, Inc.'s reverse-payment agreement with Endo Pharmaceuticals Inc. to obstruct lower-cost generic competition to Opana ER, one of Endo's core branded prescription drug products. The complaint alleges that Impax Laboratories, Inc. violated section 5 of the Federal Trade Commission Act through its agreement in restraint of trade with Endo Pharmaceuticals, Inc. to eliminate the risk of generic competition to Opana ER for at least 2½ years. In his Initial Decision, the Administrative Law Judge found that the evidence failed to demonstrate that the Challenged Agreement constituted an unreasonable restraint of trade in violation of Section 5 of the Federal Trade Commission Act and dismissed the Complaint. Complaint Counsel appealed the Initial Decision and Respondent filed a cross-appeal.

*Participants*

For the *Commission*: Daniel Bradley, Dan Butrymowicz, Synda Mark, Maren Schmidt, Eric Sprague, Jamie Towey, and Rebecca Weinstein.

For the *Respondent*: Anna Fabish and Ted Hassi, O'Melveny & Myers LLP.

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Impax Laboratories, Inc. ("Impax"), 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:



## Complaint

**Nature of the Case**

1. This action challenges an anticompetitive reverse-payment agreement between Impax and Endo Pharmaceuticals Inc. (“Endo”) to obstruct lower-cost generic competition to Opana ER, one of Endo’s core branded prescription drug products. In 2009, Opana ER was responsible for \$172 million of Endo’s net sales, comprising approximately 12% of Endo’s total annual revenues. The threat of generic entry to Opana ER posed significant financial risks for Endo. Endo knew that generic competition would decimate its Opana ER sales and that any delay in generic competition would be highly profitable for Endo, but very costly for consumers.

2. By 2010, generic entry appeared imminent. Several years earlier, Impax had submitted an application with the U.S. Food and Drug Administration to market a generic version of Opana ER. In that application, Impax asserted that Endo’s Opana ER patents were either invalid or would not be infringed by Impax’s generic version of Opana ER. Endo sued Impax for alleged patent infringement. Throughout the first half of 2010, with the patent infringement trial approaching, Impax prepared to launch its generic Opana ER product as soon as it received regulatory approval. Faced with Impax’s threat to its lucrative Opana ER franchise, Endo bought off its potential competitor.

3. In June 2010, Endo agreed to pay Impax to abandon its patent challenge and forgo entering the market with its lower-cost generic version of Opana ER for 2½ years, until January 2013. This payment included two separate components. First, Endo guaranteed that Impax would receive supracompetitive profits by being the only seller of generic Opana ER during its first 180 days on the market. Even though Endo had the legal right and financial incentive to compete with an authorized generic version of Opana ER as soon as Impax entered with its generic product, Endo agreed that it would refrain from offering an authorized generic Opana ER product during Impax’s initial 180 days of marketing (a “no-AG commitment”). If market conditions were to change to devalue this no-AG commitment, Endo further agreed to pay Impax a cash amount based on Impax’s expected profits for that six-month period of generic exclusivity. Second, Endo agreed to

## Complaint

pay Impax up to \$40 million purportedly for an independent development and co-promotion deal. The financial terms of this deal, however, made no business or economic sense for Endo independent of Impax's agreement to stay off the market for over 2½ years. To date, Endo has paid Impax over \$112 million from these two components.

4. The purpose and effect of this anticompetitive agreement was to ensure that Endo would not face generic competition for Opana ER until at least January 2013. As a result, patients were denied the opportunity to purchase lower-cost generic versions of Opana ER, forcing them and other purchasers to pay hundreds of millions of dollars a year more for this medication.

**Respondent**

5. Respondent Impax Laboratories, Inc. is a for-profit Delaware corporation, with its principal place of business at 30831 Huntwood Avenue, Hayward, California 94544. Impax engages in the business of, among other things, developing, manufacturing, and marketing generic drugs. Impax entered into the anticompetitive agreement challenged in this complaint.

**Jurisdiction**

6. Respondent is, and at all times relevant herein has been, a corporation, as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

7. Respondent's general business practices and the unfair methods of competition alleged herein are "in or affecting commerce" within the meaning of Section 5 of the FTC Act, 15 U.S.C. § 45.

**Background****A. Federal law facilitates approval of generic drugs**

8. The Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq.*, as amended by the Drug Price Competition and Patent Term Restoration Act of 1984 (the "Hatch-Waxman

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Act”) and the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 21 U.S.C. §§ 355(b)(2) and 355(j) and 35 U.S.C. § 271(e), establishes procedures designed to facilitate competition from lower-priced generic drugs, while maintaining incentives for pharmaceutical companies to invest in developing new drugs.

9. A company seeking to market a new pharmaceutical product must file a New Drug Application (“NDA”) with the U.S. Food and Drug Administration (“FDA”) demonstrating the safety and efficacy of the new product. These NDA-based products generally are referred to as “brand-name drugs” or “branded drugs.”

10. The FDA requires NDA holders to identify any patents that the NDA holder believes reasonably could be asserted against a generic company that makes, uses, or sells a generic version of the branded drug. The NDA holder must submit these patents for listing in an FDA publication entitled *Approved Drug Products with Therapeutic Equivalence Evaluations* (commonly known as the Orange Book) within 30 days of issuance of the patent. 21 C.F.R. § 314.53.

11. 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. Upon showing that the generic drug is therapeutically equivalent to the already-approved branded drug, the generic company may rely on the studies submitted in connection with the already-approved branded drug’s NDA to establish that the generic drug is safe and effective. 21 U.S.C. § 355(j)(2)(A)(iv).

12. The FDA assigns a generic drug an “AB” rating if it is therapeutically equivalent to a brand-name drug. An AB-rated generic drug is the same as a brand-name drug in dosage form, safety, strength, route of administration, quality, performance characteristics, and intended use. A generic drug also must

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contain identical amounts of the same active ingredient(s) as the brand-name drug, although its inactive ingredients may vary.

13. When a brand-name drug is covered by one or more patents listed in the Orange Book, a company seeking to market a generic version of that drug before the patents expire must make a “paragraph IV certification” in its ANDA certifying that the patents are invalid, unenforceable, and/or will not be infringed by the generic drug.

14. If a company makes a paragraph IV certification, it must notify the patent holder of its certification. If the patent holder initiates a patent infringement suit against the company within 45 days of receiving such notice, the FDA may not grant final approval of the ANDA until the earliest of: (1) patent expiry; (2) district court resolution of the patent litigation in favor of the generic company; or (3) the expiration of an automatic 30-month stay.

15. When a generic drug otherwise meets the FDA’s criteria for approval but final approval is blocked by statute or regulation, such as the Hatch-Waxman 30-month stay, the FDA may tentatively approve the relevant ANDA. Tentative approval does not permit an ANDA filer to market its generic version of the drug. The FDA can issue final approval of a tentatively-approved drug once the relevant 30-month stay expires.

16. The Hatch-Waxman Act provides the first generic company or companies filing an ANDA containing a paragraph IV certification (“first filer”) with a period of protection from competition with other ANDA filers. This is referred to as the “180-day exclusivity” or “first-filer exclusivity” period. The Supreme Court observed that the 180-day exclusivity period “can prove valuable, possibly worth several hundred million dollars” to the first filer.

17. A brand drug company can market a generic version of its own brand product at any time, including during the first filer’s exclusivity period. In that case, no ANDA is necessary because the brand company already has approval to sell the drug under its NDA. Such generics commonly are known as “authorized

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generics.” An authorized generic is chemically identical to the brand drug, but is sold as a generic product, typically through either the brand company’s subsidiary or through a third party.

18. In the absence of generic competition, a brand drug company typically will not undercut the profits on its branded drug by introducing a lower-priced authorized generic version of that drug. When an ANDA filer enters, however, an authorized generic may become attractive to the NDA holder as a means of maintaining some of the revenue it otherwise would lose to the generic competitor.

19. If an NDA holder discontinues the relevant drug, then the FDA moves the drug covered by the NDA to the Orange Book’s Discontinued Drug Product List. Generic drugs referencing the discontinued NDA still may be sold, but they will not be listed in the Orange Book as AB-rated to any branded product.

**B. State law encourages substitution of AB-rated generic drugs for brand drugs**

20. All 50 states and the District of Columbia have drug substitution laws that encourage and facilitate substitution of lower-cost AB-rated generic drugs for branded drugs. When a pharmacist fills a prescription written for a branded drug, these laws allow or require the pharmacist to dispense an AB-rated generic version of the drug instead of the more expensive branded drug, unless a physician directs or the patient requests otherwise. Conversely, these laws generally do not permit a pharmacist to substitute a non-AB-rated generic for a branded drug unless the physician specifically prescribes it by writing the chemical name of the drug, rather than the brand name, on the prescription.

21. State substitution laws were enacted in part because the pharmaceutical market does not function well. In a well-functioning market, a consumer selects and pays for a product after evaluating the product’s price and quality. In the prescription drug market, however, a patient can obtain a prescription drug only if the doctor writes a prescription for that particular drug. The doctor who selects the drug, however, does not pay for it and generally has little incentive to consider price when deciding

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which drug to prescribe. Instead, the patient, or in most cases a third-party payer such as a public or private health insurer, pays for the drug. But these purchasers have little input over what drug is actually prescribed.

22. State substitution laws are designed to correct this market imperfection by shifting the drug selection choice from physicians to pharmacists and patients who have greater financial incentives to make price comparisons.

**C. Competition from lower-priced generic drugs saves American consumers billions of dollars a year**

23. The Hatch-Waxman Act and state substitution laws have succeeded in facilitating generic competition and generating large savings for patients, healthcare plans, and federal and state governments. The first generic competitor's product is typically offered at a 20% to 30% discount to the branded product. Subsequent generic entry creates greater price competition with discounts reaching 85% or more off the brand price. According to a 2010 Congressional Budget Office report, the retail price of a generic is 75% lower, on average, than the retail price of a brand-name drug. In 2015 alone, the Generic Pharmaceutical Association reported that use of generic versions of brand-name drugs saved the U.S. healthcare system \$227 billion.

24. Because of these price advantages and cost savings, many third-party payers of prescription drugs (e.g., health insurance plans and Medicaid programs) have adopted policies to encourage the substitution of AB-rated generic drugs for their branded counterparts. As a result of these policies and lower prices, many consumers routinely switch from a branded drug to an AB-rated generic drug upon its introduction. Consequently, AB-rated generic drugs typically capture over 80% of a branded drug's unit and dollar sales within six months of market entry.

25. Consumers also benefit from competition between an authorized generic drug and an ANDA-based generic drug. Empirical evidence shows that competition from an authorized generic drug during the first-filer's 180-day exclusivity results, on average, in retail prices that are 4% to 8% lower and wholesale

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prices that are 7% to 14% lower than prices without authorized generic competition.

26. Competition from an authorized generic also typically has a significant financial impact on the first ANDA entrant. An authorized generic typically takes a significant share of the first ANDA entrant's generic sales, thereby reducing revenues during its 180-day exclusivity period by an average of 40% to 52%. Thus, if a brand company agrees to refrain from launching an authorized generic, it can double the first filer's revenues during the 180-day exclusivity period. This financial impact is well-known in the pharmaceutical industry.

### **Anticompetitive Conduct**

#### **A. Opana ER was a successful and rapidly growing branded drug**

27. Oxymorphone is a semi-synthetic opioid, originally developed over one hundred years ago. Opioids are one of the world's oldest known classes of drugs, and they have long been used to relieve pain. The FDA first approved oxymorphone in 1960.

28. Opana ER is an extended-release formulation of oxymorphone. 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." Unlike immediate-release drugs, extended-release medications like Opana ER have special coatings or ingredients that control how fast the active ingredient is released from the pill into the patient's body. Compared to an immediate-release oxymorphone formulation, Opana ER provides longer-lasting, 12-hour pain relief that allows the patient to take fewer pills each day.

29. Endo launched Opana ER in 2006 as the only extended-release version of oxymorphone on the market. The drug, available in seven dosage strengths (5, 7.5, 10, 15, 20, 30, and 40 mg), is used to treat pain for a wide variety of conditions, ranging from chronic back problems to cancer.

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30. Opana ER quickly became Endo's second best-selling drug. After a modest start of \$5 million in sales in 2006, sales grew to \$172 million in 2009. First quarter 2010 sales of \$66 million indicated continued growth.

31. Endo sells Opana ER at prices far above Endo's cost of manufacturing the product, making Opana ER highly profitable. Even accounting for other direct expenses Endo allocates to selling and marketing Opana ER, Endo's profit margin on Opana ER, ranging between 67% and 79%, is substantial.

**B. Potential generic competition from Impax threatened Endo's growing Opana ER business**

32. Opana ER's increasing sales drew the attention of numerous generic companies. Opana ER was an attractive target for generic drug makers because oxymorphone had been available for decades and was not subject to any meaningful patent protection. When Endo launched Opana ER in 2006, it only listed a single patent, No. 5,128,143 (the "143 patent"), in the Orange Book covering Opana ER. The '143 patent was not a meaningful, long-term barrier to generic competition because it was set to expire in September 2008. Endo's New Dosage Form exclusivity was set to expire in June 2009. With growing sales and no meaningful patent protection identified in the Orange Book, numerous generic entrants began preparing ANDAs for generic versions of Opana ER.

33. Following notice that a generic company had filed an ANDA to market a generic version of Opana ER, Endo listed three additional patents in the Orange Book in October 2007, well over a year after launching Opana ER.

34. On October 2, 2007, Endo listed Patent No. 7,276,250 (the "250 patent") relating to a mechanism for controlling the release of a drug's active ingredient over an extended period of time. This patent expires in 2023.

35. On October 19, 2007, Endo listed two additional patents pertaining to a controlled release mechanism—No. 5,662,933 (the "933 patent") and No. 5,958,456 (the "456 patent"). These



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patents had been issued by the U.S. Patent and Trademark Office up to a decade earlier—in 1997 and 1999, respectively. Endo failed to list the '456 and '933 patents in the Orange Book within 30 days of the FDA approving Endo's NDA for Opana ER as required under 21 C.F.R. § 314.53. The '933 and '456 patents expired in August 2013.

36. Eventually, at least nine companies submitted ANDAs seeking approval to market a generic version of Opana ER, including Impax, Actavis, and Watson. Each company included a paragraph IV certification asserting that its proposed generic product did not infringe Endo's patents and/or that Endo's patents were invalid or unenforceable. In response to each paragraph IV certification, Endo filed a patent infringement case, asserting that the generic product infringed either the '456 patent, the '933 patent, or both. Endo never asserted that any of the generic products infringed the '250 patent.

37. Impax submitted its ANDA, No. 79-087, on June 29, 2007 seeking approval to market a generic version of Opana ER. Although the FDA initially accepted the ANDA for substantive review, it later rescinded that acceptance due to certain deficiencies. Impax re-submitted ANDA No. 79-087, and the FDA accepted the application as of November 23, 2007.

38. On December 13, 2007, Impax notified Endo that it had submitted ANDA No. 79-087 with a paragraph IV certification stating that Impax's proposed generic product did not infringe Endo's '933 or '456 patents.

39. On January 25, 2008, Endo sued Impax for allegedly infringing the '456 and '933 patents. Because Endo sued Impax within 45 days of its paragraph IV notification, an automatic 30-month stay resulted. This stay prevented the FDA from granting final approval to Impax's ANDA until June 14, 2010, absent an earlier court finding that Impax's product did not infringe Endo's patents or that the patents were invalid or unenforceable.

40. Impax was the first generic company to file an ANDA with a paragraph IV certification for the 5, 10, 20, 30, and 40 mg strengths of Opana ER. Impax received first-filer exclusivity for

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those dosage strengths, precluding the FDA from approving any other generic versions of Opana ER until 180 days after Impax's generic launch. These dosage strengths account for over 95% of all Opana ER sales. Given Impax's first-filer status, if Endo could delay Impax's entry, Endo would delay all generics from entering the market for those dosages of Opana ER.

**C. Endo paid Impax to drop its patent challenge and refrain from competing until January 2013**

41. Throughout the first half of 2010, Impax prepared to launch its generic version of Opana ER at the expiration of the Hatch-Waxman 30-month stay on June 14, 2010, even if the patent challenge remained unresolved. Such generic entry is commonly referred to as an "at-risk launch."

42. On May 13, 2010, the FDA tentatively approved Impax's application for a generic version of Opana ER; final approval had to wait one month for the expiration of the Hatch-Waxman stay. Following the FDA's grant of tentative approval, the prospect of an Impax at-risk launch gained momentum. On May 13, 2010, Impax CEO Larry Hsu instructed his top executives to "alert" the Board of Directors of a "potential oxymorphone [*sic*] launch" and that "we will have a special Board conference call when we do decide to launch at risk on a later date." In materials presented to the Board of Directors that same month, Impax changed the "Current Assumption[]" for Opana ER from "no launch" to "At Risk Launch."

43. As of May 20, 2010, Impax had completed process validation, demonstrating that its manufacturing process was capable of consistently producing commercial quantities of generic Opana ER. Process validation is one of the final steps required by the FDA before launch. In addition, Impax had produced nine of the 17 lots required for launch quantities (equivalent to three months of generic market supply) and had sufficient inventory of active pharmaceutical ingredient to complete the remaining lots. Impax had also requested authorization from the Drug Enforcement Agency to purchase the additional active pharmaceutical ingredient needed to produce larger quantities of generic oxymorphone ER.

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44. Impax's impending launch presented a substantial risk to Endo's Opana ER monopoly. Endo knew that entry of AB-rated generic versions of Opana ER would cause Endo's Opana ER sales to drop rapidly and dramatically—possibly by as much as 85% within a year.

45. To protect and extend its Opana ER franchise in the face of potential generic entry, Endo had been working on a reformulated “crush resistant” version of Opana ER (“Reformulated Opana ER”) that would not be subject to automatic substitution from generic versions of its original formulation of Opana ER (“Original Opana ER”). Endo did not publicly disclose its reformulation plans.

46. Endo knew that the success of Reformulated Opana ER would hinge on whether Endo could introduce the product before it faced AB-rated generic competition for Original Opana ER. It is well known in the pharmaceutical industry that if generic versions of the original product (here, Original Opana ER) enter the market before the brand's follow-on product (here, Reformulated Opana ER), the follow-on product is likely to be much less successful. Indeed, Endo predicted that if a generic version of Original Opana ER were already on the market when it introduced Reformulated Opana ER, the reformulated version would capture only 30% to 32% of the Original Opana ER volumes.

47. In contrast, if Endo were to launch Reformulated Opana ER before generic entry, then Endo could expect to convert virtually the entire franchise to its reformulated product. Given these market realities, industry analysts have observed that “it is essential that the brand holder switch their patents to the new formulation before generic launch.”

48. Endo knew, however, that it would be unable to obtain FDA approval for its Reformulated Opana ER and convert the market before Impax could enter with its generic version of Original Opana ER. Endo, therefore, decided to purchase the time it needed by paying Impax not to compete until January 2013.

49. On or about June 8, 2010—just a week before Impax was expected to receive final FDA approval for its generic Opana ER

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and two days into the patent infringement trial—Endo and Impax reached a settlement embodied in two documents: (1) a Settlement and License Agreement; and (2) a Development and Joint Promotion Agreement (hereinafter, together the “Opana ER Agreement”).

50. Under the Opana ER Agreement, Endo agreed to pay Impax to abandon its patent challenge and to refrain from launching its generic version of Opana ER until January 1, 2013, approximately eight months before the expiration of the patents asserted in the infringement suit. This payment included two separate components. First, Endo guaranteed that Impax would receive a cash value commensurate with the supracompetitive profits that come with being the only seller of generic Opana ER for 180 days (“Guaranteed No-AG Payment”). Second, Endo agreed to pay Impax up to \$40 million purportedly for an independent development and co-promotion deal (“Side Deal Payment”).

51. Impax could not have obtained the Guaranteed No-AG Payment and the Side Deal Payment even if it had won the patent infringement litigation with Endo.

52. 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, and for the 30 mg dosage on July 22, 2010. Absent the Opana ER Agreement, Impax would have been legally permitted to launch its generic product at risk.

### **1. Guaranteed No-AG Payment**

53. Endo had the legal right and financial incentive to compete with an authorized generic version of Opana ER as soon as Impax entered with its generic product. Under the Opana ER Agreement, however, Endo agreed not to offer a competing authorized generic Opana ER product during Impax’s 180-day exclusivity period for the 5, 10, 20, 30, and 40 mg strengths.

54. The no-AG commitment was extremely valuable to Impax. With a no-AG commitment, the first filer’s revenue will approximately double on average compared to what the first filer

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would make if it faced authorized generic competition. A first filer makes significantly more without generic competition because: (1) the authorized generic takes a significant share of generic sales from the first filer; and (2) competition between the first-filer generic and the authorized generic drives down generic drug prices. The financial effects of an authorized generic on the first-filer generic are well known in the pharmaceutical industry.

55. The no-AG commitment was costly to Endo. Brand companies often introduce AGs to stem the large losses that result from the rapid shift from sales of branded drugs to cheaper generic products. Before settlement, Endo had been planning to launch an authorized generic if Impax launched at risk, estimating \$25 million in authorized generic revenues during the first six months following generic entry. Endo forecasted that launching an authorized generic would recoup as much as 35% of the branded Opana ER revenues it expected to lose during that time.

56. Impax suspected, however, that Endo was planning to shift the market to a reformulated version of Opana ER before the negotiated entry date and recognized that such a move would both undermine the value of the no-AG commitment as well as decimate the potential sales for Impax's first-to-file generic product. Endo denied any plans to introduce a reformulated version of Opana ER, despite its active efforts to do so.

57. Notwithstanding Endo's assurances, Impax sought to "protect [itself] from making no money." Impax proposed ways to address its concern through provisions that would expedite generic entry if Endo successfully introduced a reformulated product. Endo, however, rejected these proposals in favor of a so-called "Endo Credit."

58. Under the Endo Credit arrangement, Endo agreed to a "make good payment" to ensure that Impax would receive the supracompetitive profits that come with being the only seller of generic Opana ER even if Endo devalued the no-AG commitment by shifting the market to Reformulated Opana ER. Specifically, if, by the fourth quarter of 2012, Original Opana ER sales fell by more than 50% from the peak quarterly sales between the third quarter of 2010 and the third quarter of 2012, Endo would provide

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Impax with a cash payment. The dollar value of the Endo Credit was based on a formula designed to approximate Impax's expected profits as the only seller of a generic version of Opana ER assuming Endo had not launched Reformulated Opana ER. As Endo itself has explained, the Endo Credit was to ensure that Impax received "the expected bargained for benefit" of the no-AG commitment.

59. Ultimately, Endo introduced Reformulated Opana ER and discontinued Original Opana ER before Impax's generic Opana ER entry date under the settlement. Consequently, the value of the no-AG commitment fell and triggered Endo's obligation to pay Impax the Endo Credit, resulting in a payment from Endo to Impax of more than \$102 million.

**2. Side Deal Payment**

60. On or about the same day that Endo and Impax entered into the Settlement and License Agreement, Endo and Impax also entered into a development and co-promotion deal concerning a potential treatment for Parkinson's disease, code-named IPX-203. At the time of the deal, IPX-203 was still in the very early stages of pre-clinical development: Impax had not yet developed a formulation for the product, submitted an Investigational New Drug application to the FDA, or initiated any sort of clinical trials. Fewer than 1% of drugs in pre-clinical development ultimately receive FDA approval.

61. The development and co-promotion deal provided Impax with immediate cash, plus the potential for more in the future. Under the deal, Endo agreed to pay Impax \$10 million in cash up front and up to \$30 million in additional milestone payments. If Impax succeeded in developing the drug and obtaining FDA approval, Endo would have the right to co-promote the product in the United States to non-neurologists and to receive 65% to 100% of the profits generated by prescriptions from those doctors.

**D. Endo's payment to Impax is large**

62. At the time of the settlement, Impax expected to, and did, derive significant value from the Opana ER Agreement in the

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form of: (1) a Side Deal Payment of at least \$10 million and up to \$40 million; and (2) a Guaranteed No-AG Payment of at least \$37 million and potentially more than \$100 million. To date, Endo has paid Impax more than \$112 million under the Opana ER Agreement.

63. Endo's payment to Impax, both expected and actual, is large. First, the \$10 million payment under the development and co-promotion deal was guaranteed and non-refundable.

64. Second, the structure of the Guaranteed No-AG Payment ensured that Impax would derive significant financial value from either the no-AG commitment or the Endo Credit or both. Indeed, as Impax's chief negotiator explained, the possibility that Impax would receive little value from either the no-AG commitment or the Endo Credit was "so unlikely it wasn't worth worrying about."

65. Before the settlement, Impax expected that Endo would launch an authorized generic to compete with Impax's generic Opana ER product. According to Impax's internal forecasts, competition from an authorized generic would take 40% to 50% of Impax's expected unit sales and decrease the price of the remaining sales by more than 36%. With the no-AG commitment, Impax would not face this competition, retaining all generic Opana ER sales for six months at a supracompetitive price. At the time of the Opana ER Agreement, the value of the no-AG commitment to Impax ranged from \$37 to \$77 million.

66. If, however, consistent with its strategic plan, Endo destroyed the market opportunity for Impax's generic version of Original Opana ER, including the value of the no-AG commitment, then Impax would receive a cash payment under the Endo Credit. The Endo Credit payment was based on various factors affecting Impax's expected profits during the no-AG commitment period, including the generic substitution rate, expected generic pricing as a percentage of brand pricing, and Impax's net profit margin. If triggered, Endo's likely payment under the Endo Credit would be at least \$46 million and could exceed \$100 million (as actually occurred).

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67. Thus, as of the time the parties entered into the Opana ER Agreement, the total value of Endo's expected payment, including the Guaranteed No-AG Payment (at least \$37 million) and the Side Deal Payment (at least \$10 million), was at least \$47 million and potentially greater than \$100 million.

68. Endo's actual and likely payment to Impax far exceeds any reasonable measure of avoided litigation costs in the parties' underlying patent litigation. The settlement occurred late in the litigation, after trial had begun. By that time, Endo already had expended more than \$7 million in litigation fees and costs. Any remaining litigation costs would have been a small fraction of Endo's payment, whether measured against the actual amount paid (\$112 million) or any amount anticipated at the time of the Opana ER Agreement.

69. Endo's payment was designed to, and did, induce Impax to abandon its Opana ER patent challenge and agree to refrain from marketing its generic Opana ER product until January 2013. Impax's decision to settle was driven not by the strength of Endo's patent protection for Opana ER, but by the large payment Endo made to Impax. As Impax's president of generics stated to the CEO: "That money is really important as we all know."

70. Endo's payment to Impax exceeded the amount Impax projected to earn by launching its generic version of Opana ER. In May 2010—just a month before entering into the settlement—Impax projected its generic Opana ER product would generate about \$48 million in profits in its first 2½ years on the market—less than half the amount Endo already has paid Impax under the Opana ER Agreement. In fact, Endo's payment exceeded the sales generated by Impax's five new generic launches in 2013, including its generic version of Original Opana ER. As Impax explained in an SEC filing, its net income growth in 2013 was "primarily attributable" to Endo's \$102 million cash payment under the Opana ER Agreement.

71. Endo was willing to make this large payment to Impax because the January 2013 entry date would enable Endo to maintain monopoly prices for Opana ER throughout that period and beyond.



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**E. Endo's large payment to Impax is not justified**

72. Endo's large payment to Impax cannot be justified solely as compensation for the services to be performed by Impax.

73. The Guaranteed No-AG Payment is not compensation for goods or services provided by Impax to Endo. Indeed, Impax was not required to provide any goods or perform any service in exchange for the more than \$102 million Guaranteed No-AG Payment.

74. The purpose and effect of Endo's Guaranteed No-AG Payment were to induce Impax to abandon its patent challenge and agree not to compete with a generic version of Original Opana ER until January 2013. The payment is explicitly part of the Settlement and License Agreement and makes no economic sense absent Impax's agreement not to market a generic version of Opana ER until January 2013. Endo would not have agreed to the Guaranteed No-AG Payment without also securing Impax's agreement not to market a generic version of Opana ER until January 2013. Likewise, Impax would not have agreed to a January 2013 entry without also securing Endo's commitment to the Guaranteed No-AG Payment.

75. In addition, Endo's Side Deal Payment cannot be justified solely as compensation for the services to be performed by Impax under the deal. Instead, the purpose and effect of Endo's payment were to induce Impax to abandon its patent challenge and agree not to compete with a generic version of Original Opana ER until January 2013. Endo would not have agreed to make the large Side Deal Payment without also securing Impax's agreement not to market a generic version of Opana ER until January 2013. Likewise, Impax would not have agreed to a January 2013 entry without also securing the large Side Deal Payment.

76. Substantial evidence shows the direct link between Endo's Side Deal Payment and Impax's agreement to the January 2013 entry date, including:

- a. Endo and Impax never discussed a development agreement outside the context of settlement

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negotiations. Instead, the development deal and the Endo-Impax settlement agreement were negotiated and drafted at the same time, by the same people, and were held in escrow until both agreements were finalized.

- b. Impax had tried unsuccessfully for years to find a partner willing to invest in the development of a neurological drug in return for the right to co-promote the drug only to non-neurologists. As Impax's CEO explained: "So, we've been, for several years, we'll be looking for partner willing to take just the primary care physicians piece, and that's not easy. Most of the people don't want it. They say, why, if you want me to take that part, I want the whole market."
- c. Endo's substantial investment in the very early stages of drug development was contrary to the company's stated objective to invest in "marketed/market ready assets."
- d. Despite the incompatibility with Endo's corporate development strategy, and the absence of any other interested investor, Endo was nonetheless willing to accept limited co-promotion rights for the early-stage development project.
- e. The due diligence schedule for this purportedly independent business transaction was explicitly tied to the timing of the Opana ER patent trial and settlement negotiations. Due to the artificially compressed due diligence schedule and insufficient information on the proposed product, Endo based its financial valuation of the deal on a different Impax development project involving a wholly different drug.
- f. The \$10 million up-front payment was the largest Endo ever paid for a pre-clinical development product.
- g. Endo received nothing in return for its payment. Impax's development of the subject project, IPX-203, has been significantly delayed. In December 2015,

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without a single clinical trial completed, the parties terminated the side deal “by mutual agreement.”

77. In short, the financial terms of the development and co-promotion deal made no business or economic sense for Endo independent of Impax’s agreement to defer generic Opana ER entry until January 2013. The development and co-promotion deal provided the vehicle for Endo to pay Impax cash immediately as part of an overall compensation package to abandon its patent litigation and agree to stay out of the market for over 2½ years.

78. There are no other procompetitive benefits, countervailing efficiencies, or increases in consumer welfare from the Opana ER Agreement that outweigh the significant competitive harm caused by eliminating the risk of Impax’s generic entry until January 2013.

79. Moreover, Endo’s large payment to Impax was not reasonably necessary to achieve any potential procompetitive objective of the Opana ER Agreement.

**F. Endo settled with the other Opana ER first filer with no reverse payment, and a significantly earlier entry date**

80. On or about June 8, 2007, Actavis submitted ANDA No. 79-046 to the FDA for its generic version of Opana ER for the 5, 10, 20, and 40 mg dosages. After Endo listed the three patents purportedly relating to Opana ER in the Orange Book, Actavis submitted a paragraph IV certification stating that its proposed generic product did not infringe Endo’s patents and/or that Endo’s patents were invalid or unenforceable. On February 12, 2008, Actavis notified Endo that it had submitted ANDA No. 79-046 with a paragraph IV certification. On March 28, 2008, Endo sued Actavis for alleged infringement of only the ’456 patent. Because Endo sued Actavis within 45 days of its paragraph IV notification, an automatic 30-month stay resulted.

81. On or about May 29, 2008, Actavis notified Endo that it had amended its ANDA for a generic version of Opana ER to include 7.5 and 15 mg dosages and submitted a paragraph IV

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certification stating that its proposed generic product did not infringe Endo's patents. On July 11, 2008, Endo sued Actavis for alleged infringement of only the '456 patent. Because Endo sued Actavis within 45 days of its paragraph IV notification, an automatic 30-month stay resulted, preventing the FDA from granting final approval to Actavis's ANDA until November 2010, absent an earlier court finding that Actavis's product did not infringe Endo's patents or that the patents were invalid or unenforceable.

82. Actavis was the first generic company to file an ANDA with a paragraph IV certification for the 7.5 and 15 mg dosage strengths of Opana ER. As the first filer, Actavis was eligible for 180 days of exclusivity for those two dosage strengths as against any other ANDA product.

83. In February 2009, less than one year into the patent litigation, Endo settled its suit against Actavis. Under the terms of the settlement, Endo granted Actavis a covenant not to sue and a license for the sole asserted patent, the '456 patent, to begin marketing its generic version of Opana ER on July 15, 2011. In addition, Endo granted Actavis a covenant not to sue for the '250 and '933 patents—the two other patents listed in the Orange Book that Endo had not asserted in the litigation. That settlement involved no payment from Endo to Actavis.

84. Although Actavis had a license to enter in 2011, it was blocked from launching any of the five dosage strengths for which Impax was eligible for 180-day exclusivity (5, 10, 20, 30, and 40 mg), until such exclusivity expired or was otherwise lost.

**Market Power**

85. Until at least January 2013, Endo exercised market power in a relevant market that is no broader than extended-release oxymorphone ("oxymorphone ER") tablets approved by the FDA for sale in the United States. Endo shared its extended monopoly profits with Impax in exchange for its agreement to impede generic competition.

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86. There is substantial evidence of Endo's market power. Both Endo and Impax had forecast a dramatic decline in the average price of oxymorphone ER following entry of an AB-rated generic version of Opana ER. For example, Impax estimated that within one year of generic entry, AB-rated generic versions of Opana ER would be priced at approximately 5% of the brand product's WAC and would capture up to 90% of unit sales.

87. Even without an AB rating, Endo expected generic entry to have a dramatic impact on Reformulated Opana ER's revenues and unit sales: "[I]f additional generic companies enter the market with generic non-crush resistant oxymorphone extended release tablets [original formulation], Endo will experience immediate, dramatic, and irreparable price erosion and loss of sales." Indeed, as Endo predicted, Impax's and Actavis's non-AB-rated generic oxymorphone ER products captured significant share from Reformulated Opana ER through competitive pricing, with discounts of up to 40% off the brand price. In 2013, Impax's and Actavis's generic versions of Opana ER accounted for approximately 28% of all oxymorphone ER unit sales for all dosage strengths in 2013, increasing to approximately 37% for the first half of 2014. These results are consistent with Endo's own prediction that even non-AB-rated generics eventually would capture 40% or more of branded Opana ER sales.

88. If Endo were already facing robust competition to Opana ER, then the entry of generic oxymorphone ER would not have eroded the sales volume of branded Opana ER or the price of oxymorphone ER products so rapidly and dramatically.

89. In addition, other long-acting opioid products used to relieve moderate to severe pain have not meaningfully constrained Endo's pricing or sales of Opana ER. From 2007 to 2012, despite the availability of several other long-acting opioid products, Endo regularly raised the wholesale acquisition cost of Opana ER, from about \$9 per pill (40 mg) to over \$12 per pill (40 mg) without impacting sales. During that same period, the entry of new branded long-acting opioid products, such as Embeda and Exalgo, had no discernable impact on Opana ER prices or unit sales.

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90. Moreover, oxymorphone ER is not reasonably interchangeable with other pain relief medications used to treat the same or similar conditions. As Endo itself represented to the FDA and the medical community, “there is no therapeutically equivalent or pharmaceutically alternative substitutable product” to Opana ER. The abrupt discontinuation of an opioid product can result in severe withdrawal symptoms. Switching a patient from one opioid to another presents serious underdosing and overdosing risks to the patient and requires careful medical monitoring. Therefore, patients that have begun a successful course of treatment with an opioid such as Opana ER are unlikely to switch to another pain medication for economic reasons.

91. From its launch in 2006 through 2012, Opana ER accounted for 90% to 100% of the unit sales of oxymorphone ER products. By the end of 2013, even with competition from Impax’s and Actavis’s generic oxymorphone ER products, Endo’s branded Opana ER retained a 70% share of all oxymorphone ER unit sales because Endo converted the market to Reformulated Opana ER prior to generic entry.

92. Substantial barriers to entry exist in the oxymorphone ER market. Potential new branded drug competitors need to conduct expensive clinical trials and obtain FDA approval. Potential sellers of generic oxymorphone ER also face substantial barriers to entry, including the need to obtain FDA approval, costly specialized equipment and facilities, and Endo’s ability to trigger an automatic 30-month stay of FDA approval by filing a patent infringement lawsuit.

**Harm to Consumers and Competition**

93. By impeding generic competition, Respondent’s agreement with Endo denied consumers and other purchasers of Opana ER access to AB-rated generic versions of Opana ER that would offer the same therapeutic benefit as branded Opana ER but at a fraction of the price.

94. The agreement between Impax and Endo precluding Impax from launching a generic version of Opana ER until January 2013 harmed competition and consumer welfare by

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eliminating the risk that Impax would have marketed its generic version of Opana ER before that date. Through its agreement with Endo, Impax eliminated the potential that: (1) Impax would have launched its generic version of Opana ER before January 2013; or (2) Endo would have agreed to settle the patent litigation on terms that did not compensate Impax, but provided for generic entry earlier than January 2013.

95. Before the Opana ER Agreement, Impax had been preparing to enter with a generic version of Opana ER as early as FDA approval, which it received in June 2010. That entry would have quickly and significantly reduced Endo's market share, promoted economic efficiency, and led to significant price reductions for extended-release oxymorphone products. Impax abandoned its generic entry plans because it received a share of Endo's monopoly profits in the form of the Guaranteed No-AG Payment and the Side Deal Payment. Without the large payment, Impax would have launched its generic version of Opana ER prior to January 2013.

96. Entry of Impax's generic product would have given consumers the choice between branded Opana ER and lower-priced AB-rated substitutes for Opana ER. Many consumers would have purchased lower-priced AB-rated generic drugs rather than higher-priced branded Opana ER. Endo's contemporaneous forecasts assumed that approximately 85% of Opana ER unit sales would switch to an AB-rated generic version of Opana ER. Consumers likely would save hundreds of millions of dollars by purchasing generic versions of Opana ER. By entering into the anticompetitive agreement, Impax shared in Endo's additional monopoly profits at the expense of consumers.

97. Impax's agreement with Endo also prevented competition from other potential generic oxymorphone ER products for the most prescribed strengths of generic Opana ER, comprising 95% of total Opana ER sales. Under the Hatch-Waxman Act, Impax had 180-day exclusivity for those strengths, which prohibited the FDA from approving any other generic versions of Opana ER for those strengths until Impax's 180-day exclusivity period either expired or was forfeited. Because of Impax's anticompetitive agreement with Endo, the 180-day exclusivity period did not

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begin to run until January 2013, the entry date Endo paid Impax to accept. The Opana ER Agreement, therefore, precluded all generic Opana ER competition for the most prescribed strengths until January 2013. As a result of this conduct, Endo maintained its market power over oxymorphone ER products for 2½ years, allowing it to charge supracompetitive prices for Opana ER.

98. Absent injunctive relief, there is a cognizable danger that Impax will engage in similar violations causing future harm to competition and consumers. Respondent knowingly entered into and carried out a collusive anticompetitive scheme to preserve and share in Endo's monopoly profits. Impax did so conscious of the fact that this agreement would greatly enrich Impax and Endo at the expense of consumers.

99. Impax has incentives and the demonstrated interest to continue to enter such agreements in the future. Impax has entered into other similar reverse-payment agreements. For example, Impax has been sued for entering into a reverse-payment settlement involving the drug Solodyn.

100. Impax continues to develop and manufacture pharmaceutical products. Impax is regularly involved in multiple patent litigations relating to different drugs. Each of these patent litigations provides the incentive and opportunity to enter into another reverse-payment agreement.

**Violation Alleged**

101. As set forth above, Impax agreed to restrain competition in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

102. The acts and practices of Respondent, as alleged herein, constitute an 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.



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**NOTICE**

Notice is hereby given to Respondent that the nineteenth day of September, 2017, at 10:00 a.m., is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., 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 and prohibiting you from future violations of the law similar to those 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 or 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 hearing 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 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

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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, D.C. 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 (5) 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 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 entering into or attempting to enter into an agreement settling a patent infringement dispute in which: (i) the brand drug company provides to the generic drug company anything of the value *other than* the right to market its generic drug product prior to the expiration of the patent that is the basis of the patent litigation; and (ii) the generic drug company agrees not to research, develop, manufacture, market, or sell the generic drug product that is the subject of the patent litigation for any period of time.

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3. Prohibiting Respondent from entering into an agreement with another drug company that, in form or substance, prevents, restricts, or disincentives the brand drug company from competing with an authorized generic version of its drug product for some period of time.
4. 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.
5. Requiring, for a period of time, that Respondent document all communications with parties in which it is engaged in Hatch-Waxman patent litigation to document all settlement discussions, including the persons involved, the nature of the communication, and its duration, and that Respondent submit such documentation to the Commission.
6. Ordering Respondent 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.
7. 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.
8. Any other relief appropriate to prevent, correct, or remedy the anticompetitive effects in their incipience of any or all of the conduct alleged in the complaint.

**WHEREFORE, THE PREMISES CONSIDERED**, the Federal Trade Commission on this nineteenth day of January, 2017, issues its complaint against Respondent.

By the Commission.

Initial Decision

**INITIAL DECISION****I. INTRODUCTION****A. Summary of Complaint and Answer**

The Administrative Complaint in this case (“Complaint”), issued by the Federal Trade Commission (“FTC” or “Commission”) on January 19, 2017, alleges that a reverse payment settlement agreement between Respondent Impax Laboratories, Inc. (“Impax” or “Respondent”) 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 (“FTC Act”). Complaint ¶¶ 1, 3. The Complaint alleges that, through a settlement agreement entered into in June 2010 (the “Challenged Agreement” or the “Endo-Impax Settlement”), Impax, a generic drug manufacturer, agreed to abandon its legal challenge to patents held by Endo for a branded drug manufactured by Endo (Opana ER) and to forego launching its generic version of Opana ER until January 2013, in exchange for a large, unjustified “reverse payment” from Endo. Complaint ¶¶ 1, 3. According to the Complaint, the purpose and effect of the Endo-Impax Settlement was to ensure that Endo would not face generic competition for Opana ER until January 2013. Complaint ¶ 4.

Respondent filed its Answer and Defenses (“Answer”) to the Complaint on February 7, 2017. Respondent denied most material allegations in the Complaint and further asserted ten affirmative defenses, including its Eighth Defense, which averred that the challenged conduct had substantial procompetitive justifications, benefited consumers, and avoided infringement of valid patents, and that these procompetitive justifications have outweighed any alleged anticompetitive effects. Answer at 21.

**B. Procedural History**

Although the Complaint challenges an agreement between Impax and Endo, Endo is not a party to this enforcement action. As a result of a federal court action against Endo and others arising from a patent settlement in connection with Lidoderm,

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another product manufactured by Endo, Endo settled with the FTC and agreed to a stipulated order and permanent injunction that apparently resolved any FTC concerns regarding the conduct of Endo in this case. *See Federal Trade Commission v. Endo Pharms*, No. 17-cv-00312 (N.D. Cal. Feb. 2, 2017). Accordingly, this litigation proceeded only against Impax.

On August 10, 2017, Complaint Counsel filed a motion for partial summary decision with the Commission, requesting that the Commission declare that certain procompetitive justifications are not legally cognizable defenses to the conduct challenged in the Complaint, pursuant to the Supreme Court's decision in *FTC v. Actavis*, 133 S. Ct. 2223 (2013). *In re Impax Labs, Inc.*, 2017 FTC LEXIS 130, at \*11. Specifically, Complaint Counsel sought to preclude three arguments as to procompetitive benefits: (1) that the Endo-Impax Settlement enabled Impax to enter prior to expiration of various existing and future Endo patents; (2) that the Endo-Impax Settlement provided Impax with certainty that it could launch its generic products free from the risk of infringing Endo's existing and future patents; and (3) that the Endo-Impax Settlement enabled Impax to continue selling its generic product, while other potential generic sellers of Opana ER were enjoined due to a court ruling that two Endo patents obtained after the Endo-Impax Settlement were valid and infringed by such sellers. *Id.* at \*15 (Oct. 27, 2017). Complaint Counsel sought an order foreclosing Impax from making arguments to justify or otherwise defend the Endo-Impax Settlement on those bases. *Id.*

Under the Commission's Rules of Practice, the motion was not decided by the Administrative Law Judge ("ALJ"), but by the Commission.<sup>1</sup> By Order issued October 27, 2017, the

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<sup>1</sup> The Commission amended Rule 3.22 of its Rules of Practice in 2009 to allow "the Commission to decide legal questions and articulate applicable law when the parties raise purely legal issues." Proposed rule amendments; request for public comment, 73 Fed. Reg. 58,832, 58,836 (Oct. 7, 2008). "[C]ommenters (including the [Section of Antitrust Law of the American Bar Association ('Section')], criticized the [Commission's] proposed Rule change as unfairly invading the province of the independent ALJ and compromising the Commission's dual roles as prosecutor and adjudicator." Interim final rules with request for comment, 74 Fed. Reg. 1804, 1809 (Jan. 13, 2009). "For example, the Section argued that the proposed changes . . . could raise concerns about the impartiality and fairness of the Part 3 proceeding by permitting the

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Commission denied Complaint Counsel's motion. *Id.* at \*33. The Commission reasoned that the motion was premature because: (1) Respondent had not yet fully articulated the bases for its assertion of procompetitive justifications, *Id.* at \*15-18; and (2) the structure of the rule of reason for a reverse-payment settlement should be determined based on briefing and a factual record at trial. *Id.* at \*18, \*26-27. The Commission stated: "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." *Id.* at \*26-27. The Commission concluded: "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." *Id.* at \*32-33.

The evidentiary hearing began on October 24, 2017 and was completed on November 14, 2017. The hearing record was closed by Order dated November 17, 2017.<sup>2</sup> Complaint Counsel and Respondent ("the parties") filed concurrent post-trial briefs and proposed findings of fact on December 20, 2017.

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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).

<sup>2</sup> Over 1,250 exhibits were admitted into evidence, 37 witnesses testified, either live or by deposition, and there are 3,066 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 2,869 pages.

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By Order issued January 5, 2018, Endo was permitted to intervene in this action for the limited purpose of responding to Complaint Counsel's Post-Trial Brief and Proposed Order and opposing (1) any findings related to the alleged competitive effects of a 2017 settlement agreement between Endo and Impax and (2) any remedy that would order the nullification of that 2017 settlement, or otherwise affect Endo's rights under that agreement. Endo's brief on these issues, filed on January 16, 2018, has been considered.

Rule 3.51(a) of the Commission's Rules of Practice states that "[t]he Administrative Law Judge shall file an initial decision within 70 days after the filing of the last filed initial or reply proposed findings of fact, conclusions of law and order . . . ." 16 C.F.R. § 3.51(a). The parties filed replies to each other's proposed findings of fact, conclusions of law, and post-trial briefs and to Endo's January 16, 2018 brief on February 7, 2018.<sup>3</sup> Closing arguments were held on February 15, 2018.

Seventy days from the last filed reply proposed findings and conclusions and briefs was April 18, 2018, and, absent an order pursuant to Rule 3.51, the Initial Decision was to be filed on or before April 18, 2018. Based on the voluminous and complex record in this matter, an Order was issued on April 6, 2018, finding good cause for extending the time period for filing the Initial Decision by 30 days. Accordingly, issuance of this Initial Decision by May 18, 2018 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

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<sup>3</sup> The Commission's January 19, 2018 order extended the deadline for the parties to file their concurrent reply briefs and replies to proposed findings of February 7, 2018.

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contentions and arguments therein were thoroughly reviewed and considered.

Proposed findings of fact submitted by the parties but not accepted in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the merits of the case. Similarly, legal contentions and arguments of the parties that are not addressed in this Initial Decision were rejected, because they lacked support in fact or law, were not material, or were otherwise lacking in merit.<sup>4</sup> In addition, all expert opinion evidence submitted in this case has been fully reviewed and considered. Except as expressly relied on or adopted in this Initial Decision, such opinions have been rejected, as either unreliable, unsupported by the facts, or unnecessary to the findings and conclusions herein.

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 ALJ may not issue an order “except on consideration of the whole record or those parts thereof cited by a Party and

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<sup>4</sup> Ruling upon a decision of the Interstate Commerce Commission, and interpreting language in the Administrative Procedure Act that is almost identical to language in Commission 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 ALJs 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).



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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.”<sup>5</sup>

The parties’ burdens of proof are governed by Commission Rule 3.43(a), Section 556(d) of the 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

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<sup>5</sup> References to the record are abbreviated as follows:

CX – Complaint Counsel’s Exhibit

RX – Respondent’s Exhibit

JX – Joint Exhibit

Tr. – Transcript of testimony before the Administrative Law Judge

Dep. – Transcript of Deposition

IHT – Transcript of Investigational Hearing

CCB – Complaint Counsel’s Post-Trial Brief

CCRB – Complaint Counsel’s Post-Trial Reply Brief

CCFF – Complaint Counsel’s Proposed Findings of Fact

CCRRFF – Complaint Counsel’s Reply to Respondent’s Proposed Findings of Fact

RB – Respondent’s Post-Trial Brief

RFF – Respondent’s Proposed Findings of Fact

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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.

Commission Rule 3.45(a) allows the ALJ “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**

This decision arises from the first Part III administrative trial involving a reverse payment patent settlement agreement since the Supreme Court’s decision in *FTC v. Actavis*, 133 S. Ct. 2223 (2013). The evidence shows that, under the Challenged Agreement, Endo provided Impax with a reverse payment, the purpose and effect of which was to induce Impax to give up its

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patent challenge and agree not to launch a generic Opana ER until January 2013. Payment by a patent holder to a generic challenger to induce the generic challenger to drop its challenge and agree to stay out of the market, rather than face the risk of patent invalidation and resulting generic competition, is an anticompetitive harm under *Actavis*.

Under the facts of this case, however, the magnitude and extent of any anticompetitive harm is largely theoretical, based on an inference that, absent the Challenged Agreement, Impax's entry date, and therefore generic competition, would have been earlier than January 2013. The evidence shows that such earlier entry was unlikely. Moreover, even if, absent the Challenged Agreement, Impax would have entered the market substantially earlier than January 2013, the evidence demonstrates that the Challenged Agreement provided real and substantial procompetitive benefits to consumers that outweigh any anticompetitive effect. Among other things, the Challenged Agreement granted Impax a broad patent license covering Endo's existing and subsequently-acquired Opana ER-related patents, which has enabled Impax to sell generic Opana ER without interruption since launching its product in January 2013, while all other potential generic drug manufacturers have been enjoined by patent litigation. Indeed, Impax's product is not only the sole generic oxymorphone ER product available to consumers, but the only available oxymorphone ER product.

Weighing the anticompetitive harm and the procompetitive benefits, the evidence fails to prove that the Challenged Agreement was anticompetitive on balance. Rather, the evidence proves that the procompetitive benefits of the Challenged Agreement outweigh the anticompetitive harm. Thus, the evidence fails to demonstrate that the Challenged Agreement constituted an unreasonable restraint of trade. Accordingly, the evidence fails to prove a violation of Section 5 of the FTC Act. The Complaint must, therefore, be **DISMISSED**.

Initial Decision

**II. FINDINGS OF FACT****A. Background****1. Jurisdiction**

1. Impax Laboratories, Inc. (“Impax”) is a for-profit corporation with its principal place of business at 30831 Huntwood Avenue, Hayward, California. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-001 ¶ 1).
2. In addition to its Hayward, California headquarters, Impax operates out of its facilities in Middlesex, New Jersey, among other locations. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-001 ¶ 2).
3. Impax engages in the business of, among other things, developing, manufacturing, and marketing generic pharmaceutical drugs (“generics” or “generic drugs”). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-001 ¶ 3).
4. Impax 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, Fact, and Authenticity, JX001-001 ¶ 4).
5. Impax 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 1 of the Federal Trade Commission Act, 15 U.S.C. § 44. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-001-02 ¶ 5).

**2. Hatch-Waxman framework**

6. The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., as amended by the Drug Price Competition and Patent Term Restoration Act of 1984 (the “Hatch-

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Waxman Act”) and the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 21 U.S.C. §§ 355(b)(2) and 355(j) and 35 U.S.C. § 271(e), establishes procedures designed to facilitate competition from lower-priced generic drugs, while maintaining incentives for pharmaceutical companies to invest in developing new drugs. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-002-03 ¶ 12).

7. A company seeking to market a new pharmaceutical product must file a New Drug Application (“NDA”) with the U.S. Food and Drug Administration (“FDA”) demonstrating the safety and efficacy of the new product. 21 U.S.C. § 355. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-003 ¶ 13).
8. NDA-based products generally are referred to as “brand-name drugs,” “branded drugs,” or “brand drugs.” (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-003 ¶ 14).
9. The FDA requires NDA holders to identify patents that the NDA holder believes could reasonably be asserted against a generic company that makes, uses, or sells a generic version of the branded drug. 21 C.F.R. § 314.53. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-003 ¶ 15).
10. The NDA holder must submit these patents for listing in an FDA publication entitled *Approved Drug Products with Therapeutic Equivalence Evaluations* (commonly known as the Orange Book) within 30 days of issuance of the patent or within 30 days after approval of the NDA. 21 C.F.R. § 314.53. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-003 ¶ 16).
11. A company seeking to market a generic version of a branded drug may file an Abbreviated New Drug Application (“ANDA”) with the FDA. 21 U.S.C. § 355(j). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-003 ¶ 17).

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12. 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. 21 U.S.C. § 355(j)(2)(A)(iv). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-003 ¶ 18).
13. Upon showing that the generic drug is therapeutically equivalent to the approved branded drug, the generic company may rely on the studies submitted in connection with the approved branded drug's NDA to establish that the generic drug is safe and effective. 21 U.S.C. § 355(j)(2)(A). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-003-04 ¶ 19).
14. The FDA assigns a generic drug an "AB" rating if it is therapeutically equivalent to a brand-name drug. An AB-rated generic drug is the same as a brand-name drug in dosage form, safety, strength, route of administration, quality, performance characteristics, and intended use. A generic drug must also contain identical amounts of the same active ingredient(s) as the brand-name drug, although its inactive ingredients may vary. FDA, *Approved Drug Products with Therapeutic Equivalence Evaluations*, Preface § 1.7. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-004 ¶ 20).
15. When a brand-name drug is covered by one or more patents listed in the Orange Book, a company seeking to market a generic version of that drug before the patents expire must make a "Paragraph IV certification" in its ANDA certifying that the patents are invalid, unenforceable, and/or will not be infringed by the generic drug. 21 U.S.C. § 355(j)(2)(A)(vii)(IV). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-004 ¶ 21).
16. If an ANDA filer makes a Paragraph IV certification, it must notify the patent holder of its certification and the factual and legal bases for its assertion(s) that the relevant

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patent is invalid, unenforceable, and/or not infringed. 21 U.S.C. § 355(j)(2)(B). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-004 ¶ 22).

17. If the patent holder initiates a patent infringement suit against an ANDA filer within 45 days of receiving such notice (F. 16), the FDA may not grant final approval of the ANDA until the earliest of: (1) patent expiration date; (2) district court resolution of the patent litigation in favor of the generic company; or (3) the expiration of an automatic 30-month stay. 21 U.S.C. § 355(j)(5)(B)(iii). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-004 ¶ 23).
18. When a generic drug otherwise meets the FDA's criteria for approval but final approval is blocked by statute or regulation, such as the Hatch-Waxman 30-month stay, the FDA may tentatively approve the relevant ANDA. 21 U.S.C. § 355(j)(5)(B)(iv). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-005 ¶ 24).
19. Tentative approval of an ANDA by the FDA does not permit an ANDA filer to market its generic version of the drug. 21 U.S.C. § 355(j)(5)(B)(iv)(II)(dd)(BB). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-005 ¶ 25).
20. The FDA can issue final approval of a tentatively-approved drug once the 30-month stay expires. 21 U.S.C. § 355(j)(5)(B)(iii). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-005 ¶ 26).
21. The Hatch-Waxman Act provides the first generic company or companies filing an ANDA containing a Paragraph IV certification ("first filer") to a particular branded drug with a period referred to as the "180-day exclusivity" or "first-filer exclusivity" period. During this 180-day exclusivity period, no other generic manufacturer can sell its version of that particular branded drug. 21 U.S.C. § 355(j)(5)(B)(iv). (Joint Stipulations of

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Jurisdiction, Law, Fact, and Authenticity, JX001-005 ¶ 27; Second Set of Joint Stipulations, JX003 ¶ 7).

22. A brand drug company can market a generic version of its own brand product at any time, including during the first filer's exclusivity period. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-005 ¶ 28).
23. For a brand drug company to market a generic version of its own brand product, no ANDA is necessary because the brand company already has approval to sell the drug under its NDA. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-005 ¶ 29).
24. Brand drug companies' generic versions of their own brand products commonly are known as "authorized generics" ("AGs"). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-005 ¶ 30).
25. An authorized generic is chemically identical to the brand drug, but is sold as a generic product, typically through either the brand company's subsidiary or through a third party. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-005 ¶ 31).

### **3. Competition between brand and generic manufacturers**

26. A patient can obtain a prescription drug only if a doctor (or someone who is authorized to write prescriptions) writes a prescription for that drug. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-007 ¶ 11).
27. Doctors who select the medications they prescribe for their patients do not pay for the medications. Generally, when selecting appropriate medications for patients, doctors' primary concerns are efficacy and safety, rather than the cost of medications. (CX5002 (Savage Expert Report at



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063-64 ¶ 177, 180); Savage, Tr. 770-71; Michna, Tr. 2187-88; CX4046 (Michna, Dep. at 148-49)).

28. The patient, or in most cases a third-party payor such as a public or private health insurer, pays for the drug. These purchasers often have little input over what drug is actually prescribed, because physicians ultimately select and prescribe appropriate drug therapies. (CX5000 (Noll Expert Report at 031 ¶ 67); CX5002 (Savage Expert Report at 063 ¶ 177)).
29. All 50 states and the District of Columbia have drug substitution laws that encourage and facilitate substitution of lower-cost AB-rated generic drugs for branded drugs. When a pharmacist fills a prescription written for a branded drug, these laws allow or require the pharmacist to dispense an AB-rated generic version of the drug instead of the more expensive branded drug, unless a physician directs or the patient requests otherwise. Conversely, these laws generally do not permit a pharmacist to substitute a non-AB-rated generic for a branded drug unless the physician specifically prescribes it by writing the chemical name of the drug, rather than the brand name, on the prescription. (Second Set of Joint Stipulations, JX003 ¶ 72).
30. Because of the price advantages of generic drugs over branded drugs, many third-party payors of prescription drugs (e.g., health insurance plans and Medicaid programs) have adopted policies to encourage the substitution of AB-rated generic drugs for their branded counterparts. (CX5000 (Noll Expert Report at 030-32 ¶¶ 65, 67-69); CX6052 at 084-85).
31. Generic manufacturers typically charge lower prices than branded drug sellers. The first one or two generic products are typically offered at a 10% to 25% discount off the price of the branded product. Subsequent generic entry creates greater price competition which typically leads to discounts between 50% to 80% off the brand

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price. (CX5000 (Noll Expert Report at 048 ¶ 104); CX2607 (Lortie Decl. at 012 ¶ 29); CX6055 at 010).

32. Automatic substitution of the generic drug for the branded drug is the primary way that generic companies make their sales. (Mengler, Tr. 522; Engle, Tr. 1703).

**4. Opioids**

33. Opioid medications (“opioids”) are prescription drugs indicated for the treatment of moderate to severe pain. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-006 ¶ 2; Savage, Tr. 700-01).
34. Opioids are derived from opium. (Michna, Tr. 2104).
35. There are three types of opioids: ultra-fast-acting, immediate-release, and extended-release. (Michna, Tr. 2105; *see* Savage, Tr. 693).
36. Ultra-fast-acting opioids are medications that are absorbed through the mouth and have an initial onset of pain relief in about fifteen minutes. They are used to treat pain that comes on very suddenly and that may dissipate within an hour. (Michna, Tr. 2105).
37. Immediate-release (“IR”) opioids are short-acting pain medications that take effect within 30 to 45 minutes of ingestion and tend to last 3 to 6 hours. They are used to treat acute, short-lived pain as well as chronic pain. (Michna, Tr. 2106, 2118; Savage, Tr. 693, 702, 705).
38. Extended-release (“ER”) opioids provide continuous levels of medication in a patient’s blood over several hours, with effects lasting from 8 to 24 hours, and in the case of transdermal applications – patches that deliver medication through the skin – up to 7 days. (Michna, Tr. 2106; *see* Savage, Tr. 702).
39. Extended-release opioids have been pharmacologically formulated to provide gradual release of the opioid

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medication. In particular, the physical chemical structure of the tablet, capsule, or bead provides for slower release of the medication and, in turn, more gradual absorption by the body. (Savage, Tr. 693, 704-05).

40. Extended-release opioids generally are used for patients with sustained pain lasting longer than 12 to 24 hours, as well as chronic pain that requires relief 24 hours a day. (Savage, Tr. 705).

**B. Context for the Endo-Impax Litigation and Settlement****1. Opana ER**

41. Oxymorphone belongs to the class of drugs known as opioids. It is a semi-synthetic opioid used to relieve pain. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-006 ¶¶ 1-2).
42. The FDA first approved oxymorphone to relieve pain in 1960. (Second Set of Joint Stipulations, JX003 ¶ 1).
43. Opana ER is an extended-release formulation of oxymorphone. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-006 ¶ 3).
44. Opana ER is used to treat pain for a wide variety of conditions, ranging from chronic back problems to pain caused by cancer. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-006 ¶ 5).
45. Endo Pharmaceuticals Inc. (“Endo”) and Penwest Pharmaceuticals (“Penwest”) collaborated on the development and commercialization of Opana ER. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-011 ¶ 47).
46. The FDA approved Endo’s NDA for 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.” (Joint

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Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-006 ¶ 4).

47. In July 2006, Endo announced the commercial availability of Opana ER. At the time of launch in 2006, Opana ER was the only extended-release version of oxymorphone on the market.<sup>6</sup> (Second Set of Joint Stipulations, JX003 ¶ 3).
48. Endo ultimately offered Opana ER in seven dosage strengths (5, 7.5, 10, 15, 20, 30 and 40 milligram (“mg”)). (Second Set of Joint Stipulations, JX003 ¶ 3).

## 2. Endo’s initial patents for Opana ER

49. When Endo launched Opana ER in 2006, it listed a single patent in the Orange Book as covering Opana ER: U.S. Patent No. 5,128,143 (“the ’143 patent”). (CX3242 at 003).
50. The ’143 patent was set to expire in September 2008. (Second Set of Joint Stipulations, JX003 ¶ 4; CX3242 at 003).
51. In October 2007, Endo listed three additional patents in the Orange Book as covering Opana ER: U.S. Patent Nos. 7,276,250 (“the ’250 patent”), 5,662,933 (“the ’933 patent”), and 5,958,456 (“the ’456 patent”) (“the initial patents”). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-006 ¶ 9).
52. Endo listed the ’250 patent in the Orange Book on October 2, 2007. The ’250 patent will expire in February 2023. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-006 ¶¶ 9-10; Snowden, Tr. 351).
53. Endo listed the ’933 and ’456 patents on October 19, 2007. The ’933 and ’456 patents expired in September

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<sup>6</sup> As set forth in F. 110, Endo introduced a reformulated version of Opana ER in 2012. Unless otherwise specified, the term “Opana ER” as used herein refers to original Opana ER.

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2013. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-006 ¶¶ 9-10; Snowden, Tr. 351).

54. The '250, '933, and '456 patents all pertain to the controlled-release mechanism of the oxymorphone formulation. (Second Set of Joint Stipulations, JX003 ¶ 6).

### 3. Overview of Endo-Impax litigation and settlement

#### a. Impax's Abbreviated New Drug Applications

55. In June 2007, Impax filed an Abbreviated New Drug Application (No. 79-087) for a generic version of Opana ER, also referred to as generic oxymorphone ER.<sup>7</sup> (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-007 ¶ 11; Second Set of Joint Stipulations, JX003 ¶ 4).
56. As of June 2007, the '143 patent was the only patent listed in the Orange Book as covering Opana ER. (Second Set of Joint Stipulations, JX003 ¶ 4; CX2967 at 014, 017).
57. Impax's June 2007 ANDA utilized a Paragraph III certification for the '143 patent. A Paragraph III certification meant that Impax's ANDA would be eligible for FDA approval upon the '143 patent's expiration in September 2008. (Second Set of Joint Stipulations, JX003 ¶ 4; CX2967 at 017).
58. Following Endo's listing of additional patents in the Orange Book in October 2007 (F. 51-53), Impax amended its ANDA to include Paragraph IV certifications for the '250, '933, and '456 patents. With respect to the '250, '933 and '456 patents, Impax certified that, "in its opinion and to the best of its knowledge," those patents were "invalid, unenforceable, or will not be infringed by the manufacture, use, or sale of the oxymorphone

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<sup>7</sup> Endo and Impax both refer to a generic version of Endo's Opana ER as either "generic Opana ER" or "generic oxymorphone ER" interchangeably.

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hydrochloride extended-release tablets for which” Impax’s ANDA had been submitted. Impax was the first company to file an ANDA with Paragraph IV certifications for the 5, 10, 20, 30, and 40 mg dosages strengths of Opana ER. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-007 ¶¶ 12, 13; Second Set of Joint Stipulations, JX003 ¶ 7; Snowden, Tr. 355).

59. On November 23, 2007, the FDA accepted Impax’s ANDA with an amendment to include Paragraph IV certifications for the ’250, ’933, and ’456 patents. (Second Set of Joint Stipulations, JX003 ¶ 7).
60. On December 13, 2007, Impax sent Endo notice of its Paragraph IV certifications for the ’250, ’933, and ’456 patents. In its notice, Impax asserted that its product did not infringe these patents. (Second Set of Joint Stipulations, JX003 ¶ 8; Snowden, Tr. 355, 413; CX2714).

**b. The filing of the Endo-Impax patent litigation  
and FDA approval of Impax’s ANDA**

61. On January 25, 2008, Endo and Penwest filed a patent infringement lawsuit against Impax in the federal district court in Delaware, alleging that Impax’s ANDA for generic oxymorphone ER infringed Endo’s ’456 and ’933 patents (“Endo-Impax patent litigation”). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-007 ¶ 15; Snowden, Tr. 413-14).
62. The filing of the Endo-Impax patent litigation triggered a statutory 30-month stay, meaning that the FDA could not approve Impax’s ANDA until the earlier of the expiration of 30 months or resolution of the patent dispute in Impax’s favor. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-007 ¶ 15).
63. The 30-month stay was set to expire on June 14, 2010. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-007 ¶ 16).

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64. The FDA granted tentative approval to Impax's ANDA on May 13, 2010. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-007 ¶ 17).
65. Tentative FDA approval is effectively the last step in an ANDA filer's approval efforts. (Koch, Tr. 340-41; *see* Snowden, Tr. 417-18 (tentative approval from FDA "suggest[s] that Impax was almost certain to get final approval at the conclusion of the 30-month stay")).
66. Impax received final approval for Impax's generic oxymorphone ER product on the 5, 10, 20, and 40 mg dosage strengths on June 14, 2010, upon expiration of the statutory 30-month stay. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-008 ¶ 21).
67. The FDA granted final approval to Impax's ANDA for the 30 mg dosage strength of generic oxymorphone ER on July 22, 2010. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-008 ¶ 22).

**c. Summary of proceedings**

68. In the Endo-Impax patent litigation, Endo alleged that Impax's generic oxymorphone ER infringed Endo's '456 and '933 patents. Endo did not allege that Impax's generic oxymorphone ER infringed Endo's '250 patent. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-007 ¶ 15; Snowden, Tr. 415-16; CX0304 at 002 ¶ 5).
69. Impax sought to transfer the Endo-Impax patent litigation from the federal district court in Delaware to the federal district court in New Jersey because the Delaware court was overloaded and Impax hoped the case would move faster in New Jersey. The court granted Impax's request and transferred the case to the federal district court in New Jersey. (Snowden, Tr. 357-58).

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70. The district court presiding over the Endo-Impax patent litigation held claim construction hearings on December 21, 2009 and March 19, 2010. (Second Set of Joint Stipulations, JX003 ¶ 18).
71. On April 5, 2010, the court in the Endo-Impax patent litigation issued an amended order on claim construction. The court adopted the constructions for “hydrophobic material” and “sustained release” proposed by Endo, and the parties stipulated to the construction of “homopolysaccharide.” (Second Set of Joint Stipulations, JX003 ¶ 19).
72. On May 19, 2010, the court scheduled the Endo-Impax patent infringement trial to begin on June 3, 2010 and continue through June 17, 2010. (Second Set of Joint Stipulations, JX003 ¶ 22).
73. The trial in the Endo-Impax patent litigation began on June 3, 2010. (Second Set of Joint Stipulations, JX003 ¶ 24; Figg, Tr. 1906; Hoxie, Tr. 2767).
74. On June 8, 2010, the Endo-Impax patent litigation was settled and the parties entered into the Settlement and License Agreement (“SLA”) and the Development and Co-Promotion Agreement (“DCA”). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-007-08 ¶¶ 18-19; Second Set of Joint Stipulations, JX003 ¶ 26).
75. The SLA incorporates the DCA. (Second Set of Joint Stipulations, JX003 ¶ 69). The SLA and the DCA are referred to collectively in this Initial Decision as the “Challenged Agreement” or the “Endo-Impax Settlement.”
76. At the time that Endo and Impax settled their patent litigation, the outcome of Endo’s patent infringement suit was uncertain. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-008 ¶ 20; Second Set of Joint Stipulations, JX003 ¶ 26).



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**4. Costs of litigation**

77. Although litigation costs vary substantially among cases, a survey by the American Intellectual Property Lawyers Association estimated that the median litigation cost for all patent cases with more than \$25 million at stake averages about \$5.5 million for each party. When such a case is handled by firms with more than 76 attorneys, the median litigation cost averages approximately \$7 million for each party. (CX5000 (Noll Expert Report at 108 ¶ 247 & n.278)).
78. At the time of the Endo-Impax Settlement, which occurred during trial, Endo had spent between \$6 and \$7 million and Impax had spent about \$4.7 million on litigation in the infringement case. (CX2696 at 013-14; CX3212 at 009-10; CX5000 (Noll Expert Report at 108 ¶ 247)).
79. The top end of the range that Impax uses in its budgeting process to estimate costs for a generic patent litigation is about \$3 to \$4 million per litigation. This \$3 to \$4 million estimate represents total expenses from the start of litigation to completion and is based primarily on expenses for outside counsel, such as hourly attorneys' fees. Impax might also allocate some expenses for its internal legal department's work on patent litigation, but those are minor amounts. (Reasons, Tr. 1221-22).
80. During a public earnings conference call in November 2011, Impax's then-chief financial officer ("CFO") stated that Impax had "lowered [its] patent litigation expense guidance for the full year for 2011 from \$13 million to \$10 million primarily due to recent settlements" and that Impax was going to save \$3 million in litigation expenses because of settlements, including the Endo settlement. (Koch, Tr. 262-63; CX2703 at 004).
81. A reasonable estimate of the combined saved litigation costs for both Endo and Impax for settling the patent litigation in June 2010 is approximately \$5 million. (F. 77-80; Noll, Tr. 1463).

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**5. Other Endo litigation on initial Opana ER patents**

82. Eight companies submitted ANDAs seeking approval to market a generic version of Opana ER. Each company included a Paragraph IV certification asserting that its proposed generic product did not infringe Endo's patents and/or that Endo's patents were invalid or unenforceable. (Second Set of Joint Stipulations, JX003 ¶ 5; CX2607 at 008-09 (Lortie Decl. ¶ 24)).
83. In addition to suing Impax (F. 61), Endo sued all other Opana ER ANDA filers, alleging infringement of one or more of Endo's initial patents. Those suits settled, with the generic companies receiving patent licenses covering only the patents-in-suit. (Snowden, Tr. 440; RX441; RX442; RX443; CX3192).
84. Actavis South Atlantic LLC ("Actavis") filed its ANDA on February 14, 2008 covering all dosage strengths of Opana ER. Actavis was the first to file an ANDA for the 7.5 and 15 mg dosages of Opana ER. (Second Set of Joint Stipulations, JX003 ¶ 12; Snowden, Tr. 370; CX6039 at 003).
85. In March 2008, Endo sued Actavis, alleging that Actavis' ANDA covering the 5, 10, 20, and 40 mg dosages of generic oxymorphone ER infringed the '456 and '933 patents. (Second Set of Joint Stipulations, JX003 ¶ 13).
86. In July 2008, after Actavis amended its ANDA to include the 7.5, 15, and 30 mg dosages of generic oxymorphone ER, Endo filed a second suit against Actavis, alleging that Actavis' ANDA for those dosages infringed the '456 and '933 patents. (Second Set of Joint Stipulations, JX003 ¶ 14).
87. Effective February 20, 2009, Actavis settled the patent litigation with Endo relating to generic Opana ER and received a license to the litigated patents starting no later than July 15, 2011. (Second Set of Joint Stipulations,

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JX003 ¶ 15; CX3383 (Actavis settlement); Snowden, Tr. 370-71).

88. Actavis launched its 7.5 and 15 mg generic Opana ER products, for which it possessed first-filer exclusivity, in July 2011. (CX4034 (Rogerson, Dep. at 13)).
89. Actavis launched its 5, 10, 20, 30, and 40 mg generic Opana ER products on September 17, 2013, several months after the expiration of Impax's first-filer exclusivity. (CX2973; *see* CX4034 (Rogerson, Dep. at 13)).

### **6. Endo's market power**

90. At the time Endo entered into the Endo-Impax Settlement in June 2010, Endo had 100% of the market share for oxymorphone ER. (CX5000 (Noll Expert Report at 083 ¶ 189)).
91. In the pharmaceutical industry, brand-name drug patent holders have the ability to exclude firms from the market in the sense that they are entitled by law to delay competitive entry by generic manufacturers. (CX5000 (Noll Expert Report at 086 ¶ 199)).
92. Barriers to entry in the pharmaceutical industry include intellectual property rights, such as patents, and regulatory impediments, such as provisions of the Hatch-Waxman Act (F. 93). (Noll, Tr. 1408; CX5000 (Noll Expert Report at 084-85 ¶ 194)).
93. The regulatory procedures imposed by the Hatch-Waxman Act allow a brand-name drug to be protected against entry in two ways. First, if a branded drug company files a patent infringement suit against a Paragraph IV ANDA filer, the Hatch-Waxman Act provides a 30-month stay before the FDA can approve the ANDA. Second, non-first-filer Paragraph IV ANDA applicants have to wait at least 180 days after the first filer has entered before they can enter a market. (Joint Stipulations of Jurisdiction,

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Law, Fact, and Authenticity, JX001-004 ¶ 23; CX5000 (Noll Expert Report at 084-85 ¶ 194)).

94. The 30-month stay imposed by the Hatch-Waxman Act (F. 93) benefited Endo in the form of a regulatory entry barrier to the market for oxymorphone ER. (CX5000 (Noll Expert Report at 086-87 ¶ 194)).
95. Because the Paragraph IV procedures of Hatch-Waxman prevent entry by the first-filer generic for up to 30 months after a generic firm files an ANDA and by other generics for another 180 days, the patents at issue in the Impax infringement case gave Endo the power to exclude competitors even if its patents eventually were found not to be valid or infringed. (CX5000 (Noll Expert Report at 086-87 ¶ 199)).

**7. Endo's plan to reformulate Opana ER**

96. Since 2007, Endo had been working on a reformulated “crush-resistant” version of Opana ER (“reformulated Opana ER”) to replace the original version. Reformulated Opana ER was also referred to internally by Endo as EN3288 and Revopan. (CX3214 at 015; CX3199 at 046; RX007 at 0001).
97. Introducing a reformulated Opana ER was a potential way for Endo to preserve the value of its Opana ER franchise even after generics became available for original Opana ER. (CX3205 at 001 (“There is also a life cycle management (LCM) imperative for Endo’s Opana ER franchise. . . . To ensure we continue to protect the franchise in the face of loss of regulatory exclusivity in June 2009, a TRF [tamper-resistant formulation] of ER will be important to secure. Without this LCM strategy, Opana ER is expected to lose about 70% of its sales within six months if generic entry occurs.”)).
98. Reformulating Opana ER would extend the life of the brand through additional patent protection and other possible roadblocks for potential generic competitors.

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(CX2724 at 005 (forecasting up to four years of “organic exclusivity” and retaining all Opana ER sales if launched with labeling claims and ahead of generics); CX3205 at 001; CX3251).

99. In order to maximize the value of reformulated Opana ER, Endo’s goal was to launch the reformulated product before the entry of a generic for original Opana ER, with sufficient time to transition patients from original Opana ER to reformulated Opana ER. Endo forecasted peak-year sales of more than \$199 million in 2016 if reformulated Opana ER beat generics and was the first to enter the market. If, however, reformulated Opana ER was launched after generic entry, estimated peak annual sales in 2016 were \$10 million. (CX2578 at 008-09 (Dec. 11, 2007 Opana Brand LCM Update, stating that Endo’s “Priority #1” was to “Beat Generics by 1 Year”)).
100. Endo forecasted that launching reformulated Opana ER ahead of a launch of a generic for original Opana ER would result in an increased demand for the reformulated product because patients will have been transitioned to the reformulated product. (CX2724 at 006; CX2578 at 008-09; CX4025 (Bingol, Dep. at 95-96)).
101. Endo forecasted significant erosion of its Opana ER franchise if Endo was unable to get reformulated Opana ER approved in a timely manner. If Endo launched reformulated Opana ER at the same time that a generic for original Opana ER came onto the market, reformulated Opana ER would capture at most 30% to 32% of Endo’s sales of original Opana ER. (CX1106 at 004; CX2724 at 006 (generic entry would result in steep drop in Opana ER sales unless EN3288 were approved with tamper resistance claims ahead of generic entry); CX1320 at 003 (projecting only \$11.9 million in Oxy TRF revenues for 2011); 007 (forecasting rapid generic erosion upon generic entry in July 2011); 024 (“Oxymorphone TRF conversion from OPANA ER base volume: 30% to 32% conversion of base volume; Conversion curve begins at launch (July 2011); Peak conversion (30%) reached in 40 months”)).

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102. Endo planned to remove original Opana ER from the market after introducing reformulated Opana ER. (CX1108 at 008 (noting that “it is likely that removal of Opana ER will be a condition of Revopan approval by FDA” and assuming launch of Revopan in February 2011 and ending shipment of Opana ER by October 2011)).
103. Launching reformulated Opana ER as far ahead as possible of generic entry on original Opana ER would allow Endo to separate the reformulated brand product from potential generics with a reasonable amount of time to make the conversion and create the most value. (CX4025 (Bingol, Dep. at 63-64); CX2578 at 009).
104. Endo wanted to introduce reformulated Opana ER as soon as possible. (CX4025 (Bingol, Dep. at 32); Bingol, Tr. 1295 (“the quicker you get to market, the better”)).
105. In 2010, Endo forecasted filing its application for approval of reformulated Opana ER with the FDA during the third quarter of 2010 and that the approval process would take between four and ten months. Depending on various assumptions, Endo forecasted launching reformulated Opana ER sometime in 2011. (CX2575 at 004; CX1108 at 008 (assuming launch in February 2011); CX3038 at 001 (projecting range for launch between December 2010 and June 2011); *see also* CX2573 at 004 (projecting May 2011 launch); CX2724 at 005 (projecting range for launch between January and September 2011)).
106. Endo understood that patients cannot be switched immediately from one long-acting opioid to another because physicians are “very careful as they adjust dosages” for patients. Endo sought “an orderly and phased transition from one product to the other so [it] made sure [it wasn’t] leaving any current patients in a difficult situation.” Such a transition would take about six to nine months. (CX4019 (Lortie, Dep. at 39-42, 156-57); Mengler, Tr. 530-31).

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107. Endo's plan to reformulate Opana ER and transition the market to the new product, prior to entry of a generic original Opana ER, would be adversely affected if Impax launched its generic at risk<sup>8</sup> in June 2010. (CX2724 at 001).
108. If Impax launched a generic Opana ER at risk, Endo planned to launch an authorized generic for original Opana ER. (CX2576 at 003 ("We will launch on word/action of first generic competitor."); CX2581 at 001 ("Endo is prepared to launch an authorized generic if another generic is approved first."); CX2573 at 004 (Endo planned a "[l]aunch of authorized generic" in the event that Impax launched at risk); CX3007 at 003 ("If Impax launches, Endo will launch its authorized generic . . .")).
109. Endo did not intend to launch both a reformulated Opana ER and an authorized generic of original Opana ER at the same time. This is because it would have been "very difficult [for Endo] to justify" having a crushable authorized generic on the market at the same time as a crush-proof reformulation. Endo "intended to replace one product with the other, and that would be the only [Opana ER] product that [Endo] had on the market." (CX4019 (Lortie, Dep. at 117-18); Bingol, Tr. 1338-39; *see also* CX1108 at 008 (Endo forecast noting that "it is likely that removal of Opana ER will be a condition of Revopan approval by FDA"))).
110. In March 2012, Endo stopped distributing original Opana ER and launched reformulated Opana ER. (Second Set of Joint Stipulations, JX003 ¶ 33; CX4017 (Levin, Dep. 139)).
111. On June 8, 2017, the FDA publicly requested that Endo voluntarily withdraw its reformulated Opana ER product from the marketplace. On September 1, 2017, Endo ceased sales of reformulated Opana ER. (Second Set of Joint Stipulations, JX003 ¶¶ 55, 57).

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<sup>8</sup> An "at-risk launch" is further explained in F. 451-464.

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**C. The Challenged Agreement****1. Preliminary negotiations**

112. Impax and Endo first attempted to settle their patent dispute in the fall of 2009, before the claim construction hearing in the Endo-Impax patent litigation. (RX359; RX285; Second Set of Joint Stipulations, JX003 ¶¶ 16-17).
113. At the time of the settlement negotiations (fall 2009 until settlement on June 8, 2010), Larry Hsu was Impax's chief executive officer ("CEO"), Chris Mengler was president of Impax's generics division, Margaret Snowden was Impax's vice president of intellectual property litigation and licensing, and Arthur Koch was Impax's CFO. Mr. Mengler was Impax's lead settlement negotiator until he was replaced as the lead negotiator by Mr. Koch and Ms. Snowden on June 4, 2010. (Koch, Tr. 217-18, 227-30, 310-11, 322-23; Snowden, Tr. 362).
114. At the time of the settlement negotiations (fall 2009 until settlement on June 8, 2010), Guy Donatiello was Endo's senior vice president of intellectual property and Alan Levin was Endo's CFO. Mr. Donatiello and Mr. Levin were the principal negotiators for Endo. (Snowden, Tr. 362, 373-74).
115. Impax was aware during settlement discussions with Endo in the fall of 2009 that Endo already had agreed to a July 15, 2011 entry date for Actavis' generic oxymorphone ER dosages. (CX4003 (Snowden, IHT at 56-57); CX0309 at 001-02).
116. Settlement discussions between Endo and Impax in the fall of 2009 included potential generic entry dates. Specifically, Ms. Snowden proposed to Mr. Donatiello that Impax should be able to enter around July 2011 or possibly December 2011 or January 2012, to approximate the midpoint between the expiration of the 30-month stay in June 2010 (F. 63) and the expiration of the asserted



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patents in September 2013 (F. 53). Mr. Donatiello rejected Ms. Snowden's proposal, arguing that Impax's entry date should be around the midpoint between the conclusion of litigation through appeal and patent expiration. (CX4003 (Snowden, IHT at 56-57); Snowden, Tr. 418-20; Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-006 ¶ 10).

117. Settlement discussions between Endo and Impax in the fall of 2009 included discussions of a potential product collaboration. (*See* II.C.3).
118. Settlement discussions between Endo and Impax that had commenced in the fall of 2009 ended after a conference call on December 7, 2009. (CX1301 at 112).
119. Impax and Endo resumed settlement discussions in mid-May 2010, approximately one month before the June 14, 2010 expiration of the 30-month stay of Impax's ANDA imposed by the Hatch-Waxman Act and approximately three weeks before the scheduled June 3, 2010 trial in the Endo-Impax patent litigation. (Snowden, Tr. 418; CX0310 at 004; CX1301 at 112; F. 63, 73).
120. On or about May 14, 2010, Endo became aware that Impax had received tentative FDA approval for generic Opana ER, based on a press release issued by Impax. Endo had a discussion with its outside counsel the same day regarding the status of settlement discussions with Impax. (CX1307 at 001; CX1301 at 112).
121. In an internal Impax email between Dr. Hsu and Mr. Mengler on May 14, 2010, Dr. Hsu hypothesized a settlement with Endo with a January 2011 launch and a no-AG provision,<sup>9</sup> to which Mr. Mengler replied that he would "love" a settlement. (CX0505 at 001).

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<sup>9</sup> A no-AG provision, also referred to as a no-AG agreement, is a provision through which a brand-name drug company agrees not to launch an authorized generic in competition with the generic drug company's product during the 180-day exclusivity period. (Koch, Tr. 235; Snowden, Tr. 392).

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122. On May 17, 2010, Mr. Donatiello of Endo contacted Ms. Snowden of Impax by voicemail and email to resume settlement discussions. That afternoon, Ms. Snowden and Mr. Donatiello discussed a potential settlement for the first time since December 2009. (CX0310 at 004; RX316 at 0001; CX4003 (Snowden, IHT at 83-84)).
123. The SLA and the DCA were negotiated together, with contract terms for both agreements discussed in the same documents exchanged between Endo and Impax. (Koch, Tr. 244; *see, e.g.*, CX0320; RX565; CX0406 at 001; CX0407 at 001-02; CX3183 at 001).

**2. The Settlement and License Agreement****a. Overview of relevant provisions**

124. Under the SLA, Impax agreed not to launch its generic oxymorphone ER product until January 1, 2013. (RX364 at 0001-02, 0009 (executed SLA §§ 1.1, 4.1(a)) (granting license and defining the “Commencement Date”)).
125. Under the SLA, Endo granted Impax a license both to the initial Opana ER patents (defined in the SLA as the ’933, ’456, and ’250 patents and any reissuances thereof), and to “any patents and patent applications owned by Endo or Penwest . . . that cover or could potentially cover the manufacture, use, sale, offer for sale, importation, marketing or distribution of products . . . that are the subject of the Impax ANDA . . . .” (RX364 at 0009 (SLA § 4.1(a)); Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-009-10 ¶ 35).
126. Under the SLA, Endo provided Impax with a “covenant not to sue,” which prohibited Endo and its affiliates from suing Impax for patent infringement on any of the patents licensed pursuant to section 4.1(a) (F. 125). (RX364 at 010 (SLA § 4.1(b)); *see also* Figg, Tr. 1963-64; Hoxie, Tr. 2885).

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127. Under the SLA, the license granted by Endo to Impax to sell generic Opana ER was exclusive during Impax's 180-day first-filer exclusivity period for the five dosage strengths for which Impax had filed an ANDA. This exclusive license grant meant that Endo could not sell an authorized generic product of these five dosages until Impax's 180-day exclusivity period ended. (RX364 at 0010-11 (SLA § 4.1(c)); CX3164 at 009-10).
128. Under the SLA, Impax would be obligated to pay Endo a 28.5% royalty on Impax's generic Opana ER sales during Impax's 180-day exclusivity period in the event that sales of Opana ER grew by a specific percentage prior to Impax's entry. Specifically, the royalty was owed if Opana ER sales in the quarter before Impax's licensed entry "exceed[ed] \$46,973,081 compounded quarterly at an annual rate of ten percent . . . ." Otherwise, Impax had no obligation to pay a royalty. (RX364 at 0012 (SLA § 4.3)).
129. Under the SLA, pursuant to a provision titled "Endo Credit," Endo would be obligated to make a cash payment to Impax in the event Endo's Opana ER dollar sales (as calculated by units multiplied by the wholesale acquisition cost ("WAC")) fell by more than 50% from the "Quarterly Peak" (the highest sales quarter between Q3'2010 and Q3'2012) to the fourth quarter of 2012 (the quarter before Impax would be permitted to launch its generic oxymorphone ER product). (RX364 at 0003-06, 0012 (SLA §§ 1.1, 4.4, definitions of "Endo Credit," "Market Share Profit Factor," "Market Share Profit Value," "Pre-Impax Amount," "Prescription Sales," "Quarterly Peak," and "Trigger Threshold"))).
130. In January 2013, Impax launched generic oxymorphone ER in the 5, 10, 20, 30, and 40 mg dosage strengths per the terms of the SLA. (Second Set of Joint Stipulations, JX003 ¶ 40).

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**b. Negotiations of the SLA****i. Initial term sheet**

131. On May 26, 2010, Mr. Donatiello of Endo sent to Mr. Mengler and Ms. Snowden of Impax two term sheets.<sup>10</sup> Endo's initial term sheet for the SLA included a proposed license agreement with a no-AG provision. Specifically, the proposed license agreement provided that Impax would have an "Exclusivity Period" of 180 days for each of the dosages for which Impax held first-to-file exclusivity (5, 10, 20, 30, and 40 mg), during which Impax's license "would be exclusive as to all but (i) Opana ER®-branded products that are not sold as generic products and (ii) generic products covered by prior license agreements executed as of the effective date of the License Agreement with Impax." (CX0320 at 009-10).
132. Endo's May 26, 2010 initial term sheet for the SLA included a proposed license agreement that granted Impax a license to sell generic Opana ER with a commencement date of March 10, 2013 and provided that Impax would not enter the market prior to that commencement date. (CX0320 at 009).
133. Delaying Impax's entry was valuable to Endo. Endo calculated that "[e]ach month that generics are delayed beyond June 2010 is worth ~\$20 million in net sales per month." Endo forecasted that if Impax launched its generic in July 2010, Endo would lose approximately \$100 million in branded Opana ER sales during the first six months Impax was on the market. Endo forecasted that it would lose 85% of its branded Opana ER sales within three months of generic entry. (CX1106 at 005; CX3445 at 001, 002; CX1320 at 007).
134. The proposed license agreement included with Endo's May 26, 2010 initial term sheet for the SLA was limited to the then-issued Opana ER patents (defined as the '933,

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<sup>10</sup> The May 26, 2010 term sheet relating to the DCA is discussed in F. 294.

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'456 and '250 patents), and any issued continuations thereof. (CX0320 at 006-07, 009-10).

135. The proposed license agreement included with Endo's May 26, 2010 initial term sheet for the SLA contained a provision requiring Impax to pay royalties to Endo at a rate of 35% on Impax's gross sales of generic Opana ER during Impax's 180-day exclusivity period, if Endo's gross sales of Opana ER during the three full calendar months before Impax's entry date exceeded a certain specified dollar amount. (CX0320 at 010).

**ii. Impax's counteroffer**

136. Impax responded to Endo's May 26, 2010 initial term sheets (F. 131) on May 27, 2010, with a counteroffer. (RX318).
137. Impax's May 27, 2010 counteroffer to Endo, transmitted by Mr. Mengler to Mr. Levin of Endo, provided for a generic launch date of January 1, 2013, "with no authorized generic and certain acceleration triggers, including market degradation to any alternate product." (RX318 at 0001; Koch, Tr. 237-38; Snowden, Tr. 432; Mengler, Tr. 532).
138. An acceleration provision or trigger for market degradation would allow Impax to launch its generic oxymorphone ER product earlier than January 1, 2013 in the event that Opana ER brand sales fell by a certain amount or percentage. (CX4010 (Mengler, IHT at 33-34)).
139. Impax wanted a market acceleration provision as "protection in case Endo had any intentions of moving the market to a next-generation product." Impax had included similar provisions in other patent settlements with brand companies. (CX4032 (Snowden, Dep. at 104); CX4003 (Snowden, IHT at 121-22)).

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140. Although Impax did not have specific information about Endo's plans to reformulate Opana ER, Impax was concerned that Endo had "a secret plan to damage the market" with the introduction of a reformulated Opana ER product. (CX0217 at 001; *see* Snowden, Tr. 433-34; Mengler, Tr. 569-70; CX4017 (Levin, Dep. at 118)).
141. Impax had seen analyst reports suggesting that Endo was working on crush-resistant drugs generally. (CX2540 at 001; Mengler, Tr. 579-80).
142. In light of concern about opioid abuse, the FDA encouraged opioid manufacturers to "figure out a way to make them tamper-resistant [and] the primary manner in which companies were doing that was to make the tablet in such a manner that [it] couldn't be crushed." (Mengler, Tr. 569).
143. Impax was aware that Purdue Pharma, L.P., the manufacturer of OxyContin, had introduced a reformulated, crush-resistant version of its product and was withdrawing its original formulation. (Mengler, Tr. 569; CX4017 (Levin, Dep. at 118-19)).
144. Impax's May 27, 2010 counteroffer to Endo revised Endo's formula for calculating royalties to Endo in connection with the license to sell generic Opana ER by raising the amount of gross sales that would trigger a royalty payment, and revising the royalty calculation. (RX318 at 0001).
145. After receiving Impax's May 27, 2010 counteroffer, Mr. Levin of Endo responded by email that the parties were "[c]learly . . . too far apart" and suggested a conference call among Mr. Mengler and Ms. Snowden for Impax, and Mr. Levin and Mr. Donatiello for Endo. (CX1305 at 001).
146. Negotiators for Endo and Impax conferred by telephone on May 27, 2010, and over the weekend of May 28 and 29, 2010. (CX1301 at 113; CX310 at 005).

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**iii. Rejection of acceleration trigger and development of the Endo Credit**

147. Endo opposed the concept of accelerated entry and rejected Impax's request for a market acceleration trigger. Endo insisted to Impax "that they had no interest in" moving the market to a crush-resistant version of Opana ER and "they weren't planning to." (CX4032 (Snowden, Dep. at 104, 106-07); Snowden, Tr. 385; CX4014 (Hsu, IHT at 85-87)).
148. Endo's rejection of an acceleration trigger increased Impax's concern that Endo was going to switch the market to a crush-resistant version of Opana ER. (Mengler, Tr. 568).
149. Because the proposed settlement provided for "a period of time between the date of [FDA] approval and the . . . launch [in] January [2013]. [Impax was] worried about the control the brand had over their product during that time, and [Impax was] looking for a way to gain – take back some of that control away from the brand." (Koch, Tr. 240-41).
150. Mr. Mengler responded to Endo's insistence that Endo was not planning to move the market to a crush-resistant version of Opana ER that, "if you're telling me the truth and the product is really going to grow, well, you know, there will be something in it for you as well [and] if you're not telling me the truth, you're going to pay me what I would have made anyway." (CX4010 (Mengler, IHT at 35-36); *see also* CX4026 (Nguyen, Dep. at 164-66) (the "gist" of the Endo Credit was "Mr. Mengler basically telling Endo to put its money where its mouth was"))).
151. At an in-person meeting among negotiators for Endo and Impax held on June 1, 2010, Endo proposed to Impax that "if the product declines by more than 50%, [Impax] would be entitled to a 'make good' payment such that [Impax's] potential profits would equal to 50%." (RX387 at 0001

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(June 1, 2010 Mengler internal email recapping the “current proposal”); *see also* CX0310 at 005).

152. On June 1, 2010, Mr. Mengler of Impax, in an internal email to Dr. Hsu, Ms. Snowden and others, described the current proposal as including a generic launch date of February 1, 2013, with acceleration triggers. In addition, “[i]f the product grows beyond certain levels, we pay them [a percentage of profits] during the six month exclusivity . . . [I]f the product declines by more than 50%, we would be entitled to a ‘make good’ payment such that our potential profits would equal to 50%.” Mr. Mengler stated his opinion that he “still like[s] January” for the agreed generic launch date and that “[t]he make-good trigger is too low. A similar arrangement with, say a 75% number might be quite attractive.” (RX387).
153. Once Endo refused to agree to an acceleration trigger, and agreed instead to the concept of a make-whole payment, Impax stopped pursuing an acceleration trigger. (CX4018 (Koch Dep. at 71); Snowden, Tr. 385).
154. On the afternoon of June 3, 2010, negotiators for Endo and Impax reached an agreement in principle for settling the litigation. That same day, in an internal email from Mr. Mengler of Impax to Dr. Hsu, Ms. Snowden, Mr. Koch, and others, Mr. Mengler described the key provisions for the SLA. Generic launch would be January 1, 2013. The royalty provisions were further adjusted and “[i]f the units decline by more than 50% from peak at launch, make whole provisions kick in that protect the downside.” (CX0407 at 001-02; CX3334 at 001 (Mr. Levin reporting that Endo had “reached a handshake agreement with Impax); CX4012 (Donatiello, IHT at 139) (“Endo and Impax reached an agreement in princip[le] around midday on June 3rd.”); CX0114 at 001 (June 3, 2010, email from Mengler reporting that “[i]t seems all parties internally are good to go”).
155. On June 4, 2010, Mr. Mengler was replaced as Impax’s lead negotiator by Mr. Koch and Ms. Snowden. After an



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internal Impax management discussion that day, at the instruction of Impax management, Mr. Koch and Ms. Snowden had a conference call with Endo in which they proposed dropping the existing terms for the SLA and DCA, and entering into a “simple settlement” with the same July 15, 2011 entry date that Endo provided to Actavis in their settlement. (CX4032 (Snowden, Dep. at 97-99); Snowden, Tr. 372-74; CX507 at 001).

156. In response to Impax’s June 4, 2010 proposal for a simple settlement with a July 15, 2011 entry date (F. 155), Mr. Levin of Endo expressed anger that the terms of the deal he had negotiated with Mr. Mengler were not being honored, refused Impax’s request, and insisted on reverting back to the deal he had negotiated with Mr. Mengler. (CX4032 (Snowden, Dep. at 99-102); Snowden, Tr. 374-75).

**iv. Finalizing the SLA****(a) No-AG provision and Endo Credit**

157. Between June 4 and June 7, 2010, Endo and Impax exchanged numerous drafts, and redlined revisions thereto, of the SLA. (*See, e.g.*, CX0323 (June 4, 2010 Endo first draft); CX0324 (June 5, 2010 Impax revisions); CX2771 (June 6, 2010 Endo revisions); CX1813 (June 7, 2010 Endo revisions); CX2767 (June 7, 2010 Impax revisions); RX336 (June 7 Impax revisions); RX322 (June 7 Endo revisions); RX364 (SLA)).
158. Each draft of the SLA exchanged by Endo and Impax, as well as the final executed SLA, provided for an entry date of January 1, 2013. (*See, e.g.*, CX0323 § 1.1 (definition of “Commencement Date”), § 4.1(a); CX0324 (same); CX2771 (same); CX1813 (same); CX2767 (same); RX336 (same); RX364 (SLA)).
159. Endo’s initial term sheet to Impax, provided on May 26, 2010, as well as each settlement draft exchanged by Endo and Impax, contained a no-AG provision. (*See, e.g.*, F.

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131; CX0323 § 4.1(c); CX0324; CX2771; CX1813; CX2767; RX336; RX364 (SLA)).

160. Endo drafted the first iteration of the make-whole provision, which was included in the first draft of the SLA Endo sent to Impax on Friday June 4, 2010 as section 4.4 of the SLA. Under Endo's proposal, Endo's obligation to pay Impax a cash amount would be triggered if the amount of oxymorphone active pharmaceutical ingredient ("API") shipped in the Opana ER strengths for which Impax was first to file fell below a set threshold from the peak consecutive three-month sales period between the SLA's effective date and the fourth quarter of 2012. The amount Endo would ultimately be obligated to pay depended on Impax's sales during its 180-day exclusivity period. Generally, the lower Impax's net profits during the exclusivity period, the lower the amount Endo was obligated to pay. (CX0323 at 001, 005-07, 012 (June 4, 2010 draft SLA § 1.1 (definitions of "Impax's Net Profit," "Impax Product," "Exclusivity Period," "Pre-Impax Amount," "Three Month Shipment Amount," and "Trigger Threshold"), § 4.4).
161. Roberto Cuca, Endo's vice president of financial planning and analysis, was tasked with developing a provision that became known as "the Endo Credit" (F. 95-96). Mr. Cuca's "goal was to make the provision be as beneficial to Endo as possible." Mr. Cuca looked for ways to "improve the economic effect of this provision to Endo." (CX4035 (Cuca, Dep. at 68-69, 96-97); Cuca, Tr. 612, 614-15).
162. On Saturday, June 5, 2010, counsel for Impax sent a revised draft of the SLA to Endo. Impax renamed Endo's section 4.4 the "Endo Credit" and proposed two changes to Endo's proposal. First, Endo's obligation to pay the Endo Credit would be dependent on a decline of 50% or more in Opana ER unit sales rather than API. Second, if Endo's obligation to pay was triggered, the amount to be paid would not rely on Impax's actual sales of generic oxymorphone ER during its exclusivity period, but rather on the revenues Impax would have expected to make

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during the exclusivity period had Endo not switched the market. To approximate this expected amount, the formula incorporated the generic substitution rate (90%), the generic price (75% of the WAC brand price), and the length of the exclusivity period (50%, or half a year or 180 days). (CX0324 at 001, 045 (June 5, 2010 draft SLA § 4.4, definitions of “Endo Credit,” “Market Share Factor,” “Market Share Value,” “Pre-Impax Amount,” “Trigger Threshold,” and “Quarterly Peak.”)).

163. On Sunday, June 6, 2010, Endo responded to Impax’s proposal for the Endo Credit with two additional changes. First, Endo proposed that its obligation to pay the Endo Credit would be dependent on a decline of 50% or more in Opana ER dollar sales, as calculated by multiplying unit sales by the wholesale acquisition cost (WAC), instead of unit sales. Second, Endo wanted the amount to reflect Impax’s expected profits during the exclusivity period, rather than Impax’s expected revenues, which would effectively reduce any amount to be paid to Impax under the Endo Credit. (CX2771 at 001, 005-07, 014 (June 6, 2010 draft SLA § 1.1 (definitions of “Endo Credit,” “Market Share Profit Factor,” “Market Share Profit Value,” “Pre-Impax Amount,” “Prescription Sales,” and “Quarterly Peak”), § 4.4; Cuca, Tr. 639). *See also* CX4035 (Cuca, Dep. at 105-06) (“[T]hat is one of the ways that the Endo team would have negotiated to make it more financially favorable to Endo.”)).
164. Endo believed that incorporating Impax’s net profit margin into the Endo Credit was consistent with the objective of “trying to make [Impax] whole at the bottom line, so at their profit line, whereas the prior provision would have made them whole at the revenue line and actually would have advantaged them as compared to what was trying to be achieved.” (Cuca, Tr. 638-39).
165. Impax agreed to the two changes to the Endo Credit proposed by Endo in Endo’s June 6, 2010 revised draft to Impax. (CX2767 at 004, 006-07, 013 (June 7, 2010 Impax draft SLA § 4.4, definitions of “Endo Credit,” “Market

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Share Profit Factor,” “Market Share Profit Value,” “Pre-Impax Amount,” “Prescription Sales,” and “Quarterly Peak”); RX364 at 0003-06, 0012 (SLA § 1.1 (definitions of “Endo Credit,” “Market Share Profit Factor,” “Market Share Profit Value,” “Pre-Impax Amount,” “Prescription Sales,” and “Quarterly Peak”), § 4.4).

**(b) Scope of patent license**

166. Both Endo’s May 26, 2010 initial term sheet for the SLA and Endo’s June 4, 2010 first draft of the SLA limited Impax’s license to the three patents then listed in the Orange Book for Opana ER (the ’933, ’456, and ’250 patents). (CX0320 at 006-07, 009-10 (May 26, 2010 Endo term sheets); CX0323 at 006, 010 (June 4, 2010 draft SLA §§ 1.1, 4.1(a))).
167. At the time the negotiations were being conducted, Impax was aware that Endo had additional pending patent applications relating to Opana ER and recognized that Endo could acquire still other patents. (RX398 at 001; RX568; Mengler, Tr. 571-72; Snowden, Tr. 440, 442-43; *see also* Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-010 ¶ 36).
168. Given the possible effects of Endo’s additional patent applications relating to Opana ER, a reasonable litigant would have been concerned with Endo’s future patents. (Figg, Tr. 1938).
169. On June 5, 2010, Impax proposed broadening the patent license in the SLA to “any patents and patent applications owned by or licensed to Endo . . . that cover or could potentially cover” Impax’s generic oxymorphone ER product. (CX0324 at 030 (June 5, 2010 Impax revised draft of SLA § 4.1(a)); *see also* CX4026 (Nguyen, Dep. at 153-55) (testifying that the June 5 SLA draft expanded the scope of the patent license); CX4012 (Donatiello, IHT at 93)).

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170. Endo accepted Impax's language, referenced in F. 169. (CX2771 (June 6 Endo revisions); CX1813 (June 7 Endo revisions); CX2767 (June 7 Impax revisions); RX336 (June 7 Impax revisions); RX322 (June 7 Endo revisions)).

**c. Value transferred to Impax under the SLA**

**i. No-AG provision**

171. First-filer exclusivity (F. 21) is very valuable to a generic drug manufacturer. First-filer exclusivity gives the first filer 180 days, or "six months of runway," before any potential entry by another generic and helps the generic company make more money. (Koch, Tr. 232-33).
172. A first-filer generic manufacturer makes a substantial portion of its profits during the 180-day exclusivity period. The introduction of an authorized generic during that exclusivity period reduces the value of the exclusivity period by causing lower prices and fewer sales for the first filer. (Reasons, Tr. 1213-15; Koch, Tr. 232-33).
173. Impax was the first company to file an ANDA with Paragraph IV certifications for the 5, 10, 20, 30, and 40 mg dosages of oxymorphone ER, which comprised all of the dosages of Opana ER except the 7.5 and 15 mg dosages. The five doses as to which Impax was the first to file constitute the five most popular dosages of Opana ER, comprising 95% of Endo's Opana ER sales. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-007 ¶ 13; Mengler, Tr. 525; Koch, Tr. 231-32; Snowden, Tr. 354, 414).
174. As the first filer on the 5, 10, 20, 30 and 40 mg dosages of oxymorphone ER, Impax was entitled to 180 days of generic exclusivity. During that 180 days, no other ANDA filer could market a generic version of Opana ER because the applicable statute does not allow the FDA to give final approval to any other ANDA filer during that 180-day time period. (Joint Stipulations of Jurisdiction,

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Law, Fact, and Authenticity, JX001-007 ¶ 14; Second Set of Joint Stipulations, JX003 ¶ 7; Snowden, Tr. 414; *see also* Mengler, Tr. 522-23).

175. The term “authorized generic” is a term of art used in the pharmaceutical industry to describe a generic that is made available for sale using the brand company’s New Drug Application approval. An authorized generic is generally launched by the brand company or another company licensed by the brand company. Launching an authorized generic helps a company partially recoup sales of the branded product that are lost to generic competition. (Mengler, Tr. 523; Koch, Tr. 233; Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-005 ¶¶ 28-31; Reasons, Tr. 1211-12).
176. The 180-day exclusivity period does not prevent the brand company from launching an authorized generic. The brand company, if it chooses, can launch an authorized generic during the 180-day exclusivity period and compete with the first-filing generic during that period. (Mengler, Tr. 523-24; *see also* Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-005 ¶ 28; Second Set of Joint Stipulations, JX003 ¶ 7).
177. Having an authorized generic competitor during the 180-day exclusivity period generally results in a decrease in the first filer’s prices of approximately 30 to 35%. The first filer’s share of the generic market will also be reduced as the first generic manufacturer will have to split the sales with the authorized generic manufacturer. (Reasons, Tr. 1213-14; Mengler Tr. 524).
178. Endo, as the holder of the approved NDA for Opana ER, could market its own authorized generic version of Opana ER during Impax’s exclusivity period. (Second Set of Joint Stipulations, JX003 ¶ 7).
179. Impax was aware that an authorized generic would adversely impact Impax’s market share and profits. (CX0514 at 004 (5/16/2010 email from Chris Mengler

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attaching 5-year forecast 2010 showing Impax with less than 100% of the generic market share within the 180-day exclusivity period); CX2825 at 008 (2/11/2010 email from Ted Smolenski attaching 5-year forecast 2010 showing same)).

180. If there were no authorized generic, then Impax would be the only generic product on the market during its 180-day exclusivity period and could charge a higher price for generic Opana ER compared to a marketplace that had two companies selling generic products. (Reasons, Tr. 1215; Snowden, Tr. 392).
181. Impax executives estimated that if Endo launched an authorized generic when Impax entered the market, Endo's authorized generic would capture as much as half of sales of generic Opana ER and cause substantially lower generic prices during the exclusivity period than would be the case if Impax sold the only generic. (CX4037 (Smolenski, Dep. at 53-54); CX4002 (Smolenski, IHT at 80-81); CX0202 at 001).
182. Impax would generally seek a no-AG provision as an element of negotiating a settlement agreement with a brand manufacturer. The absence of an authorized generic would mean more control for the generic company, and control can often lead to higher profits for the generic company. (Koch, Tr. 234).
183. Mr. Mengler, Impax's primary negotiator with Endo, believed that getting a no-AG provision would be beneficial to Impax. Along with obtaining the earliest possible entry date, a no-AG agreement is among the more important things that Impax would seek in a negotiation in order to get the best possible deal for Impax. (Mengler, Tr. 526).
184. A six-month no-AG provision was one of the terms included as part of the Endo-Impax settlement throughout the settlement negotiations. (F. 159).

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185. The no-AG provision in the SLA prohibited Endo from selling an authorized generic product for any of the five specified dosages as to which Impax was first to file until after Impax's 180-day exclusivity period ended. (F. 127; RX364 at 0010-11 (SLA § 4.1(c)).
186. At time of the execution of the SLA, Impax did not know whether, absent the settlement, Endo would launch an authorized generic. (CX3164 at 019-20).
187. The no-AG provision in the SLA guaranteed to Impax that Impax, as the first to file on generic Opana ER, would be the only seller of generic Opana ER during its first 180 days on the market and would not face competition from an Endo authorized generic. (Snowden, Tr. 392; CX0320 at 009-10; CX4003 (Snowden, IHT at 111-13)).
188. The no-AG provision in the SLA was worth substantial value to Impax when the SLA was executed because the no-AG provision ensured that Impax would face no generic competition during the 180-day exclusivity period and would earn greater profits by not having to share generic sales with an Endo authorized generic. (CX5000 (Noll Expert Report at 153-55 ¶¶ 346-48); Noll, Tr. 1452-54).
189. In 2010, Impax forecasted the effect of an authorized generic by Endo on Impax's expected generic sales. In what Impax referred to as the "upside" scenario, Impax assumed that Endo's authorized generic Opana ER would enter about two months after Impax's launch of generic Opana ER. Under the upside scenario, Impax's share of generic sales was estimated to fall to 60% and Impax's average price was estimated to fall by 36% (from 55% of brand WAC to 35%). Under what Impax referred to as its "base" scenario, Impax assumed that Endo's authorized generic Opana ER would enter simultaneously with Impax, would capture half of the market, and would cause prices to fall by the same 36%. (CX4037 (Smolenski, Dep. at 147-50, 166); CX0004 at 005-19; CX0222 at 004-



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11; CX2825 at 008-17; CX2830 at 004-09; CX2831 at 003-08; CX2853 at 007-15).

190. Complaint Counsel's economic expert, Professor Roger Noll, applying Impax's forecasts in 2010 (F. 189), calculated that under Impax's upside scenario, entry by an authorized generic during Impax's 180-day exclusivity period would cause Impax's revenues to fall by 61.6%, or approximately \$23 million. Under Impax's "base" assumptions (F. 189), entry by an authorized generic during Impax's 180-day exclusivity period would cause Impax's revenues to fall by 68%, or approximately \$33 million. (CX5000 (Noll Expert Report at 155 ¶ 350)).
191. In May 2010, Todd Engle, of Impax's sales and marketing team, prepared an analysis for Dr. Hsu and Mr. Mengler of the effect of an authorized generic on Impax's profits during Impax's 180-day exclusivity period, which projected lost profits in the amount of \$24.5 million if an AG entered within two to four weeks after Impax's launch of generic oxymorphone ER. (CX2753 at 004 (six month lost profits model for oxymorphone ER, predicting profits of \$53 million with no AG, and \$28.5 million with AG)).
192. On June 1, 2010, Endo approximated the revenues it would gain from launching an authorized generic of Opana ER, if Impax launched at risk and Endo launched its authorized generic on July 1, 2010, to be \$25 million. (CX1314).
193. The no-AG provision in the SLA was worth between \$23 and \$33 million in projected sales revenue to Impax at the time Impax entered into the SLA. F. 189-191.
194. The no-AG provision had substantial value to Impax even if original Opana ER sales grew so much that Impax ended up having to pay a royalty to Endo, pursuant to the SLA. If Endo's sales of original Opana ER reached a sufficiently high level prior to Impax's generic entry, Impax would be obligated to pay a royalty to Endo in the amount of 28.5% of Impax's net sales of generic Opana

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ER. Because the royalty percentage is lower than the expected decline in Impax's revenue attributable to competition from an AG, Impax's revenues with the no-AG provision and a royalty are always higher than revenues with competition from an AG and no royalty. In all cases, Impax would benefit more from being the only seller of a generic oxymorphone ER product, than it would be required to pay Endo in royalties. (RX364 at 0012 (SLA § 4.3); CX5001 (Bazerman Expert Report at 026 ¶ 51); CX5000 (Noll Expert Report at 155-56 ¶¶ 350-51); Mengler, Tr. 533).

**ii. Endo Credit**

195. Under section 4.4 of the SLA, titled "Endo Credit," Endo agreed to pay Impax an amount, determined by a mathematical formula, in the event that prescription sales of Opana ER declined by more than 50% from the quarterly peak sales during the time period from July 2010 to September 2012. (RX364 at 0003-06, 0012 (SLA §§ 1.1, 4.4) ("If the "Pre-Impax Amount is less than the Trigger Threshold, then Endo shall pay to Impax the Endo Credit"); CX3164 at 010-11).
196. The formula for calculating the Endo Credit incorporates a number of factors that relate to Impax's sales of generic Opana ER multiplied by the market opportunity for the generic product in the quarter of peak sales. The agreement defines Impax's "Market Share Profit Value" as the product of (1) an assumed generic substitution rate for original Opana ER (90%), (2) an assumed net realized generic price discounted from the brand-name price (75%), (3) an assumed generic profit margin (87.5%), (4) 50% (expressing the 180-day exclusivity period as half of a year), and (5) the annualized sales of Opana ER during the quarter of peak sales for Opana ER during the period from the third quarter of 2010 to the third quarter of 2012 divided by 100. (RX364 at 0003 ("Endo Credit" definition), 0004 ("Market Share Profit Factor" definition & "Market Share Profit Value" definition), 0005 ("Pre-Impax Amount" definition), 0005-06 ("Quarterly Peak"

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definition), 0006 (“Trigger Threshold” definition), 0012 (“Endo Credit” provision)).

**(a) Purpose of the Endo Credit**

197. The Endo Credit was designed to “back-up” the value of the no-AG provision and provide value to Impax regardless of whether Endo launched a reformulated version of Opana ER. (F. 198-215).
198. When brand companies introduce a reformulated drug, they often cease marketing and selling the original product. They can also withdraw the original product’s reference-listed drug designation, preventing generic products from having AB-rated status. (CX4003 (Snowden, IHT at 30-31); CX4014 (Hsu, IHT at 152)).
199. By introducing a reformulated drug, the brand company can greatly reduce the opportunity for generic versions of the original drug since those generic products are no longer bioequivalent to – and not subject to automatic substitution in place of – the reformulated product. (Snowden, Tr. 434; CX4030 (Hsu, Dep. at 108); Koch, Tr. 238 (reformulation can “switch patients away from the brand product” as to which Impax has the generic “in favor of a line extension” not covered by the ANDA)).
200. Impax’s generic Opana ER would not be AB-rated to a reformulated Opana ER product. (Mengler, Tr. 528).
201. Protecting the market for Impax’s entry date was a priority for Impax. (Snowden, Tr. 490).
202. Because “the generic would rely on the . . . automatic substitution in the pharmacy,” not having a reference brand product means that pharmacists “can’t substitute” the generic for the branded drug. (CX4014 (Hsu, IHT at 152)).
203. For a generic drug to be sold where there is no branded drug for which it is automatically substituted, doctors must

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actually write out a prescription for the generic product. (CX4014 (Hsu, IHT at 152); CX4004 (Engle, IHT at 221)).

204. If Endo were to move to a reformulated Opana ER, then Impax's market opportunity for its generic product would be significantly reduced or even zero, because Opana ER in its original form disappears or becomes insignificant. (Snowden, Tr. 434; Mengler, Tr. 527).
205. Mr. Mengler was concerned that reformulation was an effort by Endo to "subvert the value of the deal" he was trying to put together to get Impax's product on the market. (Mengler, Tr. 526-27).
206. If Endo did destroy the market for Impax's generic Opana ER, Mr. Mengler wanted Impax "to be made whole for the profits that [Impax] would have otherwise achieved." (Mengler, Tr. 533).
207. If "the market changed substantially before the date that the parties agreed that Impax could launch," the provision "would be a way of making Impax whole." (Cuca, Tr. 617; CX4035 (Cuca, Dep. at 69-70) ("If sales of Opana ER had decreased," the provision would "kind of fix that . . . [b]y making a true-up payment to Impax. . . . The true-up payment would correct for the loss in the value of the market that had occurred before the generic entry date.")).
208. Getting downside protection for Impax in the event Endo reformulated Opana ER was "super, super important" to Impax's primary negotiator of the Endo-Impax Settlement. According to Mr. Mengler, "something that didn't protect us from the downside was . . . a deal-breaker." (Mengler, Tr. 535-36; CX4010 (Mengler, IHT at 44)).
209. A sharp decline in the sales of branded Opana ER before Impax's generic launch would decrease the value of the no-AG provision that Impax agreed to with Endo, because the total market potential for generic Opana ER would be decreasing. The Endo Credit payment was designed to

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“correct for the loss in the value of the market that had occurred before the generic entry date.” (Reasons, Tr. 1218; CX4035 (Cuca, Dep. at 69-70)).

210. If the market for Opana ER did not decline, the value of the no-AG provision would be higher, but if the market did decline, the Endo Credit provision was designed to provide Impax with a payment. (Reasons, Tr. 1218-19; CX4020 (Reasons, Dep. at 55-56)).
211. The Endo Credit was designed as insurance against the risk of Endo reformulating Opana ER. If the market for Opana ER did not decline, the value of the no-AG provision would be higher, but if Endo effected a “switchout” to reformulated Opana ER, then the Endo Credit provision was designed to provide Impax with a payment. (Koch, Tr. 265-66; Reasons, Tr. 1218-19; CX4020 (Reasons, Dep. at 55-56)).
212. If Endo’s obligation to pay the Endo Credit were triggered, based on declining sales of Opana ER prior to Impax’s generic entry, the calculations of the Endo Credit were designed to approximate the net profits Impax would have expected to make during its six-month exclusivity period, with no AG. The provision achieved this by basing the calculation in part on the expected generic substitution rate (90%), the expected generic price (75% of the brand WAC price), Impax’s net profit margin (87.5%), and the length of the no-AG exclusivity period (50%, or 180 days expressed as half a year). (RX364 at 0004 (SLA § 4.4, definitions of “Market Share Profit Value”); *see also* Cuca, Tr. 635-37). By including Impax’s net profit margin rather than just looking to Impax’s expected revenues, any amount Endo would be required to pay was reduced by 12.5%. (RX364 at 0004 (SLA § 4.4, definitions of “Market Share Profit Value”); Cuca, Tr. 640-41).
213. The Endo Credit provision “was intended to insulate” Impax from the risk of substantial decrease in Opana ER sales prior to the agreed generic entry date. The goal was,

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“if the market changed substantially before the date that the parties agreed that Impax could launch, there would be a way of making Impax whole” by providing Impax with the profits that Impax otherwise would have achieved during its 180-day exclusivity period, had a change in the marketplace not occurred. (Cuca, Tr. 617; CX4035 (Cuca, Dep. at 81-82); Mengler, Tr. 533).

214. The Endo Credit provision was designed to provide an approximation of the profits that Impax would have earned from sales of generic Opana ER during Impax’s six-month exclusivity period, based on pricing, share and other assumptions. (CX4010 (Mengler, IHT at 36-37); CX4035 (Cuca, Dep. at 69-70) (“If sales of Opana ER had decreased,” the provision would “kind of fix that . . . [b]y making a true-up payment to Impax. . . . The true-up payment would correct for the loss in the value of the market that had occurred before the generic entry date.”)).
215. During a November 2011 earnings call, Impax’s CFO, Mr. Koch, who also helped negotiate the SLA, discounted the impact of Endo switching Opana ER to a new formulation because of the terms of the Endo-Impax Settlement, stating: “Fortunately, though, we do have [downside] protection built into the agreement so we should have a reasonable outcome almost no matter what happens.” (Koch, Tr. 264-65; CX2703 at 012-13).

**(b) Dollar value of the Endo Credit at the time of settlement**

216. The dollar value of the Endo Credit was uncertain at the time of settlement. The dollar value was contingent on unknown future events that were outside of Impax’s control, such as the figure for quarterly peak sales for Opana ER prior to generic entry, which was the biggest “input” in the Endo Credit formula. (Cuca, Tr. 629; Snowden, Tr. 437-38).
217. The formula that determined any Endo Credit payment required (1) determining Endo’s quarterly peak sales

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between July 2010 and September 2012; (2) determining the “Pre-Impax amount” of Opana ER sales, meaning the sales of Opana ER in the fourth quarter of 2012, immediately prior to Impax’s January 2013 generic entry; (3) comparing the quarterly peak number to the pre-Impax amount, and determining if the pre-Impax amount is less than 50%, which triggered a payment obligation; and (4) multiplying the difference between the quarterly peak number and the pre-Impax number by a specified amount to calculate the final sum due. Each of these formula inputs was unknown at the time of settlement. (Snowden, Tr. 437-38; *see* RX364 at 006; Engle, Tr. 1749-50).

218. Impax did not forecast a payment under the Endo Credit in Impax’s business forecasts. (Mengler, Tr. 582; CX4038 (Engle, Dep. at 187-88)).
219. Financial projections by Endo and Impax at the time of the settlement anticipated continued growth in Opana ER sales. (CX0222 at 003-11 (Impax forecasts for Opana ER); CX2530 at 007-08 (Endo forecasts for Opana ER)).
220. Prior to the settlement, Mr. Cuca ran some calculations for the Endo Credit formula to “make sure that it was producing outputs that [he] thought it was supposed to be producing.” Using the Excel program, Mr. Cuca spent approximately five minutes entering potential “peak sales” figures into the Endo Credit formula to make sure it produced a sensible result. These calculations produced a range of payouts, including a possible zero payment. For the “peak sales” input, Mr. Cuca relied on Endo sales forecasts. (Cuca, Tr. 628-31; CX4035 (Cuca, Dep. 79-84)).
221. Prior to the settlement, Impax’s director of market planning, Ted Smolenski, told Mr. Mengler that there were certain circumstances under which the Endo Credit would not result in a payment to Impax, including a situation in which Endo would withdraw its NDA for original Opana ER and time the elimination of sales in such a way that the Endo Credit would result in zero

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payment. Mr. Mengler decided not to pursue the issue further because he did not deem the potential to be likely enough to be “worth the energy” to try to “correct for it in the agreement.” (Mengler, Tr. 589-90; CX4037 (Smolenski, Dep. at 253); *see also* CX0219 at 001 (Smolenski email to Hsu describing “downside scenario as probably unlikely” and stating that Mengler viewed the “potential downside scenario” as “so unlikely it wasn’t worth worrying about”)).

222. The amount of any payment under the Endo Credit could not be estimated before learning the quarterly peak sales of Opana ER between July 2010 and September 2012. (Cuca, Tr. 668-69).
223. Endo first reported a liability under the Endo Credit in May 2012. (RX494 at 0007 (Endo SEC Form 8-K from May 1, 2012); CX4017 (Levin, Dep. at 140-41)).
224. In or about May 2012, Endo took a pre-tax charge in the amount of \$110 million “to reflect a one-time payment that the company now expects to make to Impax per the terms of Endo’s 2010 settlement and license agreement with Impax.” (RX117 at 0021 (Endo SEC Form 10-Q for 1Q12 showing \$110 million “[a]ccrual for payment to Impax related to sales of Opana ER”)).

**(c) 2013 payment under the Endo Credit**

225. Endo filed a supplemental New Drug Application (No. 201655) for a reformulated version of Opana ER (“reformulated Opana ER”) in July 2010. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-011 ¶ 48; CX3189).
226. The FDA approved Endo’s supplemental NDA for a reformulated version of Opana ER in December 2011. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-011 ¶ 48).



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227. At the end of 2011, after discovering manufacturing deficiencies, the FDA shut down the plant where Novartis Consumer Health, Inc. (“Novartis”), another pharmaceutical company, manufactured original Opana ER for Endo. The shutdown of the Novartis plant caused a supply disruption for original Opana ER and required Endo to scale up its manufacturing of reformulated Opana ER. (CX4017 (Levin, Dep. at 136-39)).
228. The Novartis plant shutdown at the end of 2011 created a “supply chain crisis” for original Opana ER. (CX4017 (Levin, Dep. at 136-39); *see* RX094 at 0003-04; RX563 at 0001; RX139 at 0001).
229. In or about February 2012, the FDA ordered Endo to cease selling original Opana ER in order to avoid consumer confusion. Specifically, the FDA informed Endo that “once any tablets of CRF [crush-resistant formulation] were sold, [Endo] could no longer sell any tablets of the old formulation.” (CX4017 (Levin, Dep. at 138-39, 155); RX100 at 0001; RX094 at 0004).
230. In March 2012, Endo stopped distributing original Opana ER and launched reformulated Opana ER. (Second Set of Joint Stipulations, JX003 ¶ 33; CX4017 (Levin, Dep. 139)).
231. It was not until after the Novartis supply disruption in late 2011, the FDA’s order to stop selling original Opana ER in February 2012, and the launching of reformulated Opana ER in March 2012, that Endo first concluded that it would have to make a payment under the Endo Credit provision. The first time Endo knew that its sales of Opana ER would be zero was in the last quarter of 2012, after the supply interruption caused by the Novartis plant shutdown. (Cuca, Tr. 665, 671, 677; Reasons, Tr. 1203, 1229; RX039; RX094 at 0003-06).
232. On May 31, 2012, Endo requested that the FDA move original Opana ER to the Orange Book Discontinued List. (Second Set of Joint Stipulations, JX003 ¶ 34).

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233. In August 2012, Endo filed multiple citizen petitions with the FDA, in which Endo argued that the FDA should (1) determine that original Opana ER was discontinued for safety reasons and could no longer serve as a reference-listed drug for any ANDA; (2) refuse to approve any ANDA pending for original Opana ER; and (3) withdraw any already-granted approvals for original Opana ER ANDAs. (Snowden, Tr. 476-77, 479-80; CX3203 (Endo's citizen petitions); Second Set of Joint Stipulations, JX003 ¶ 34).
234. Impax formally responded to the petition and offered scientific evidence that the discontinuation of Endo's original Opana ER was unrelated to safety or effectiveness. (Snowden, Tr. 480).
235. The FDA concluded that Endo did not withdraw original Opana ER for safety or efficacy reasons. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-012 ¶ 51).
236. On January 18, 2013, Ms. Snowden, Impax's vice president for intellectual property litigation and licensing, provided Endo with written documentation supporting payment under the Endo Credit provision in the amount of \$102,049,199.64. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-011 ¶ 45; Snowden, Tr. 386-89; CX0332 at 007-08).
237. On April 18, 2013, pursuant to section 4.4 of the SLA, Impax received a payment from Endo in the amount of \$102,049,199.64. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-011 ¶ 46; Reasons, Tr. 1204; CX0333; CX1301 at 007).

**iii. Complaint Counsel's expert's valuations**

238. Complaint Counsel's economic expert, Professor Noll devised four examples of what the potential value of the no-AG and Endo Credit could be to Impax based on assumptions as to future events. Professor Noll did not

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attach any probabilities to the assumed events occurring. (Noll, Tr. 1613, 1650-51; CX5000 (Noll Expert Report at 240 Appendix F)).

239. Professor Noll's purported calculations of the value of the Endo Credit (F. 238) were based on discounting the amount of the actual payment under the Endo Credit in 2013. (CX5000 (Noll Expert Report at 169)).
240. Professor Noll did not calculate the expected value of the Endo Credit at the time of settlement. (Noll, Tr. 1591, 1613, 1651-52; Addanki, Tr. 2384).
241. Professor Noll acknowledged that he had not seen any documents predating June 2010 in which either Impax or Endo estimated the value for the Endo Credit. (Noll, Tr. 1611).
242. Professor Noll acknowledged that whether the Endo Credit would be paid, or the amount that would be paid, depended on contingent events and that there was a possibility that Impax would not receive any payment under the Endo Credit. (Noll, Tr. 1611-12).
243. Although Professor Noll acknowledged that it is important to take agreements as a whole, Professor Noll did not consider the value of the patent license rights Impax received under the SLA. (Noll, Tr. 1648).

### **3. The Development and Co-Promotion Agreement**

#### **a. Overview of relevant provisions**

244. On June 7, 2010, Endo and Impax executed a Development and Co-Promotion Agreement ("DCA") with respect to a Parkinson's disease treatment known internally at Impax as IPX-203. (Snowden, Tr. 397-99; Nestor, Tr. 2935; RX365 (executed DCA)).

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245. The DCA was executed simultaneously with the SLA and is incorporated into the SLA. (RX312; CX0326; Second Set of Joint Stipulations, JX003 ¶ 69).
246. Under the DCA, Impax and Endo agreed to collaborate with respect to the development and marketing of a potential treatment for Parkinson's disease using an extended release, orally administered product containing a combination of levodopa and carbidopa. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-010 ¶ 37).
247. Endo agreed to pay Impax an "Upfront Payment" of \$10 million within five days of the agreement's effective date. The \$10 million payment was guaranteed and non-refundable. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-010 ¶ 39; Snowden, Tr. 399-400).
248. The DCA contained the possibility that Endo would make up to \$30 million in additional "Milestone Payments" for achieving specified milestone events in the development and commercialization of the product. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-010 ¶ 40; Snowden, Tr. 408).
249. Under the DCA, Impax and Endo agreed to share promotional responsibilities, with Impax promoting IPX-203 to its network of neurologists, and Endo promoting IPX-203 to its network of non-neurologists, including primary care physicians who prescribe Parkinson's disease medications. (RX365).
250. If the target product, IPX-203, was successfully commercialized, Endo would be entitled to a share of the profits. Specifically, Endo would receive a co-promotion fee equal to 100% of gross margins on sales resulting from prescriptions by non-neurologists. (RX365 ¶ 3.4).
251. On June 24, 2010, Endo wired a payment of \$10 million to Impax in accordance with section 3.1 of the DCA. (Joint

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Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-011 ¶ 44).

252. Upon receipt of Endo's \$10 million payment, Impax deferred the accounting of the money, attributing it as an investment related to research and development work that would be accomplished in the future. (Reasons, Tr. 1242-43).
253. Impax and Endo terminated the DCA by mutual agreement effective December 23, 2015. At the time of termination, the development had not met any of the milestones that would have required additional payment from Endo and Endo made no additional payments to Impax. (Joint Stipulations of Jurisdiction, Law, and Fact, and Authenticity, JX001-011 ¶ 43; Snowden, Tr. 461).

**b. Background to the DCA**

**i. Endo's reliance on collaboration agreements**

254. Endo generally does not research or discover new drug molecules on its own. Instead, it acquires and licenses drugs from other pharmaceutical companies. This means that Endo enters many collaboration agreements with other pharmaceutical companies. (Cobuzzi, Tr. 2513-15).
255. Endo's collaboration agreements with other pharmaceutical companies can relate to drugs at every stage of the development lifecycle, including early-stage development agreements. Because Endo had "no discovery pipeline . . . in place," Endo would enter "very early, very speculative agreements." (Cobuzzi, Tr. 2516).
256. In connection with a collaboration agreement, Endo identifies therapeutic areas of interest and companies that own promising drug molecules in those areas and enters into early-stage development deals. Endo also regularly licenses technology from and collaborates with other companies for more developed products. For Opana ER, Endo licensed the necessary technology to make both

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original and reformulated Opana ER. (Cobuzzi, Tr. 2516-17).

**ii. Endo's interests in neurology products and Parkinson's disease treatments**

257. In 2005, the areas of significant interest to Endo were pain, neurology, areas of movement disorders, including Parkinson's disease, and gastroenterology. (Cobuzzi, Tr. 2518).
258. By 2010, although Endo's focus had shifted away from pain and neurology to urology, endocrinology, and oncology, Endo's sales force still had a focus on pain and neurology and Endo was interested in products that were compatible with Endo's existing products and sales efforts. (Cobuzzi, Tr. 2518-19).
259. In 2010, Endo was selling Frova, which Endo marketed to neurologists and primary care physicians who treat migraine sufferers. (Cobuzzi, Tr. 2519-21).
260. For a number of years, Endo sold an immediate-release Parkinson's disease drug known as Sinemet, which was the original formulation of carbidopa and levodopa. (Cobuzzi, Tr. 2524; Nestor, Tr. 2938; CX1007 at 001).
261. In the 2010 timeframe, Endo evaluated collaborations with other companies related to treatments for Parkinson's disease. This included exploring potential Parkinson's disease collaboration opportunities with an Italian company called Newron, which had multiple Parkinson's disease products, and conducting due diligence on a Parkinson's disease product with a novel mechanism of action that was owned by a Finnish company. (Cobuzzi, Tr. 2520-22).

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**iii. Impax's efforts to develop Parkinson's disease treatments**

262. Impax, formed in 1995, is a manufacturer of generic pharmaceutical drugs. Impax created a separate brand division to manufacture and sell its own branded drugs in 2006. (Koch, Tr. 219-20; Nestor, Tr. 2926, 2929; CX4014 (Hsu Dep. at 9)).
263. When Impax's brand division was founded in 2006, it focused its efforts on central nervous system and neurology products, with a specific focus on improved treatments for Parkinson's disease. As part of this focus, Impax's brand division also concentrated on developing a network of relationships with neurology physicians. (Nestor, Tr. 2929-31).
264. Impax promoted other companies' products to the neurology community, including Carbitol, an epilepsy product, and licensed Zoming, a migraine drug created by AstraZeneca. Impax did so because it "wanted to begin the process of developing those relationships with the neurology physicians." (Nestor, Tr. 2931-32).
265. The "gold standard" treatment for Parkinson's disease is a combination of carbidopa and levodopa molecules. (Nestor, Tr. 2929).
266. The majority of carbidopa-levodopa medications are available only in immediate-release formulations. (Nestor, Tr. 2929).
267. Immediate release carbidopa-levodopa requires frequent dosing and often results in patients losing control of their motor skills as they experience rapid increases and decreases in the concentration of medicine in their bodies, especially as the disease progresses. (Nestor, Tr. 2929-30, 2939).
268. Impax's first attempt to develop an extended-release carbidopa-levodopa treatment for Parkinson's disease was

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known as Vadova. That product was intended to combine carbidopa-levodopa with controlled-release technology to give a much smoother effect to the amount of medication in Parkinson's patients' blood, providing for more control over motor symptoms. Vadova was never fully developed or marketed. (Nestor, Tr. 2926-27, 2929-30).

269. Impax's second attempt to develop an extended-release Parkinson's disease medication was IPX-066. (Nestor, Tr. 2930-31).
270. IPX-066 was a combination of carbidopa and levodopa that had been formulated to extend the release profile of Parkinson's disease drugs. (Cobuzzi, Tr. 2524; *see* Reasons, Tr. 1236).
271. As with Vadova, IPX-066 was intended to better treat Parkinson's patients by allowing for less frequent and more consistent dosing of up to six hours, as well as more consistent motor symptom control. (Nestor, Tr. 2930-31; *see* RX247).
272. By significantly extending the absorption of the drug, IPX-066 would provide "significant improvement of the patient's quality of life." (CX4014 (Hsu, IHT at 38-39)).
273. IPX-066 had reached Phase III clinical trials<sup>11</sup> in 2010 and was marketed under the name Rytary in 2015. (Snowden, Tr. 401; Nestor, Tr. 2930-31).
274. By 2010, Impax had begun efforts to develop a "next generation" of IPX-066. The goal of the next-generation product, which was first designated as IPX-066a and later became known as IPX-203, was to further improve treatment to Parkinson's patients by extending dosing time even longer than IPX-066. (Cobuzzi, Tr. 2599; Nestor, Tr. 2935-36; *see* RX247).

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<sup>11</sup> Phase III of clinical development is the last stage of development before submitting a drug application for approval to the FDA. (Nestor, Tr. 3003).



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**c. Negotiations of the DCA****i. Background to the negotiations**

275. In early 2009, Impax approached Endo about a collaboration with respect to Endo's central nervous system drug Frova, which treats migraine headaches. (RX393 at 0014; *see* Nestor, Tr. 2932; Koch, Tr. 318-19; CX4036 (Fatholahi, Dep. at 51-52)).
276. Impax was interested in collaborating with Endo on Frova because the product fit with Impax's focus on central nervous system and neurology products. (Snowden, Tr. 453-54; Nestor, Tr. 2929).
277. Endo rejected Impax's proposal to collaborate on Frova in the early 2009 discussions (F. 275). (Nestor, Tr. 2932).
278. In late 2009, after Endo and Impax began discussions relating to the settlement of the Opana ER patent litigation (F. 112), Shawn Fatholahi, the head of sales and marketing for Impax's brand division, contacted Ms. Snowden to express his interest in a co-development arrangement with Endo on Frova. (Snowden, Tr. 346, 454-55).
279. In October 2009, Impax and Endo discussed a potential business collaboration on Frova and executed a non-disclosure agreement in connection with those discussions. (Snowden, Tr. 455-56; RX359; CX1816).
280. The discussions between Impax and Endo relating to Frova did not result in a collaboration agreement. (Snowden, Tr. 495).
281. In the fall of 2009, in the course of Endo's and Impax's discussions relating to the settlement of the Opana ER patent litigation, Endo became aware of Impax's efforts to develop drugs for Parkinson's disease and expressed an interest. (Koch, Tr. 323-24).

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282. In December 2009, Endo and Impax ended their discussions on a potential settlement of the '456 and '933 patent infringement litigation. (Second Set of Joint Stipulations, JX003 ¶ 17).

**ii. Negotiations resume in May 2010**

283. On May 17, 2010, Endo and Impax resumed discussions on the potential settlement of the '456 and '933 patent infringement litigation. (Second Set of Joint Stipulations, JX003 ¶ 21).
284. After discussions relating to settlement of the Opana ER litigation resumed on May 17, 2010, Impax and Endo began discussing a potential joint development agreement and Endo expressed an interest in marketing IPX-066. (CX0310 at 004; CX4003 (Snowden, IHT at 89-90); Koch, Tr. 320, 323-24).
285. On May 19, 2010, in conjunction with the discussion of a potential collaboration agreement, Mr. Donatiello of Endo confirmed to Ms. Snowden and Mr. Mengler of Impax that the confidential disclosure agreement Endo and Impax had entered as part of negotiations in October 2009 (F. 279) was still in effect. (CX2966 at 002; CX1816 at 001).
286. Between May 17 and 26, 2010, Impax and Endo held two conference calls and exchanged numerous emails and materials regarding IPX-066. (CX2966; RX272 at 0001-03, 0005-08; CX1301 at 112-13; CX0310 at 004-05).
287. At Endo, the senior vice president of corporate development, Dr. Robert Cobuzzi, and his team of employees were responsible for evaluating potential pharmaceutical business deals for further development. Dr. Cobuzzi first learned about a potential collaboration with Impax on IPX-066 from Endo's chief financial officer, Mr. Levin, who was not part of the corporate development group. Dr. Cobuzzi was not involved in the SLA negotiations, and was only vaguely aware of them. (Cobuzzi, Tr. 2513, 2567-68, 2584).

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288. On May 19, 2010, David Paterson, Impax's vice president of business development, provided initial written materials on IPX-066 to Dr. Cobuzzi, including a presentation entitled "IPX066: Licensing Opportunity For Parkinson's Disease." The presentation touted the clinical benefits of IPX-066 over Sinemet, the leading carbidopa-levodopa brand product, and projected a launch of IPX-066 in the United States in the second half of 2012. (CX2966 at 001, 003, 038, 040-45, 73).
289. On May 20, 2010, Dr. Cobuzzi directed his team of employees to work on an opportunity evaluation worksheet ("OEW") to assess a potential collaboration with Impax on IPX-066. Dr. Cobuzzi noted that IPX-066 will be positioned with Frova, that it is a known molecule, that Endo has looked at the space before, and that it fits with Frova. (CX1006 at 001).
290. On May 21, 2010, Endo asked an outside consulting firm to provide guidance about the potential value of IPX-066, stating: "There is no time for market research on this as we need the forecast by Wed. of next week (that's right, it's not a typo!) . . . . No detailed proposal is needed at this point given the extremely tight timelines . . . ." (RX072; Cobuzzi, Tr. 2587).
291. On May 22, 2010, Dr. Paterson of Impax provided Dr. Cobuzzi and a number of additional Endo employees access to a "data room" with "a large amount of IPX-066 related documents." The documents covered: (i) intellectual property/legal; (ii) chemistry, manufacturing, and controls; (iii) commercial; (iv) regulatory; (v) clinical; (vi) clinical pharmacology; and (vii) Impax's unredacted confidential presentation on IPX-066. (RX272 at 0001).
292. On May 25, 2010, the outside consulting firm hired by Endo (F. 290), informed Dr. Cobuzzi that: its best estimate of peak U.S. revenue for IPX-066 was [REDACTED]; the data suggest that IPX-066 will be superior to a comparator drug; and although the current market is heavily

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genericized, “we think that if the final data continue to show a [REDACTED], neurologists will push through payer barriers to the drug for at least some of their patients.” (RX072, *in camera*).

293. On May 25, 2010, Dr. Cobuzzi directed his staff to help in the assessment of IPX-066, stating: “It is a controlled-release formulation of carbidopa-levodopa for Parkinson’s disease that benefits by [REDACTED]. We have very little time for this evaluation . . . . All of the information is available in an e-dataroom . . . . As this is an area we know well as a company both in terms of past evaluations, and by virtue of the fact that we previously held the rights to IR Sinemet, this should not be a difficult evaluation.” (CX1007 at 001, *in camera*).
294. On May 26, 2010, Mr. Donatiello of Endo sent to Mr. Mengler and Ms. Snowden of Impax two term sheets.<sup>12</sup> The initial term sheet for what evolved into the DCA proposed an option agreement concerning IPX-066 “and all improvements, modifications, derivatives, formulations and line extensions thereof.” The term sheet gave Endo the option to receive either the right to co-promote the product to non-neurologists within the United States or to purchase an exclusive license to the product in the United States. Endo would pay Impax a \$10 million “Option Fee” upon signing the agreement and a \$5 million milestone fee upon the FDA’s acceptance of the NDA for the product. If Endo exercised the option to co-promote, Endo would receive a fee of 50% “on the net sales” from prescriptions by non-neurologists in the United States. If Endo exercised the option for a license, Endo would pay Impax a one-time license fee based on projected sales. (RX565 at 0002; CX320 at 002-05).
295. On May 27, 2010, Mr. Mengler responded to the May 26, 2010 term sheet (F. 294) that any collaboration would be “for a product I will designate as [IPX]-066a. This is our

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<sup>12</sup> The May 26, 2010 term sheet relating to the SLA is discussed in F. 131.

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next generation of [IPX]-066. We have significant data and can name the product at signing.” Impax set out milestone payments for the collaboration, beginning with a payment at signing of \$3 million, and followed by up to six additional payments of increasing amounts based on reaching specified milestones, for a total of \$60 million. (RX318 at 0001 (Impax’s response to Endo’s initial term sheet) (proposed milestones as follows: signing (\$3 million); Phase II initiation (\$4 million); Phase II completion (\$6 million); Phase III initiation (\$8 million); Phase III completion (\$11 million); application filing (\$13 million); FDA approval (\$15 million)).

296. Following a June 1, 2010 in-person meeting between Endo and Impax, internal Impax emails referred to the deal structure for the co-development of IPX-066a. (RX387 at 0001; CX0406 at 001; CX1011).
297. In an internal Impax email dated June 1, 2010, Mr. Mengler described the “current proposal . . . [w]ith regard to the R&D collaboration” for “project 066a: milestone funding totaling 40M” including \$5 million at signing. Mr. Mengler stated his opinion that he “like[s] the 40M. 5M guaranteed and the rest is success based. A lot of this depends on how successful we think this program will be – and how much the program will cost.” (RX387 at 0001).
298. On June 2, 2010, Mr. Levin of Endo clarified to Impax that Endo’s offer for IPX-066a was for an upfront payment of \$10 million and a single additional milestone payment of \$5 million upon successful completion of Phase II. If Endo elected to exclusively in-license the compound, Endo would pay Impax five times the projected first four years of sales (rather than three years) as well as give Impax a co-promote on 10% of the total promotion effort. (CX1011).
299. In an internal Impax email dated June 3, 2010, Mr. Mengler stated that the current proposal for the R&D

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collaboration was a total of \$20 million, with half (\$10 million) upfront. (CX0114 at 001).

300. On June 3, 2010, Mr. Mengler of Impax and Mr. Levin of Endo reached an agreement in principle on the SLA and the DCA. (CX3334 at 001; CX0412 (Donatiello, IHT at 139)).
301. After Endo rejected Impax's June 4, 2010 proposal for a simple settlement with a July 15, 2011 entry date for Impax's generic version of Opana ER and no compensation terms (F. 155-156), Impax dropped its request for such a settlement and sought Endo's agreement to an increase in the milestone payments under the DCA. (F. 302, 306; Snowden, Tr. 378-80; CX4032 (Snowden, Dep. at 197-99)).
302. On June 4, 2010, Mr. Koch proposed to Endo new terms for the IPX-066a development agreement, with Endo paying Impax \$10 million upfront, \$20 million more in development milestones, and an additional \$10 million if annual sales were projected to exceed \$150 million within the product's first ten years on the market. (CX0410 at 001-02).
303. In a June 4, 2010 email, Impax informed Endo that IPX-203 was the product that had been designated as IPX-066a and provided Endo with additional information on IPX-203. (CX1311).
304. In an internal Endo email dated June 4, 2010, Mr. Levin stated that he received a call from Impax "looking to recut the economics on the R&D collaboration." (CX1311).
305. In an internal Impax email dated June 4, 2010, Mr. Koch expressed his belief that Mr. Mengler had "dropped" the milestones for the product collaboration too dramatically from the prior proposal of \$40 million. Mr. Koch agreed with the proposal's including a \$10 million upfront payment. (CX407 at 001).

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306. On June 4, 2010, Impax and Endo exchanged first drafts of the SLA and the DCA. After exchanging the first drafts, Impax and Endo continued to negotiate the language of the documents, exchanging numerous drafts and holding at least ten teleconferences between June 4 and June 7, 2010. (CX4003 (Snowden, IHT at 137-38); RX406 at 0001; CX1301 at 114-18; CX0310 at 006-11).
307. On June 7, 2010, Dr. Cobuzzi provided the final opportunity evaluation worksheet on IPX-203 to Endo's executive team, stating: "I believe this OEW provides adequate and fair representation of what I would define as a good deal for Endo." (CX2748).
308. On June 7, 2010, an execution version of the DCA was circulated. (CX0326).

**d. Relationship between IPX-066 and IPX-203**

309. In 2010, Impax was not looking for a partner in the United States for IPX-066 because Impax planned to market the product domestically on its own, utilizing its established neurologist network. (Snowden, Tr. 456-57; Koch, Tr. 319-20; CX4036 (Fatholahi, Dep. at 77, 80) (Impax "could effectively market [IPX-]066 here in the U.S. ourselves and didn't need any assistance.")).
310. In 2010, Impax had already shouldered all development risks and development costs of IPX-066. Therefore, it made little sense to Impax to share potential profits from the drug with a partner. (Nestor, Tr. 2941-42).
311. Dr. Michael Nestor, the head of Impax's brand division,<sup>13</sup> was "absolutely not" willing to consider an agreement with Endo regarding IPX-066. (Nestor, Tr. 3054-55).
312. Impax ultimately engaged GlaxoSmithKline ("Glaxo") as a partner for marketing IPX-066 outside the United States

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<sup>13</sup> As president of the brand division, Dr. Nestor had to approve any co-development and co-promotion agreement. (Nestor, Tr. 3054-55).

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and Taiwan. Glaxo would assist with the regulatory and infrastructure hurdles associated with commercializing a product outside the United States and Taiwan and could ensure the commercialization process proceeded in non-U.S. markets. (Nestor, Tr. 2942-43).

313. In response to Endo's May 26, 2010 proposal for an agreement concerning IPX-066 and all improvements, modifications, derivatives, and line extensions thereof (F. 294), Impax countered on May 27, 2010 that any collaboration would be for IPX-066a. (F. 295; *see also* Snowden, Tr. 405-06 (testifying that "Endo was interested in the Parkinson's space and wanted the deal to cover both products, the original IPX-066 and the follow-on product, but Impax wasn't interested in doing the deal on IPX-066. So there wasn't actually . . . a switch as much as Endo was trying to negotiate for both product rights and Impax was only interested in doing product rights on the one product.")).
314. IPX-066a, which later became known as IPX-203 (F. 303), was Impax's "next generation" version of IPX-066 and was a planned carbidopa-levodopa-based product that Impax hoped would improve the treatment of Parkinson's disease symptoms and also have favorable dosing over IPX-066. (Reasons, Tr. 1236; *see* Koch, Tr. 320; Nestor, Tr. 2935).
315. At the time of the DCA negotiations, IPX-203 was in the beginning of the formulation stage. Impax had not landed on a final formulation for the product, but, based on the opinion of Dr. Suneel Gupta, the chief scientific officer at Impax in 2010, Impax believed that the product concept for IPX-203 would be "doable." (Nestor, Tr. 2946, 3030-31; RX387 at 0001).
316. Dr. Gupta had expertise in reformulating existing chemical compounds to create commercial and clinical improvements through reformulation and "is renowned for taking existing compounds and reformulating them and turning those products into very successful drugs in the



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marketplace that meet significant medical need[s].” When Dr. Gupta tells Impax management that a product concept is “doable,” they believe him and rely on his judgment. (CX4033 (Nestor, Dep. at 80-83)).

317. Impax’s expertise has long been the development of extended-release technologies, which gives it “the basis of knowledge to know what kinds of things to look for in a formulation that would give you” longer effective time for a Parkinson’s disease medication. Such expertise is “a very important asset for” Impax and allows it to regularly “take advantage of that [controlled-release] technology” to compete successfully. (Nestor, Tr. 2955-56; *see* CX4014 (Hsu, IHT at 10, 30) (Impax is “a company specialized in the controlled release” of medications.)).
318. Impax was already planning to withdraw promotion and sampling of IPX-066 (Rytary) once IPX-203 reached the market, allowing patients to continue successful use of IPX-066 while avoiding any division of Impax’s sales force between multiple Parkinson’s disease products. This was consistent with the commercial goal of extending the IPX-066 franchise. (Nestor, Tr. 2935-37).
319. The ultimate goal of IPX-203 was to further extend the amount of time patients have control over their motor symptoms after taking the medication. (Nestor, Tr. 2935 (“the whole idea behind this product . . . is to be able to even extend more the effective time that a patient is on IPX-203, meaning that they have a longer period of time when their motor control symptoms are under control”); CX4014 (Hsu, IHT at 39)).
320. IPX-203 would also employ a “much more simplified” dosing regimen than IPX-066, making it more intuitive for neurologists to prescribe the product. (Nestor, Tr. 2994).
321. Impax projected that the total cost of development for IPX-203 would be between \$80 and \$100 million. The projected costs were a “natural extrapolation” of the

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development costs incurred in connection with IPX-066. (Nestor, Tr. 2944-45; Koch, Tr. 321; RX387 at 0001).

**e. Due diligence efforts by Endo**

**i. Review of information regarding IPX-203**

322. Impax provided Endo with information regarding Impax's research into the IPX-203 product concept and about how IPX-203 would improve upon existing Parkinson's disease therapies, including IPX-066. (RX377; Cobuzzi, Tr. 2525-26, 2602).
323. The information Impax provided on IPX-203 made clear that IPX-066 and IPX-203 were intended to be [REDACTED]. (Cobuzzi, Tr. 2530, *in camera*).
324. IPX-203 was intended to be a modification of carbidopa and levodopa, a well-known combination treatment for Parkinson's disease. (CX1209 at 003; Nestor, Tr. 3004; Cobuzzi, Tr. 2524).
325. Levodopa generally is not well absorbed in the colon. (Cobuzzi, Tr. 2535).
326. IPX-203 would have [REDACTED]. (Nestor, Tr. 2950-51, 2957, *in camera*; Cobuzzi, Tr. 2529-30, 2538, *in camera*).
327. The information Impax provided on IPX-203 [REDACTED]. (Cobuzzi, Tr. 2530, 2534-35, *in camera*; see RX377 at 0031, 0040-41, *in camera*).

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**ii. Review of information regarding IPX-066**

328. Impax sent IPX-066 materials to Endo to “help [Endo] frame their evaluation of the market environment into which IPX-203 could be launched as a successor to IPX-066.” (Cobuzzi, Tr. 2539; RX376 at 0001; *see* RX272 at 0001; RX080 at 0006 (“IPX-066 affords a reasonable surrogate for IPX-203 given the anticipated similarities in constituents and formulation.”)).
329. Impax sent IPX-066 materials to Endo because (1) Impax had already established a data room regarding IPX-066 when it sought a partner to market the product outside the United States, and (2) IPX-203 was a follow-on product to IPX-066; therefore “the foundational aspects of what was in the data room about IPX-066 were relative to the kind of product we envisioned IPX-203 ultimately to be, which is an extended release carbidopa-levodopa formulation that would offer clinically meaningful benefit[s] over and above what the current standard of care was.” (Nestor, Tr. 3055-56).
330. The materials Impax provided regarding IPX-066 aided Endo’s assessment of IPX-203 “tremendously.” Dr. Cobuzzi explained that IPX-066 was relevant to his assessment of IPX-203 because, among other reasons, both products would contain carbidopa and levodopa, and the only difference was [REDACTED], [REDACTED], “which we viewed as being relatively simple, although it does change the chemistry.” (Cobuzzi, Tr. 2625, 2539-40, *in camera*).
331. Julie McHugh, Endo’s chief operating officer at the time of settlement and the individual responsible for assessing the commercial opportunity of any product, deemed IPX-066 an appropriate commercial proxy for assessing IPX-203. (CX2772 at 001; Cobuzzi, Tr. 2541-42).
332. The IPX-066 materials, as well as Endo’s experience with other Parkinson’s disease treatments, suggested that the successful development of IPX-203 would more

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effectively treat Parkinson's disease symptoms. (Cobuzzi, Tr. 2634-35).

333. The materials Impax provided regarding IPX-066 showed that IPX-066 was forecasted to have [REDACTED] in sales by 2019. (RX376 at 0050, *in camera*).
334. Endo used those forecasts (F. 333) to calculate "conservative estimates" for IPX-203 sales. (CX2780 at 001; *see* RX080 at 0011-12; CX2533 at 001 ("I think we can hold to the original forecast assumptions with a shift out in the sales line to reflect the 2017 launch versus the 2013 launch with IMPAX-066.")).
335. Endo's reliance on information about a related drug when evaluating IPX-203 was not unusual. Endo relies on information about one pharmaceutical asset to assess another, related pharmaceutical asset "all the time." (Cobuzzi, Tr. 2624).
336. When information about related pharmaceutical assets is available, it is "much easier" to evaluate a proposed drug than it is to evaluate a new chemical entity on its own. (Cobuzzi, Tr. 2625).

**iii. Sufficiency of time and information**

337. Dr. Robert Cobuzzi was the head of Endo's corporate development group as well as the lead scientist on the team that evaluated the commercial and scientific merits of the DCA with Impax. (Cobuzzi, Tr. 2523).
338. Dr. Cobuzzi and his team conducted Endo's due diligence review of the DCA. (Cobuzzi, Tr. 2547-48).
339. Dr. Cobuzzi holds a Ph.D. in molecular and cellular biochemistry and wrote his dissertation on Parkinson's disease. (Cobuzzi, Tr. 2511-12).
340. Dr. Cobuzzi's team included at least one other scientist with a background in Parkinson's disease treatments. Dr.

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Kevin Pong, who was in charge of evaluating Endo's scientific licenses, had a "significant amount of experience" in the area of Parkinson's disease treatments. (Cobuzzi, Tr. 2512-13).

341. Endo also employed an outside consulting firm to provide guidance about the potential value of IPX-066. (RX072).
342. Dr. Cobuzzi believes that Endo had sufficient time to assess IPX-203 before entering into the DCA, particularly in light of Dr. Cobuzzi's and Endo's familiarity with Parkinson's disease treatments (F. 257-261, 293) and the detailed nature of the information Impax provided on IPX-066 (F. 328-332). (Cobuzzi, Tr. 2543, 2563, 2625).
343. In his May 25, 2010 email to the Endo team performing due diligence on a potential Parkinson's disease treatment collaboration with Impax, Dr. Cobuzzi wrote: "this is an area we know well as a company both in terms of past evaluations, and by virtue of the fact that we previously held the rights to IR Sinemet [another Parkinson's disease treatment], this should not be a difficult evaluation." (CX1007 at 001; Cobuzzi, Tr. 2547-48).
344. Endo knew "the underlying molecules, the carbidopa and levodopa, and we looked at a number of Parkinson's opportunities in the past, so we knew the general landscape of the area in which we were looking at this as a commercial opportunity." (Cobuzzi, Tr. 2548-49).
345. Taken together, Dr. Cobuzzi believed that Endo had adequate time and "the information [it] needed" to evaluate the DCA properly. (Cobuzzi, Tr. 2563).

**f. Endo's valuation of IPX-203**

346. Any time Endo considers a pharmaceutical collaboration, it completes an OEW (opportunity evaluation worksheet), which is Endo's standard method of assessing the science, medical information, commercial opportunity, and related

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financial considerations behind a potential collaboration project. (Cobuzzi, Tr. 2540-41, 2546-47).

347. In Endo's OEW on IPX-203, Dr. Cobuzzi and his team concluded that Endo should enter the DCA. Dr. Cobuzzi made that recommendation to Endo's CEO, CFO, and board of directors. (Cobuzzi, Tr. 2544, 2561; CX2748 at 001).

**i. Commercial aspects**

348. Endo's OEW on IPX-203 stated that the DCA was "a good deal for Endo." (CX2748 at 001; *see* Cobuzzi, Tr. 2545-46, 2554; CX4017 (Levin, Dep. at 166-67)).
349. Dr. Cobuzzi recommended the DCA as "an exciting opportunity for Endo" because it "further builds our product pipeline for the future with a drug candidate that fits with our commercial footprint." (CX1209 at 001; Cobuzzi, Tr. 2549-50).
350. In 2010, Endo did not have many products in its commercial pipeline and did not have the capacity to develop new products in-house. (Cobuzzi, Tr. 2515, 2562).
351. Endo's OEW on IPX-203 stated: "[m]arket research provided by Impax is similar to work done several years ago by Endo in evaluating other [Parkinson's disease] related opportunities." (CX1209 at 011).
352. Endo also analyzed the net present value of its initial investment under the DCA. Endo generally requires a 10% rate of return on its investment before agreeing to a development and co-promotion deal. (Cobuzzi, Tr. 2561).
353. Endo determined that the DCA and IPX-203 had a "very reasonable rate of return" of [REDACTED]. (Cobuzzi, Tr. 2560, *in camera*; CX1209 at 018, *in camera* (estimating net present value of the DCA

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to be [REDACTED]);  
RX080 at 0017, *in camera*).

354. Endo thought it could realize the type of return referenced in F. 353, even though the market for Parkinson's disease treatments was heavily genericized, because IPX-203 would offer a superior product. (CX2748 at 0012; Cobuzzi, Tr. 2622-23).
355. Dr. Cobuzzi explained that "the better [a product] is for the patient or the end user, the more likely they are to want it, need it, or use it," and the more likely that doctors will prescribe the new compound. (Cobuzzi, Tr. 2536-37).

**ii. Medical aspects**

356. Endo's OEW on IPX-203 stated that market research "indicate[d] that most physicians who treat [Parkinson's] patients are generally satisfied by existing treatment options with two exceptions: 1) existing treatments do not modify the course of the disease, they only palliate symptoms; and, 2) existing drugs begin to lose effectiveness within 10-15 years after initiation of therapy due to the development of feedback inhibition and other biochemical mechanisms that can be classified loosely as 'resistance.' Other unmet needs include a need for better control of efficacy over time . . . ." (CX1209 at 011).
357. IPX-203 was intended to address the second exception described in F. 356. Specifically, it would extend the period of time over which the drug is absorbed, which would allow doctors to lower the doses needed for effective treatment. Over time, lower doses would also prevent the drug from losing effectiveness in patients. (Cobuzzi, Tr. 2555; *see* Nestor, Tr. 2935 ("the whole idea behind this product . . . is to be able to even extend more the effective time that a patient is on IPX-203, meaning that they have a longer period of time when their motor control symptoms are under control"))).

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358. Endo's OEW on IPX-203 (F. 356) explained that "IPX066 has been developed by Impax to address physician[s'] desire for a superior long-acting carbidopa-levodopa product, and IPX-203 represents a still greater improvement in pharmaceutical profile with a value proposition that includes faster onset of action, superior management of motor fluctuations and convenient oral dosing in a simplified regimen that could require no more than twice-daily administration, and in some cases even once-daily administration." (CX1209 at 012).
359. Taking the drug less frequently would be particularly beneficial for Parkinson's patients, who can have trouble "even picking up the pill." (Cobuzzi, Tr. 2557).
360. Dr. Cobuzzi and his team concluded that the attributes ascribed in F. 357-359 (to lower doses and taking drugs less frequently) would make IPX-203 a "greater improvement in disease control and ease of use relative to" IPX-066. (RX080 at 0011).
361. Dr. Cobuzzi and his team concluded that IPX-203 "had the opportunity to move very quickly through development" and "was an exciting compound in that it was made up of . . . two compounds that have already been approved by the FDA . . ." (CX4017 (Levin, Dep. at 166-67)).
362. Dr. Cobuzzi and his team concluded that there was "a higher than average probability that we might be able to get this drug approved if they were able to make the modification" envisioned in the IPX-203 product concept. (Cobuzzi, Tr. 2537-38).
363. Dr. Cobuzzi believed that IPX-203 had a path to approval that would successfully bring IPX-203 to the market. (Cobuzzi, Tr. 2552).

**iii. Allocation of risk**

364. Endo's OEW analysis on IPX-203 explained to Endo's board of directors that the DCA's "deal structure



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acceptably mitigates Endo's exposure despite the early development stage." (CX1209 at 003; Cobuzzi, Tr. 2543-44 (noting that most of the risk under the DCA was borne by Impax)).

365. One way in which the DCA mitigated risks to Endo is that Endo had to make a single contribution to Impax's development work and would make additional payments only if the "risk associated with proving the concept would have been retired" through successful completion of development milestones such as Phase II clinical trials. Thus, Endo knew its maximum development costs up front even though "[d]rug development is extremely expensive." (Cobuzzi, Tr. 2543-44, 2558; *see* CX1209 at 003).
366. A second way in which the DCA mitigated risks to Endo is that it did not require Endo to perform any development work or otherwise expend internal resources. (Cobuzzi, Tr. 2558-59, 2627-28).
367. A third way in which the DCA mitigated risks to Endo is that Endo retained the same profit-sharing rights no matter how much time or money Impax expended on IPX-203's development. (Cobuzzi, Tr. 2564, 2627-28).
368. These factors (F. 365-367) left Endo "comfortable" with the collaboration from the perspective of risk. (Cobuzzi, Tr. 2543-44).
369. Dr. Cobuzzi believed that the profit-sharing rights Endo received under the DCA justified Endo's payment obligations. (Cobuzzi, Tr. 2564).
370. Compared to other collaboration agreements, Endo's \$10 million investment to buy into the IPX-203 opportunity was "not an uncharacteristically large amount of money." (Cobuzzi, Tr. 2559).

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**g. Impax's valuation of IPX-203 and the DCA**

371. Dr. Michael Nestor, president of Impax's brand division, noted in 2010 that he "would hate to have to sell" IPX-203 since the product was envisioned as a better product than, and "a potential franchise extender for," IPX-066. (RX387 at 0001).
372. In negotiating the DCA, Impax initially wanted to retain any profits flowing from prescriptions written by high-prescribing non-neurologists – which were the profits Endo sought under the DCA – because of the "significant" amount of money those prescriptions represented. (RX405 at 0001; *see* CX4033 (Nestor, Dep. at 123); CX1009 at 008 (non-neurologists "manage about 40%" of Parkinson's patients)).
373. Impax knew that there were at least "a couple of thousand physicians who were primary care physicians that prescribed Parkinson's patients, somewhat like a neurologist. So that was the audience that we had envisioned promoting IPX-203 to." (Nestor, Tr. 2948).
374. With the DCA, Impax "got a partner who would fund some of the costs to get [IPX-203] approved." (Koch, Tr. 321).
375. In 2010, Impax did not have the money to begin working on the clinical research for IPX-203. Impax could not fund the IPX-203 project internally because its shareholders did not "want to see large sums of money being spent over an extended time period on a single product. They were accustomed to R&D investments being made on many individual products that you bring to market as a generic." (Nestor, Tr. 3052-53).
376. Impax needed external funding to move the IPX-203 product forward in development and explored a number of possible funding approaches, including seeking money from venture capital firms. (Nestor, Tr. 2941, 3052-53).

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377. When the idea was raised of obtaining funding for IPX-203 through a co-development program with Endo, Impax's brand drug development team was "very excited about that." (Nestor, Tr. 2941).

**h. Impax's efforts to develop IPX-203**

378. As early as November 2009, Impax had reviewed [REDACTED] [REDACTED]. (Nestor, Tr. 2952-53, *in camera*; RX247, *in camera*).
379. Following execution of the DCA, Impax devoted substantial efforts to IPX-203's development. Impax personnel have spent over [REDACTED] working on IPX-203 since June 2010. (Nestor, Tr. 2970-71, *in camera*; RX241, *in camera*).
380. In 2010, Impax commissioned preclinical pharmacokinetic studies testing several relevant compounds and began laboratory research. (RX241; RX242).
381. In the course of its development efforts, Impax explored various IPX-203 formulations in an effort to achieve the desired clinical outcome. This involved multiple rounds of pharmacokinetic studies of various formulations to assess their pharmacokinetic profiles, a metric that spoke directly to the clinical improvement Impax was seeking to achieve with the program. (Nestor, Tr. 2961-62; CX0310 at 26-27; RX242; CX3166 at 039-42).
382. Impax completed pharmacokinetic studies of IPX-203 no later than 2012. Impax then conducted additional pharmacokinetic studies and completed Phase I clinical trials. (RX242 (Tab 2012); CX3166 at 039-42; Nestor, Tr. 2957; RX157 at 0020).
383. Impax manufactured a clinical supply of IPX-203, developed protocols for Phase II clinical trials, submitted those protocols to the FDA, and secured FDA approval for

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efficacy and safety studies in November 2014. (RX157 at 0020).

384. Further development work on IPX-203 was delayed after Impax experienced delays in the development of IPX-066, the brand drug IPX-203 was intended to extend and improve upon. (Reasons, Tr. 1237-38; CX4021 (Ben-Maimon, Dep. at 145) (IPX-066 development was delayed for a “[c]ouple years”); CX4033 (Nestor, Dep. at 135-36)).
385. Bryan Reasons, Impax’s current chief financial officer, explained that when IPX-066 was delayed, “resources were put to focus on the approval of Rytary [IPX-066] so that we could get that to market, grow that . . . commercially, and it would also be beneficial to . . . when we launched the next generation of [IPX]-203.” (Reasons, Tr. 1237-38).
386. Further development work on IPX-203 was also delayed after Impax received an FDA Warning Letter in 2011 relating to Impax’s manufacturing processes, which caused Impax to direct its scientific staff to spend their time helping the operations people correct the deficiencies that the FDA noted in its last inspection. (Nestor, Tr. 2968, 2985-86).
387. Impax’s research and development team “worked to help remediate” any issues identified by the FDA and to prepare for “the FDA to come in and do their re-inspection,” which meant that “nothing was going to go forward until such time as we got over that hurdle.” (Nestor, Tr. 2985-88).
388. Notwithstanding the delays (F. 387) and the DCA’s termination (F. 389), Impax has continued development work on IPX-203. (Nestor, Tr. 2970).
389. IPX-203 is currently Impax’s “lead compound on the brand side of [its] R&D programs. It’s really our strategy to continue to grow and extend the duration of our Parkinson’s franchise.” (Reasons, Tr. 1238).

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390. Impax has now completed Phase II clinical trials for IPX-203 and plans to begin Phase III clinical trials at the beginning of 2018. (Nestor, Tr. 2978; Reasons, Tr. 1238).
391. Phase II clinical trials of IPX-203 revealed a statistically significant improvement in treatment over IPX-066 and other existing treatments, reducing the amount of time Parkinson's patients are without control over their motor symptoms. (Nestor, Tr. 2978).
392. The Phase II clinical trials of IPX-203 suggest that it will offer an improvement of over two hours in motor symptom control when compared to immediate-release carbidopa-levodopa treatments and one hour of improvement over IPX-066. (Nestor, Tr. 2984-85; *see also* RX208 at 0015-16).
393. An improvement of over two hours in motor symptom control over existing medications is a "terrific result" that is "highly statistically significant" and "clinically meaningful." (Nestor, Tr. 2978-79, 2984-85).
394. The Phase II clinical results of IPX-203 suggest that Parkinson's patients will have "their symptoms . . . under control for a longer time period," which is "a very important thing" for patients. (Nestor, Tr. 2937, 2966).
395. Impax also sought, and the FDA granted, a special protocol assessment for further clinical trials of IPX-203 in 2017. A special protocol assessment is an agreement between a pharmaceutical company and the FDA regarding the design of clinical trials. When a special protocol assessment is in place, the FDA will not question the trial designs in Phase III clinical trials, which "takes an element of risk out of a new drug application review." (Nestor, Tr. 3001-02).

**i. Termination of the DCA**

396. Impax's IPX-203 development efforts revealed that the formulation of IPX-203 contemplated by the DCA could

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not achieve the intended clinical benefits. (Snowden, Tr. 459-60; *see* Nestor, Tr. 2960-61).

397. Between 2014 and 2015, Impax's research team determined it could not achieve the desired product profile with a [REDACTED] formulation. Impax consequently began pursuing alternative approaches to an extended-release formulation of carbidopa and levodopa. (Snowden, Tr. 459-60; Nestor, Tr. 2960-61).
398. After extensive research and testing, [REDACTED]  
[REDACTED]  
[REDACTED].  
(Nestor, Tr. 2961-62, *in camera*).
399. In 2014, Impax filed an Investigational New Drug Application with the FDA regarding [REDACTED]  
[REDACTED], which the FDA accepted. (Nestor, Tr. 2963, *in camera*).
400. Although the specific formulation of IPX-203 changed, Impax still viewed [REDACTED]  
[REDACTED] it had been developing since 2009 "[b]ecause it was all towards the same end. It still involved carbidopa-levodopa. It was just a variation in formulation." (Nestor, Tr. 2962, *in camera*).
401. Under the terms of the DCA, Impax and Endo formed a joint development committee that was to meet four times a year. These meetings were intended to be "[e]ssentially a progress report on clinical development by Impax." (Nestor, Tr. 3036-37; RX365 at 0016-17 (DCA §§ 7.2, 7.3); CX3345 at 006).
402. As of 2014, the joint development committee had not met. Michael Nestor, the president of Impax's brand division, explained that Impax really had nothing to discuss with Endo until the formulation work was settled. Once

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Impax's formulation work had reached that point, Impax met with Endo in 2015 regarding the status of Impax's IPX-203 development work. (CX3165; Nestor, Tr. 2963-64, 2967-69; CX4033 (Nestor, Dep. at 163-64)).

403. In April 2015, Impax approached Endo to update it on the status of Impax's IPX-203 development work, including the change in formulation strategy. Impax made a presentation describing Impax's formulation testing and results and [REDACTED]. (Nestor, Tr. 2963-64, *in camera*; RX208, *in camera*).
404. Impax viewed the presentation (F. 403) as a "precursor" to the joint development committee meetings called for by the DCA. (Nestor, Tr. 2967; CX4033 (Nestor, Dep. at 164)).
405. Endo and Impax "had not had a meeting of the joint development committee" before 2015 "because, quite frankly, we really had nothing to discuss with them" until the formulation work was settled. (Nestor, Tr. 2967-69; *see* CX4033 (Nestor, Dep. at 163-64)).
406. Indeed, Impax "had to make sure we had a formulation first and that we were ready to go into the clinic" before meetings of the joint development committee "would be relevant." (CX4033 (Nestor, Dep. at 163-64); *see* Nestor, Tr. 2967-68).
407. By 2015, Impax had sufficient formulation research, as well as [REDACTED], to report to Endo. (Nestor, Tr. 2963, *in camera*).
408. During the parties' April 2015 discussion (F. 403), Impax offered to amend the DCA so that the DCA would cover the [REDACTED] to IPX-203. (Nestor, Tr. 3057, *in camera*; CX2928 at 013, *in camera*).
409. Impax was prepared to amend the DCA to include the new formulation of IPX-203 because it wanted to work with

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Endo in order to move the drug forward and Impax believed the new formulation would give it “an avenue through which we could continue the development of IPX-203.” (Nestor, Tr. 3056-57).

410. Endo initially agreed to the proposed amendment (F. 408), noting that it “would like to maintain or even increase [its] involvement with the development program . . . as [it] remain[ed] optimistic this will be a successfully differentiated product, which Endo looks forward to the opportunity to co-promote . . . with Impax.” (RX218 at 0001; *see* Snowden, Tr. 459-60).
411. Following Endo’s initial agreement (F. 410), Impax consequently prepared an amendment to the DCA and expected the parties to continue collaborating on IPX-203. (Snowden, Tr. 458-59; *see* CX2747).
412. Endo subsequently informed Impax that Endo had “decided not to amend the existing agreement” and would no longer “participat[e] in [the] program,” but did not provide any explanation. (CX2747).
413. Endo’s decision surprised Impax because “fairly recently” Endo “had said the opposite, that they were interested in continuing forward with the program and amending the agreement.” (Snowden, Tr. 460-61; RX221 at 0001 (Endo’s decision not to amend DCA was “a surprise”).
414. Because Endo retracted its initial expression of interest in amending the DCA to cover the new formulation for IPX-203, Impax and Endo terminated the DCA by mutual agreement effective December 23, 2015. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-011 ¶ 43); Snowden, Tr. 407; RX219 at 0001-02; RX198 at 0005-07 (termination agreement)).

**j. Complaint Counsel’s experts’ opinions**

415. Complaint Counsel’s expert in pharmaceutical business development agreements, Dr. John Geltosky, has worked



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on a handful of development deals in their early stages and has never negotiated a development and co-promotion agreement similar to the DCA. The majority of Dr. Geltosky's experience with pharmaceutical collaboration agreements relates to his employment with large pharmaceutical companies and Dr. Geltosky admitted that he could not speak to how the universe of small or mid-sized pharmaceutical companies approach partnerships for early-stage products. (Geltosky, Tr. 1141-45).

416. Dr. Geltosky acknowledged that Endo's senior vice president of corporate development (Dr. Cobuzzi) is better qualified to assess the strategic fit of the DCA for Endo than he is. (Geltosky, Tr. 1163).

**i. Bona fide product collaboration**

417. Dr. Geltosky did not offer an opinion regarding whether the DCA was a bona fide scientific collaboration or whether Endo exercised good business judgement in entering the DCA. (Geltosky, Tr. 1125-28).
418. Dr. Geltosky acknowledged that the DCA was a way for Impax and Endo to share both risks and costs associated with developing IPX-203. (Geltosky, Tr. 1135).
419. Dr. Geltosky did not offer an opinion regarding whether Endo or Impax bore more of the risk under the DCA and did not quantify any risk related to the DCA or opine what the appropriate payment would be to reflect that risk. (Geltosky, Tr. 1138, 1147).
420. Dr. Geltosky acknowledged that at the time of settlement, Impax estimated costs for the development of IPX-203 to be between \$80 and \$100 million, that Impax had to cover all development costs in excess of Endo's specified milestone contributions, no matter how much the development work cost, and that Endo's risks and costs associated with developing IPX-203 were limited to the milestone payments. (Geltosky, Tr. 1136-38).

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421. Dr. Geltosky's opinion that IPX-203 did not fit within Endo's strategic area of focus was based on his review of certain Endo documents provided to him by Complaint Counsel, which did not list Parkinson's disease as an area of interest, and one of which stated that Endo was interested in near-term revenue generators. In reaching that opinion, Dr. Geltosky did not consider other deals contemplated or completed by Endo. Dr. Geltosky did not have contact with the individuals involved in evaluating the DCA. (Geltosky, Tr. 1159-61).
422. Dr. Geltosky acknowledged that Endo has entered into very-early, discovery-stage pharmaceutical partnership deals and that pharmaceutical companies enter early-stage development deals "all the time." (Geltosky, Tr. 1145-46).
423. Dr. Geltosky offered no criticism of Impax's behavior with regard to the DCA. (Geltosky, Tr. 1183).

**ii. Due diligence**

424. Dr. Geltosky reached an opinion of Endo's due diligence efforts in evaluating the DCA based on one document provided to him by Complaint Counsel. (Geltosky, Tr. 1159).
425. Dr. Geltosky admits that Impax provided Endo with comprehensive information regarding IPX-066, including clinical information regarding safety and efficacy, intellectual property, technical due diligence, and financial analysis. (Geltosky, Tr. 1156-58; RX272 at 0005-08).
426. Dr. Geltosky admits that information about IPX-066 provides useful information for IPX-203 because IPX-203 was a follow-on drug, because the two products could compete, and because, in modeling how IPX-203 might perform in the market, Impax and Endo needed to use IPX-066 as a benchmark. (Geltosky, Tr. 1153-56).

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427. Dr. Geltosky did not offer an opinion on whether Endo exercised good business judgment in its due diligence of the DCA. (Geltosky, Tr. 1128).

**iii. Valuation**

428. Dr. Geltosky has never performed a financial valuation of a pharmaceutical collaboration. (Geltosky, Tr. 1179-80).
429. Dr. Geltosky did not conduct any valuation analysis of the DCA, did not calculate a net present value of the DCA at the time it was executed, and did not conduct any other form of empirical analysis regarding the DCA. (Geltosky, Tr. 1125, 1133).
430. Dr. Geltosky did not offer any opinion about the actual value of the DCA to Endo. (Geltosky, Tr. 1125).
431. Dr. Geltosky did not compare the payment terms in the DCA to the payment terms in other pharmaceutical collaboration agreements. (Geltosky, Tr. 1139-40).
432. Dr. Geltosky did not address the actual value of the profit-sharing rights acquired by Endo or whether Endo's profit-sharing rights justified its DCA payment obligations. (Geltosky, Tr. 1124-25).
433. Dr. Geltosky agreed that Endo's profit-sharing rights remained the same regardless of the development costs incurred by Impax. (Geltosky, Tr. 1137-38).
434. Dr. Geltosky did not offer an opinion regarding whether the profit-sharing provisions in the DCA favored Impax or Endo. (Geltosky, Tr. 1138).
435. Complaint Counsel's economic expert, Professor Noll, acknowledged that, if a payment from a brand company to a generic company is used to purchase a bundle of rights at a fair market price, the payment is justified. (Noll, Tr. 1620).

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436. Professor Noll did not independently analyze the DCA to determine whether it was justified, had value to either party, or represented an overpayment. (Noll, Tr. 1456, 1581-82).
437. Professor Noll relied on Dr. Geltosky's "analysis of the degree to which the \$10 million payment and co-development deal represented the acquisition of an asset that was approximately valued at a \$10 million price." (Noll, Tr. 1582).
438. Professor Noll agreed that if Dr. Geltosky did not offer an opinion regarding the actual value of the DCA to Endo at the time it was executed, then Professor Noll "would not include the \$10 million as part of the large payment that was unjustified." (Noll, Tr. 1585-86).
439. Professor Noll agreed that if Dr. Geltosky did not provide a "sufficiently well-documented rationale for the conclusion that the payment [under the DCA] was unjustified, then you would pull [the DCA] out of the case." (Noll, Tr. 1582-83).

**D. Anticompetitive Effects****1. Harm to competition**

440. A basic economic principle is that consumers benefit from increased competition in the form of lower prices and increased choice. (CX5000 (Noll Expert Report at 011 ¶ 24, *see also* at 109-10 ¶ 250)).
441. Harm to competition occurs when the conduct of firms on one side of a market (usually sellers) inflict harm on participants on the other side of the market (usually consumers). Harm to competition is not limited to the certain elimination of competition, but also includes eliminating the possibility that participants on the other side of the market will have the opportunity to experience the benefits of competition, such as lower prices. (CX5000 (Noll Expert Report at 011 ¶ 24)).

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442. Normally when a generic drug launches, the competition between the brand-name firm and the generic firm causes the price of the drug to drop, which is a benefit to consumers. Reverse payment settlements can harm consumers, to the extent that the settlement extends the period in which the brand-name firm is the only seller of a drug, by requiring the generic firm to forego entering at an earlier date. (CX5000 (Noll Expert Report at 118, 132 ¶¶ 268, 300); Noll, Tr. 1425-27).
443. A reverse payment settlement replaces the possibility of successful generic entry with a certainty. To this extent, the brand-name firm is buying an insurance policy by which it pays the generic firm a premium in exchange for the generic firm guaranteeing it will not compete prior to the date specified in the settlement of the patent litigation. (CX5000 (Noll Expert Report at 118 ¶ 268); Noll, Tr. 1427-28).
444. Payment to an alleged patent infringer, in exchange for a certain entry date, converts the possibility of substantial loss of profits for the patent-holder, due to generic competition, into the certainty that it will continue to earn profits as the sole seller of the drug until the entry date agreed to in the settlement of the patent litigation. (CX5000 (Noll Expert Report at 104 ¶ 239)).
445. By eliminating the possibility of generic competition for a period of time, reverse payment settlements interfere with the competitive process and can harm consumers by depriving them of the possible benefits of increased competition in the period prior to the entry date provided under the settlement agreement. (Noll, Tr. 1422-23; CX5000 (Noll Expert Report at 119 ¶ 269)).
446. A large reverse payment can imply that the market entry date in the settlement agreement is later than the date that the patent holder expected the alleged patent infringer would enter the market since it is unlikely that a patent holder would agree by a settlement to pay an alleged patent infringer anything more than saved litigation costs,

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only to obtain entry on the date the alleged patent infringer would have entered anyway. (CX5000 (Noll Expert Report at 103-04 ¶ 238); *see also* Bazerman, Tr. 873-74; CX5001 (Bazerman Expert Report at 006 ¶ 10) (“[L]itigation costs to the parties increase the viability of a negotiated agreement, as both parties save these costs if they can negotiate an agreement.”)).

447. A brand-name pharmaceutical firm has an economic incentive to pay the generic firm as part of a settlement if the payment is less than the profits the brand firm would earn during the period before the agreed-upon entry date of the generic product. (CX5000 (Noll Expert Report at 124-26 ¶¶ 280, 284-85); CX5001 (Bazerman Expert Report at 023 ¶ 46) (stating that it is a “common pattern” in the pharmaceutical industry that the brand company’s gains from not facing generic competition are greater than the costs to the generic for agreeing not to sell a generic product)).
448. A generic pharmaceutical firm has an economic incentive to enter into reverse payment settlements. By agreeing not to launch its generic product for some period of time, the generic firm loses profits it would earn on sales of its generic product. However, if the brand-name firm compensates the generic firm with a sufficiently large payment, the generic firm will be willing to postpone its launch until a later date. (CX5000 (Noll Expert Report at 128-29 ¶¶ 290-92)).
449. The Hatch-Waxman regulatory framework creates additional incentives for pharmaceutical companies to enter into reverse payments. Because of the 180-day exclusivity period granted to first filers (*see* F. 21), by settling with the first filer, the brand company not only eliminates the possibility of entry by the first filer during the period before the generic firm’s product’s entry date in the agreement, but also eliminates the possibility of market entry for six months beyond this period by other potential generic drug competitors. (CX5000 (Noll Expert Report at 104 ¶ 239)).

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**2. At-risk launch**

450. Impax would not have launched its generic Opana ER at risk. (F. 451-548).

**a. At-risk launches generally**

451. Launching a generic product before a non-appealable decision in patent litigation is commonly known as an “at-risk launch.” (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-008 ¶ 23; *see* Koch, Tr. 246; Bingol, Tr. 1282; Hoxie, Tr. 2831).

452. An at-risk launch can occur any time after FDA final approval, including (1) before a district court decision, (2) after a district court decision but before an appellate decision by the Federal Circuit, or (3) after a Federal Circuit opinion if the case is remanded or otherwise continues. (Hoxie, Tr. 2810-11; CX4021 (Ben-Maimon, Dep. at 133-34); CX4026 (Nguyen, Dep. at 47-48)).

453. If a generic company launches a product before a non-appealable court decision or patent expiration, brand companies can be awarded damages, as measured by the brand seller’s own lost profits rather than by the generic seller’s earned profits. Lost profits are measured by the profits the patent owner would have made on sales of its branded product but for the launch of the generic product. Damages can be trebled if the infringement is found to be willful, for instance, if the generic product was launched before a district court ruled on the patent dispute. (Koch, Tr. 286-87; Figg, Tr. 1921-23; Hoxie, Tr. 2782; CX4030 (Hsu, Dep. at 48-49)).

454. Generic companies often risk far more in infringement liability than they earn from each sale when launching at risk. (Koch, Tr. 286-87; CX4021 (Ben-Maimon, Dep. at 159) (at-risk launches could result in generic “pay[ing] more to the brand company than [generic] made”); *see also* CX4039 (Noll, Dep. at 74)).

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455. The risk of damages for launching at risk represent “bet-the-company” stakes and can “take [away] the solvency of the company entirely.” Damages can be in the billions of dollars if the sales of the branded drug are high enough. The profits that the brand company loses would almost always be greater than the total revenues that the generic company receives. (Koch, Tr. 287; Hoxie, Tr. 2782; Figg, Tr. 1922-23; *see* CX4030 (Hsu, Dep. at 43) (“the risk can be huge depending on the size of the product and depending on whether we’re first to file”)).
456. A first filer’s launch of a generic product triggers the beginning of the 180-day exclusivity period, which is “extremely valuable.” If the generic launches at risk and is enjoined from making sales, the generic forfeits some of its 180-day exclusivity because the 180-day time period would continue to run during the period the generic is enjoined. Even if the injunction was eventually lifted or the infringer prevailed in the underlying patent litigation, the patent infringer could never recover the forfeited part of its 180-day exclusivity period. (Snowden, Tr. 503-04; Figg, Tr. 1923-24; Hoxie, Tr. 2754, 2778-80; CX4021 (Ben-Maimon, Dep. at 164-65)).
457. If the branded company wins its action against a generic company that has launched at risk and the generic’s actions are deemed “exceptional,” courts may award attorney’s fees to the brand company. (Figg, Tr. 1924).
458. At-risk launches are fairly uncommon across the entire pharmaceutical industry. (Figg, Tr. 1924-26).
459. At-risk launches are most common when there are multiple ANDA filers who have received approval from the FDA, no ANDA filer has exclusivity, and there subsequently is a race to the market by generic firms. (Hoxie, Tr. 2704-05).
460. When at-risk launches do occur, they generally are undertaken by large pharmaceutical companies that can



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absorb significant financial risk in the event they are found to infringe. (Figg, Tr. 1925).

461. Complaint Counsel's expert, Professor Noll, identified 48 at-risk launches over a 15-year period (August 2001 thru April 2015). Twenty-one of those forty-eight at-risk launches were conducted by Teva, which Professor Noll explains, "is by far the most likely company to do at-risk launches." (Noll, Tr. 1607-09; CX5004 (Noll Rebuttal Expert Report at 92-99)).
462. Teva is a "very large pharmaceutical company" and, as a result, can undertake at-risk launches more regularly. (Figg, Tr. 1925; *see also* Hoxie, Tr. 2820 (Complaint Counsel's expert noting that Teva has "a high willingness to take risks" and "a greater appetite for risk than others.")).
463. Of the 48 at-risk launches identified by Professor Noll (F. 461), only 4 were conducted by companies with less than \$1 billion in revenue. (Noll, Tr. 1609).
464. Mr. Hoxie agreed with industry analysts who empirically analyzed at-risk launches between 2003 and 2009 that, generally, "at-risk launches are fairly uncommon." (Hoxie, Tr. 2827-28).

**b. Impax's history of at-risk launches**

465. Impax is a small pharmaceutical company. In 2010, Impax's revenues were less than \$1 billion. (Koch, Tr. 275, 287; *see* Figg, Tr. 1925; CX3278 at 45 (Impax 2010 Annual Report)).
466. Impax is "incredibly conservative" with respect to at-risk launches. (CX4021 (Ben-Maimon, Dep. at 34); *see* Koch, Tr. 287).
467. Mr. Koch, Impax's CFO at the time of the Endo-Impax Settlement, explained that "being a small company," Impax "could not bet the company on any one product."

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(Koch, Tr. 275; *see* CX4018 (Koch, Dep. at 97) (describing risks as “huge”)).

468. Impax only “infrequently” considers the possibility of an at-risk launch. (Koch, Tr. 246-47).
469. Prior to the Endo-Impax patent litigation, Impax had launched a product at risk only once. That at-risk launch was for one dosage strength of a generic version of oxycodone. Impax limited its risk of damages by capping its potential sales at \$25 million. Impax launched at risk only after it received a favorable district court decision holding the relevant patents unenforceable and after Teva, the first ANDA filer for the relevant dosage, had launched at risk six months earlier. (Koch, Tr. 274-75; Snowden, Tr. 425-26).
470. The risks to a second generic company launching at risk are lower than the risks associated with an initial at-risk launch because (1) the second generic company does not have first-filer exclusivity at stake, and (2) the patent holder may have a harder time arguing that damages are the result of any one particular generic company’s sales. (Hoxie, Tr. 2817-18).
471. Since the Endo-Impax Settlement in 2010, Impax has considered possible at-risk launches. Only one of those launches occurred, and only in a limited manner. (Snowden, Tr. 466-67; CX2927 at 014-19).
472. Impax’s one post-settlement at-risk launch involved a drug called azelastine, a nasal spray antihistamine. Impax and Perrigo, the ANDA holder and marketer of azelastine, entered a partnership agreement through which Impax would share development costs and litigation expenses in return for a share of the drug’s profits. In 2014, Perrigo notified Impax that it intended to launch azelastine at risk. Under the terms of the Impax-Perrigo partnership agreement, Impax could participate in the launch and earn a share of the profits or could not participate, in which case Perrigo would receive all azelastine profits. Impax

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participated in Perrigo's at-risk launch, but limited its exposure to potential damages by capping its participation at 150,000 units. (Snowden, Tr. 462-65; CX4021 (Ben-Maimon, Dep. at 37-39, 153); CX2689 (minutes of special meeting of Impax Board)).

**c. Impax's process for approval of an at-risk launch**

473. It is an absolute prerequisite for Impax's board of directors to formally approve any at-risk launch. (Koch, Tr. 276-77 ("every at-risk launch is a board-level decision"); Snowden, Tr. 426; CX4030 (Hsu, Dep. at 128); CX4021 (Ben-Maimon, Dep. at 160)).
474. Many steps take place before an at-risk launch is formally approved by Impax's board of directors. F. 474-483.
475. Impax's process for evaluating a possible at-risk launch starts with Impax's new product committee, which evaluates the science, marketing opportunity, and legal issues related to the drug under consideration for an at-risk launch. If Impax's new product committee recommends an at-risk launch, Impax's research and development team conducts further due diligence regarding the drug. (Koch, Tr. 276).
476. When evaluating whether to launch a product at risk, Impax's in-house legal team conducts an analysis regarding the specifics, including any pending patent litigation between Impax and the brand company, and the strength of the underlying patents. (Koch, Tr. 276; CX4021 (Ben-Maimon, Dep. at 166)).
477. When evaluating whether to launch a product at risk, Impax's division heads, including those from the legal, marketing, and operations departments, and from the generics division, meet with Impax's CFO to formulate a risk analysis profile. Impax's CFO must present a risk analysis profile to Impax's executive committee, which has to approve any at-risk launch. (Koch, Tr. 276-77).

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478. Impax's CEO must approve any decision to launch at risk. (CX4030 (Hsu, Dep. at 127); CX4021 (Ben-Maimon, Dep. at 167-68)).
479. If Impax's CEO and executive committee approve a possible at-risk launch, a presentation is made to Impax's board of directors by Impax's CFO, legal department, president of the generics division, and the manufacturing department ("Board presentation"). (Koch, Tr. 277; see CX2689; CX3223).
480. The Board presentation includes background on the product, the basis for the executive committee's decision to propose an at-risk launch, and a resolution seeking the Board's vote on the matter. (Koch, Tr. 277).
481. Impax's board of directors must formally authorize any at-risk launch. (Koch, Tr. 276-77 ("every at-risk launch is a board-level decision"); Snowden, Tr. 426; CX4021 (Ben-Maimon, Dep. at 160)).
482. For an at-risk launch, Impax has "to have sign off from the Board, because we're such a small company, and a launch at risk would . . . potentially cause our company problems if we were hit with damages, big damages." (CX4026 (Nguyen, Dep. at 55-56)).
483. If the Board formally authorizes an at-risk launch, the Board approval is recorded in the board of director's minute book. (Koch, Tr. 286).
484. In the case of azelastine, the nasal spray antihistamine that Impax did launch at risk (F. 472), Impax's senior management, including the president of Impax's generics business, Impax's general counsel, and Impax's in-house attorney responsible for intellectual property, made a presentation and recommendation regarding a limited at-risk launch at a special board of directors meeting. A resolution was then placed before the Board, and the Board voted to approve the resolution. (Snowden, Tr. 463-66; CX4021 (Ben-Maimon, Dep. at 153-54); CX2689

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(minutes of special meeting of Impax Board regarding azelastine)).

485. Impax would not launch a product at risk if it did not have Board approval. (Snowden, Tr. 470).

**d. Impax did not seek or receive Board approval for an at-risk launch of generic Opana ER**

486. Impax did not seek or receive Board approval for an at-risk launch of Opana ER. (F. 487-502).
487. Impax's senior management never decided to pursue an at-risk launch of generic Opana ER. (Mengler, Tr. 547-48, 584; Koch, Tr. 299, 324-25; Snowden, Tr. 470-71).
488. In 2010, senior management was looking at possible scenarios and modeled an at-risk launch to forecast how that might impact Impax's budget if the decision to launch at risk were made. (Koch, Tr. 299-300; *see* CX4014 (Hsu, IHT at 129-30) ("We could settle, we could launch at risk, we could do many other things, and as the job of CEO, I just have to, you know, lay out everything, get prepared so I don't get accused by the board and say, well, wait a minute, how come you didn't prepare for plan B?")).
489. On May 9, 2010, Impax's CEO, Dr. Hsu, informed Mr. Koch, Impax's CFO, that "[i]t's unlikely we will launch Opana ER this year (I actually prefer not to launch this year for obvious reason[s])." (RX297 at 0002).
490. In response to an internal Impax email reporting that on May 13, 2010, the FDA granted tentative approval to Impax's ANDA for generic Opana ER (F. 64), Dr. Hsu stated that Impax would most likely "make launch decision based on court decision on the PI." (CX2929 at 001; Koch, Tr. 310).
491. After the FDA granted tentative approval to Impax's ANDA for generic Opana ER (F. 64), when customers inquired about the status of Impax's Opana ER product, on

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May 17, 2010, Todd Engle, a senior member of Impax's sales and marketing team, told members of the Impax sales team that "[a] launch decision has not been made yet. There is nothing we can tell the customers yet." (Engle, Tr. 1778-79; RX323 at 0001).

492. Impax told the court presiding over the Endo-Impax patent litigation on May 20, 2010 that Impax would not launch at risk during trial. (Snowden, Tr. 471-72; RX251).
493. Mr. Mengler, president of Impax's generics division, created a presentation for the May 2010 board of directors meeting, in which he listed an at-risk launch of oxymorphone as a "current assumption" for the purpose of projecting sales of oxymorphone ER. Mr. Mengler's assumptions with respect to possible sales numbers did not "imply or mean that any legal decision ha[d] been made to clear the way for a launch." (CX2662 at 012; Koch, Tr. 337-38; Mengler, Tr. 552-53).
494. The minutes of the meeting of the board of directors meeting on May 25 and 26, 2010 note that Mr. Mengler "expressed the view that [o]xymorphone was a good candidate for an at-risk launch." (CX2663 at 001).
495. Mr. Mengler raised oxymorphone ER at the May 2010 Board meeting to put oxymorphone ER "on the radar" of the Board and to "alert the board as to the product being out there that might get to the point of an at-risk launch." Mr. Mengler discussed potential revenues from oxymorphone ER and told the Board that he thought oxymorphone ER "was a great market opportunity" because it was a "very rapidly growing product." (Mengler, Tr. 584-85; Koch, Tr. 294-95, 300-01).
496. Mr. Koch, who wrote the minutes of the meeting of the board of directors meeting on May 25 and 26, 2010, explained that Mr. Mengler was communicating his evaluation of the oxymorphone market and sharing that information with the Board because senior management was unsure of what direction it would "ultimately take and

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. . . [did not] want to come back to the board seeking an at-risk launch with them never having heard of it before.” (Koch, Tr. 301).

497. Dr. Hsu explained that senior management “want[s] to alert the board that we are considering this [as] one of the scenario[s] so that if we do come up with a final recommendation to the board, there will be no surprise. . . . [T]his is very typical.” (CX4030 (Hsu, Dep. at 82)).
498. Impax’s senior management did not make a recommendation to the Board for an at-risk launch, did not discuss the risk or benefits of an at-risk launch, and did not ask the Board to approve an at-risk launch at the May 25 and 26, 2010 Board meeting. (Koch, Tr. 295, 299; Mengler, Tr. 584-85; Snowden, Tr. 470-71; CX4030 (Hsu, Dep. at 85)).
499. There was no substantive discussion of an at-risk launch at the May 2010 board of directors meeting. (Koch, Tr. 295; Mengler, Tr. 584).
500. If a recommendation, discussion, or approval to launch at risk had been made to or by the board of directors, it would have been “very carefully” recorded in detailed Board meeting minutes, and would include the at-risk launch discussion, the resolution regarding the possible launch, a formal request for a vote, and the actual Board vote about the at-risk launch. No such meeting minutes exist. (Koch, Tr. 289-90, 297-98 (“I would have written the resolution, and there was no resolution for oxymorphone.”)).
501. As of June 8, 2010, the Impax board of directors had not been asked to vote on whether or not to launch generic oxymorphone ER at risk. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-009 ¶ 29; Koch, Tr. 299; CX4030 (Hsu, Dep. at 85)).

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502. The board of directors never voted on or approved an at-risk launch of generic oxymorphone ER. (CX4030 (Hsu, Dep. at 85); Koch, Tr. 298-99).

**e. Impax's launch preparedness efforts****i. Impax's general preparedness practices**

503. Impax generally strives to have its products that have been filed with Paragraph IV certifications ready to launch after the expiration of the Hatch-Waxman Act's 30-month stay. (Engle, Tr. 1768-69).
504. Impax's supply chain department is responsible for producing and packaging Impax's products. Joseph Camargo was Impax's vice president of the supply chain group from 2006 through 2011. (Camargo, Tr. 950-51).
505. Each month, the supply chain group receives from Impax's marketing department a product forecast for the next 18 months which the supply chain group uses to begin routine launch planning. (Camargo, Tr. 958; CX4023 (Hildenbrand, Dep. at 78-79)).
506. When a product is 18 months away from its earliest theoretical launch, the supply chain group begins prelaunch preparation activities. (Camargo, Tr. 958; CX4023 (Hildenbrand, Dep. at 9-12, 79)).
507. Impax uses a computer system called Enterprise Resource Planning ("ERP") and a product launch checklist to plan and track product production projects within the 18-month planning horizon. The ERP system tracks the purchasing of materials, shop floor activities, financials associated with paying suppliers, and other planning activities based on projected batch sizes, necessary materials, and how the product is produced. (Camargo, Tr. 959-61).
508. Once a product is uploaded into the ERP system, the supply chain group undertakes the following tasks: requests a quota from the U.S. Drug Enforcement Agency



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(“DEA”) to purchase any active pharmaceutical ingredients (“API”) that are controlled substances; purchases the API and other unique materials necessary to produce the finished product; conducts “process validation” (F. 510) to prove that Impax’s manufacturing process is repeatable and makes the product in a satisfactory manner; and produces a “launch inventory build” to ensure that Impax has enough product to meet expected demand on the launchable date. (Camargo, Tr. 964-68).

509. The supply chain group holds monthly meetings called “launch coordination meetings” to assess the status of any products in the 18-month planning horizon, which are chaired by Impax’s vice president of supply chain and attended by representatives of all departments who have responsibilities related to the planning of a product launch, including the marketing, purchasing, and regulatory departments. (Camargo, Tr. 962-63).
510. Process validation is an FDA requirement imposed on all pharmaceutical manufacturers to prove that their manufacturing processes are satisfactory and repeatable. Every product must undergo successful process validation before it can be launched. (Camargo, Tr. 966-67; Koch, Tr. 270).
511. Impax’s practice is to begin process validation six months before FDA approval of the relevant drug is expected, even if the product is the subject of active litigation. (Koch, Tr. 269-70; CX3278 at 101 (Impax’s 2010 10-K report: “When the Company concludes FDA approval is expected within approximately six months, the Company will generally begin to schedule manufacturing process validation studies as required by the FDA to demonstrate the production process can be scaled up to manufacture commercial batches.”)).
512. Impax may build pre-launch quantities of the products in its planning pipeline before either FDA approval is granted or a formal launch decision is made. (CX3278 at

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101 (Impax's 2010 10-K report: "the Company may build quantities of pre-launch inventories of certain products pending required final FDA approval and/or resolution of patent infringement litigation, when, in the Company's assessment, such action is appropriate to increase the commercial opportunity, FDA approval is expected in the near term, and/or the litigation will be resolved in the Company's favor.")).

513. Impax generally builds pre-launch quantities of products because it takes months to build up launch inventory. (CX4030 (Hsu, Dep. at 42); Koch, Tr. 270-71).
514. Impax considers its production of pre-launch quantities "routine" and consistent with industry practice. (Koch, Tr. 271; CX3278 at 100-01).
515. By having pre-launch quantities ready, Impax is able to "increase the commercial opportunity" for its drugs and have the option of launching if the decision to launch is made. (CX3278 at 100-01; CX4030 (Hsu, Dep. at 86)).
516. Because Impax's operations team prepares products for launch before FDA approval or a formal decision about launch timing, it is not unusual for Impax to discard and write off some of the products and raw materials in its inventory. (Camargo, Tr. 1020-21, 1033 (discarding of products or materials was "a matter of course pretty much every month"); Koch, Tr. 273 (writing off and destroying product is a routine and "small cost" of doing business in the generic industry)).

**ii. Impax's launch preparedness efforts for generic Opana ER**

517. Impax's operations team sought to be ready to launch its generic oxymorphone ER product at the expiration of the Hatch-Waxman Act's 30-month stay, June 14, 2010. (Mengler, Tr. 558; Engle, Tr. 1769).

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518. To meet a June 2010 launch date, Impax began planning oxymorphone ER production in 2009. (Camargo, Tr. 969).
519. The supply chain group created master data for oxymorphone ER in its ERP system to manage production capacity and materials planning and put oxymorphone ER on its product launch checklist to coordinate all launch-related activities. (Camargo, Tr. 1006).
520. In June 2009, the supply chain group acknowledged that the “odds of launching [oxymorphone in June 2010] when the 30-month stay expires may be low.” Mr. Camargo explained that “it didn’t seem likely to me that we would actually launch” in mid-2010 because the company “tended to shy away from” at-risk launches and oxymorphone ER would have been an at-risk launch given the ongoing litigation. (RX181; Camargo, Tr. 1009-10).
521. Impax undertook its normal launch preparations for oxymorphone ER to be prepared for a potentially “very lucrative” situation, even if the odds of an actual launch in June 2010 were low because the “upside [was] substantial and . . . we may want to plan for” it. (RX181; *see* Camargo, Tr. 1008-10).
522. Because oxymorphone, the API for generic Opana ER, is a controlled substance, purchasing oxymorphone is regulated by the DEA. (Camargo, Tr. 965; CX4027 (Anthony, Dep. at 13-14, 150-51)).
523. Impax requested a procurement quota from the DEA for oxymorphone, a necessary step before it could purchase oxymorphone API for any reason, including to conduct process validation of its oxymorphone ER product. (Camargo, Tr. 974, 1013).
524. Impax was initially allotted 9.0 kg (of anhydrous base) of procurement quota for oxymorphone for 2010 by the DEA. The initial allotment of oxymorphone quota was for product development manufacturing. (Joint Stipulations

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of Jurisdiction, Law, Fact, and Authenticity, JX-001-008 ¶ 24; CX4027 (Anthony, Dep. at 145-48)).

525. On January 18, 2010, Impax submitted a request for additional oxymorphone procurement quota to the DEA, which was approved. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX-001-008 ¶¶ 25-26).
526. On April 15, 2010, Impax submitted another request for additional oxymorphone procurement quota to the DEA, which was approved. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX-001-008-009 ¶¶ 27, 30).
527. Impax conducted process validation for oxymorphone ER in 2010. (Camargo, Tr. 1011-12).
528. Impax used a matrix approach for conducting process validation for its generic Opana ER product. A matrix approach to process validation takes less time, reduces the amount of product produced during the validation process, and ultimately reduces the costs incurred by Impax. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX-001-009 ¶ 31; Camargo, Tr. 1012-13).
529. As of May 20, 2010, Impax had completed process validation for the 5 mg, 10 mg, 20 mg, and 40 mg dosages of generic oxymorphone ER. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX-001-008 ¶ 28).
530. The process validation batches that Impax had built were not sufficient to meet the market demand for a full launch. (Koch, Tr. 292-93).
531. As a general practice, after process validation is complete, the Impax operations team does not build launch inventory without management approval. (Camargo, Tr. 1015-16; RX186 at 0004).
532. In the case of oxymorphone ER, the Impax operations team never received instructions from senior management

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to begin a launch inventory build. (Camargo, Tr. 1016-17, 1020; CX2898-001 (internal Impax email from Mr. Camargo on May 12, 2010: “[W]e will not commence the launch inventory build until we receive direction to do so from senior mgmt.”); RX186 at 0004 (we “await management decision to proceed with 8-lot launch inventory build.”); Engle, Tr. 1778-79; RX323 at 0001 (internal Impax email from Mr. Engle on May 17, 2010: “There has been no decision yet to complete the launch build.”)).

533. Impax never actually completed a launch inventory build in support of an oxymorphone ER launch. (Camargo, Tr. 1020).
534. By May 28, 2010, Impax’s operations team had still not produced enough oxymorphone ER to support a product launch. (Engle, Tr. 1783; CX0006 at 001 (internal Impax email from Todd Engle, Impax’s vice president of sales and marketing for the generics division, to Impax’s operations team that Impax would need at least one additional lot of 20 mg and three additional lots of 40 mg oxymorphone ER to meet sales estimates for even one month of sales)).
535. Having less than one month’s worth of product would have prohibited a product launch because Impax would “rapidly run out of product, and most likely . . . would have started to incur penalties from [its] customers for not delivering on time.” (Engle, Tr. 1784-85).
536. The time required to produce the necessary amount of oxymorphone ER would have made a product launch soon after FDA approval in mid-June 2010 impossible. (Engle, Tr. 1780).
537. Impax had solicited letters of intent from four customers asking customers for their good faith estimate of how much product they likely would buy if generic oxymorphone ER came on the market, but Impax did not have any pricing contracts or agreements to purchase with

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those customers. (CX2868 at 001; CX2882; Engle, Tr. 1780-81, 1797-98).

538. Prior to the Endo-Impax Settlement, Impax's inventory included finished goods of generic oxymorphone ER, including three lots of 10 mg, as well as bright stock<sup>14</sup> of generic oxymorphone ER, including three lots of 5 mg, one lot of 20 mg, and two lots of 40 mg dosage strengths. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX-001-009 ¶ 32).
539. Based on the cost of materials and labor, the total value of Impax's manufactured oxymorphone ER at the time of Endo-Impax Settlement was \$1,387,883. (Camargo, Tr. 994-95).
540. Following the Endo-Impax Settlement in June 2010, Impax accounted for the oxymorphone ER product as likely to be rejected because the product could not be used and the finished goods eventually were destroyed. (Camargo, Tr. 998; Koch, Tr. 273).
541. In June 2010, Impax also possessed oxymorphone API that had not been incorporated into any finished products which may have been used later to manufacture other products. (Camargo, Tr. 1022; CX2928 at 015).
542. Because Impax seeks to be prepared for all possible outcomes, discarding product "falls under the category of cost of doing business in weighing all your options." (CX4004 (Engle, IHT at 181); *see also* Engle, Tr. 1785-86 ("Throwing away product or discarding product in about a 1.5 million range happens frequently and it – it's not unusual."); Camargo, Tr. 1020-21, 1033 (discarding products or materials was "a matter of course pretty much every month"); Koch, Tr. 273 (discarding and writing off product is a routine and "small cost" of doing business)).

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<sup>14</sup> Bright stock is product that has been manufactured and placed in bottles, but has not been labeled yet. (Koch, Tr. 253).

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543. Impax wrote off over \$1 million worth of non-oxymorphone ER products in April 2010, and \$560,000 worth of non-oxymorphone ER product in June 2010. Impax also discarded and wrote off roughly \$25 million in finished product in 2017. (CX2905 at 003; CX2896 at 002-03; Camargo, Tr. 1023-24; Engle, Tr. 1786).

**f. Economic disincentives**

544. Had Impax launched a generic version of Opana ER at risk, Impax's potential liability for damages would have exceeded any profits Impax realized from the launch. (Addanki, Tr. 2379-80; F. 545-546).
545. Impax projected a total of \$28 million in potential oxymorphone ER sales over six months in 2010 following an at-risk launch. (CX2662 at 015).
546. Based on Endo documents indicating that at the time of the Endo-Impax Settlement Endo's Opana ER net sales were \$20 million per month and an assumption that Endo had a 90% profit margin on those sales such that Endo's profits were \$18 million per month, if Impax sold a month's worth of Opana ER at risk, and if Impax took 50% of Endo's sales, Impax could be risking as much as \$9 million per month or \$54 million for six months of sales. If Endo showed that Impax's infringement was willful and was awarded treble damages, Impax could be risking as much as \$162 million for six months of sales. (CX1106 at 005; Hoxie, Tr. 2784-92).
547. The 180-day exclusivity period starts from the day of launch. If Impax launched at risk and then was subsequently enjoined, the 180-day exclusivity period would continue to run and Impax would forfeit that part of the 180-day exclusivity period. (Addanki, Tr. 2380-81).
548. Because of these economic disincentives for an at-risk launch by Impax (F. 544-547), it "was perfectly reasonable for Impax to view a launch at risk as a losing proposition." (Addanki, Tr. 2380).

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**g. Complaint Counsel's experts**

549. Although Mr. Hoxie identified risks to Impax of an at-risk launch, he did not quantify the risk to Impax from an at-risk launch, conduct a risk-benefit analysis for an at-risk launch by Impax, or evaluate the magnitude of potential lost-profit damages that Impax would have faced if it launched at risk. (Hoxie, Tr. 2760, 2769-70, 2782-83, 2910).
550. Mr. Hoxie did not opine that an at-risk launch would have been a reasonable risk from Impax's perspective. (Hoxie, Tr. 2808).
551. Professor Noll, Complaint Counsel's economic expert, did not analyze Impax's economic incentives to determine whether it was economically rational for Impax to launch at risk. (Noll, Tr. 1601-02).
552. Professor Noll testified that an at-risk launch was a hypothetical possibility, but did not offer an opinion about whether Impax would have launched at risk or when it would have done so, and did not conduct any economic analysis to determine if a launch at risk would have been good, bad, or economically rational for Impax. (Noll, Tr. 1600-06).

**3. Launch after litigation**

553. At the time of the Endo-Impax Settlement, the outcome of the Endo-Impax patent litigation was uncertain. (RX548 (Figg Expert Report at 0030-31 ¶ 69)).
554. The outcome of the Endo-Impax patent litigation on appeal, if there was one, was also uncertain. (Figg, Tr. 2007-08, 2046; CX4045 (Figg, Dep. at 132); CX5007 (Hoxie Rebuttal Expert Report at 043 ¶ 79)).
555. If Impax and Endo had not entered into the Endo-Impax Settlement, the trial in the patent litigation would have continued. (Snowden, Tr. 400-01).



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556. Following a trial in the Endo-Impax patent litigation, the parties would have had to wait for the district court to issue findings of fact, conclusions of law, and an order. Based on a review of Hatch-Waxman cases from the district court of New Jersey conducted by Impax's patent litigation expert, Mr. Figg, a decision would have been issued approximately four to five months after completion of trial, in or around November 2010. (Figg, Tr. 1906-07, 2027-28).
557. Mr. Figg is an attorney specializing in intellectual property, primarily involving the chemical, pharmaceutical, healthcare and biotechnology industries. Mr. Figg has practiced patent law since 1978 and his principal emphasis is patent litigation. He has served as lead counsel in numerous complex patent litigation matters, including Hatch-Waxman litigation, in federal district court and the Federal Circuit Court of Appeals.. (Figg, Tr. 1810; RX548 (Figg Expert Report at 006-08 ¶¶ 6-10)).
558. Regardless of when the district court would have issued its decision in the Endo-Impax litigation, an appeal was likely, and would take 30 days to be docketed in the Federal Circuit Court of Appeals. (Figg, Tr. 1908).
559. Based on statistics maintained by the Federal Circuit and reviewed by Mr. Figg, the median time from docketing to final decision was approximately eleven months in 2010 and 2011. Applying these statistics, Mr. Figg estimated that an appellate decision in the Endo-Impax patent litigation would have been issued in November 2011. This estimate is "very conservative" because the median time from docketing to a final decision includes settlements and summary affirmances. (Figg, Tr. 1908-09).
560. The Federal Circuit is generous with briefing extensions, which increases the time it takes to receive a decision. (Figg, Tr. 1909-10).

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561. If Impax had lost at the trial level, the “centerpiece” of the appeal would have been the trial court’s claim construction ruling. Impax would have had “substantial arguments” regarding that ruling on appeal. (Figg, Tr. 1911-12; Hoxie, Tr. 2694).
562. If the appellate court agreed with Impax’s arguments regarding the district court’s claim construction, it is likely that the appellate court would remand to the trial court for further development of the evidentiary issues. This is because the parties would need to litigate infringement and validity under Impax’s construction of the claims. Because the trial court’s claim construction ruling was in favor of Endo, Endo never developed a record that Impax infringed its patents under Impax’s construction of the claims. Absent a record on the issue of infringement and validity, the Federal Circuit would not decide these issues itself, but would instead direct such decision to the trial court via remand. (Figg, Tr. 1912-13).
563. If the appellate court ruled in favor of Impax and remanded the case to the trial court, the evidentiary proceedings on remand would likely have taken up to 18 months to complete, and therefore would not be concluded until a date close to January 2013. (Figg, Tr. 1914-15, 1973).
564. If Impax had lost in the Federal Circuit, Impax would be enjoined and would not have been able to launch its oxymorphone ER product until the expiration of the patents in September 2013. (Figg, Tr. 1915, 1973).

**E. Procompetitive Benefits****1. Broad license agreement**

565. In settlement negotiations with brand companies, Impax would regularly seek a broad patent license whenever it intended to launch and continue to sell its generic product indefinitely, in order to provide Impax with as much flexibility as possible. In any negotiation where the brand

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company tried to narrow the scope to the patents being litigated, Impax was “very firm,” explaining that “this is not about the patents being litigated. This is about a product, and we want the ability to operate.” (CX4026 (Nguyen, Dep. at 155-58)).

566. For Impax, every “agreement has to cover all the patent[s], not just the patent [at issue] today, but cover all future patent[s] as well . . . [O]therwise you end up with [a] launch [of] the product and still have to be under the [patent] risk, and that doesn’t really help [Impax].” (CX4014 (Hsu, IHT at 116)).
567. The SLA contains a broad license agreement and a covenant not to sue that covered all patents “that would ever be owned by [Endo and Penwest] that would cover the Impax product, so the patents that existed at the time as well as future patents” were covered. (Snowden, Tr. 439; RX364 at 009).
568. Section 4.1(a) of the SLA grants Impax a license both to the “Opana ER Patents” (defined in the SLA as the ’933, ’456, and ’250 patents and any reissuances thereof) and to “any patents and patent applications owned by Endo or Penwest . . . that cover or could potentially cover the manufacture, use, sale, offer for sale, importation, marketing or distribution of products . . . that are the subject of the Impax ANDA . . . .” (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-009-10 ¶ 35).
569. The Settlement and License Agreement identified “the patent applications (and any patents issued thereunder)” as the “Pending Applications.” (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-010 ¶ 36).
570. In section 4.1(b) of the SLA, Endo provided Impax with a covenant not to sue, which prohibited Endo and its affiliates from suing Impax for patent infringement on any of the patents licensed pursuant to section 4.1(a) (F. 568-

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569). This provision meant that Endo could not sue Impax for infringement of Endo's patents listed in the Orange Book at the time of settlement, as well as any continuations, continuations in part, or divisions of those patents, or patent applications owned or controlled by Endo that could cover the product described in Impax's ANDA for original Opana ER. (RX364 at 0010 (SLA); *see also* Figg, Tr. 1964; Hoxie, Tr. 2885).

**2. Endo's additional patents and patent litigation**

571. After entering into the SLA, Endo obtained additional patents and patent licenses that it has asserted cover both original and reformulated Opana ER (the "after-acquired patents"). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-012 ¶ 55).
572. At the time of the Endo-Impax Settlement, some of the after-acquired patents (F. 571) were pending and it was uncertain whether any new patents would issue. (Snowden, Tr. 440, 442-43; CX3455 at 022-23).

**a. The Johnson Matthey Patent**

573. Endo acquired its first post-settlement patent – U.S. Patent No. 7,851,482 – from Johnson Matthey in March 2012 (the "Johnson Matthey patent"). (Snowden, Tr. 442-43; RX127; Addanki, Tr. 2362; Figg, Tr. 1949).
574. The Johnson Matthey patent addressed a process for making a purified type of oxymorphone and was issued in December 2010. (Snowden, Tr. 443; CX4017 (Levin, Dep. at 150-51); CX3329 at 006).

**b. The '060, '122, and '216 patents and New York litigation**

575. The Patent and Trademark Office issued U.S. Patent Nos. 8,309,060 and 8,309,122 to Endo on November 13, 2012 ("the '060 and '122 patents"). (Joint Stipulations of

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Jurisdiction, Law, Fact, and Authenticity, JX001-012 ¶ 56).

576. The Patent and Trademark Office issued U.S. Patent No. 8,329,216 to Endo on December 11, 2012 (“the ’216 patent”). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-012 ¶ 57).
577. In December 2012, Endo began asserting the ’060, ’122, and ’216 patents against drug manufacturers seeking to market generic versions of both original and reformulated Opana ER. At that time, Endo did not assert these patents against Impax’s generic version of original Opana ER. Endo did, however, assert these patents against Impax’s generic version of reformulated Opana ER, as to which Impax had filed an ANDA. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-012-13 ¶ 58; Snowden, Tr. 440-41, 444-45).
578. In August 2015, the 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 version of reformulated Opana ER. The court issued an injunction barring all defendants except Impax from selling their generic versions of original Opana ER until 2023. That ruling is currently on appeal to the Federal Circuit. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-013 ¶ 62; Snowden, Tr. 444-45).

**c. The ‘737 and ‘779 patents and Delaware litigation**

579. The U.S. Patent and Trademark Office issued U.S. Patent No. 8,808,737 to Endo on August 19, 2014 (“the ’737 patent”). (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-013 ¶ 59).
580. The U.S. Patent and Trademark Office issued U.S. Patent No. 8,871,779 on October 28, 2014 (“the ’779 patent”).

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(Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-013 ¶ 60).

581. Endo also acquired an exclusive field-of-use license to U.S. Patent No. 8,871,779 from Mallinckrodt. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-013 ¶ 61).
582. The '779 patent specifies the maximum levels of impurity that can be contained in the active pharmaceutical ingredient for generic Opana ER. (Figg, Tr. 1965).
583. Endo asserted the '737 and '779 patents in litigation in the district court of Delaware against drug manufacturers seeking to market both original and reformulated Opana ER. (Snowden, Tr. 450-51).
584. Endo did not assert these patents (F. 583) against Impax's generic version of original Opana ER because of the SLA's broad license provision, but did assert them with respect to Impax's ANDA for a generic version of reformulated Opana ER. (Snowden, Tr. 450).
585. In November 2015, the federal district court in Delaware held that the '737 patent was invalid. The ruling is currently on appeal to the Federal Circuit. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-013 ¶ 63).
586. In October 2016, the federal district court in Delaware held that the '779 patent was not invalid and was infringed by a generic version of reformulated Opana ER. That ruling is currently on appeal to the Federal Circuit. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-013 ¶ 64; *see* Snowden, Tr. 441).
587. In August 2017, the district court in Delaware ruled that the '779 patent was not invalid following a bench trial against certain ANDA filers. In September 2017, Judge Andrews entered a final order, enjoining all defendants from selling generic Opana ER until the patents expire in

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2029. (Second Set of Joint Stipulations, JX003 ¶¶ 56, 58; RX544; RX575).

588. The '779 patent expires in 2029. (Snowden, Tr. 451).

**d. The Endo v. Impax New Jersey litigation**

589. On May 4, 2016, Endo filed a lawsuit against Impax in federal district court in New Jersey, alleging that Impax was in breach of the SLA for failing to negotiate with Endo in good faith a royalty for three after acquired patents – the '122, '216 and '737 patents. Endo included claims for patent infringement in its complaint, predicated on the alleged breach and termination of the contract, which would have terminated Impax's license under the SLA. (CX2976; Figg, Tr. 2050-51).

590. On August 5, 2017, Endo and Impax resolved the New Jersey litigation (F. 589) regarding the breach of the SLA by entering into a Contract Settlement Agreement. (CX3275).

591. The August 5, 2017 Contract Settlement Agreement (F. 590) includes [REDACTED]. (CX3275 at 011-15, *in camera*).

**3. Effect of the broad license agreement**

592. The broad patent license and covenant not to sue provided in the SLA (collectively, the “broad patent license” or “broad license agreement”) gave Impax freedom to operate “[u]nder both the litigated patents as well as future patents that Endo might obtain in this area.” (Figg, Tr. 1936-37).

593. The broad license agreement in the SLA gave Impax protection against any future patents being asserted against Impax and potentially preventing continued sales of

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Impax's generic version of original Opana ER. (Addanki, Tr. 2376).

594. The January 2013 entry date and the broad license agreement in the SLA allowed Impax to launch its product eight months before the original patents expired and sixteen years before the after-acquired patents expired, and to “continue with the sale of that product right up to the present day because . . . Endo did not sue Impax for infringement of the second wave patents or the third wave patents for the original Opana ER product.” (Figg, Tr. 1971-72; *see* Noll, Tr. 1674).
595. Although every other Opana ER ANDA filer settled patent claims asserted by Endo related to Opana ER, no other drug manufacturer negotiated rights to future Opana ER patents similar to the broad license agreement that Impax obtained in the SLA. (RX441; RX442; RX443; CX3192; *see* Snowden, Tr. 440; Figg, Tr. 1939-40, 1947; Hoxie, Tr. 2714, 2886).
596. Taken together, Endo's acquisition and litigation of additional patents (F. 575-588) has led to all generic manufacturers other than Impax being enjoined from selling a generic version of Opana ER until Endo's patents expire. Impax's product is the only generic Opana ER available to consumers. (Snowden, Tr. 440-42).
597. Impax has sold generic Opana ER without interruption since launching its product in January 2013. (Snowden, Tr. 476).
598. Impax's product is now the only oxymorphone ER product available to consumers. (Second Set of Joint Stipulations, JX003 ¶ 59; Figg, Tr. 1972).
599. Complaint Counsel's economic expert, Professor Noll, admits that consumers are better off today because Impax is selling oxymorphone ER. (Noll, Tr. 1669).



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600. The “real-world effect” of the SLA is that “there is a product on the market and available to consumers today that would not be there had Impax not had the foresight to negotiate licenses to future patents.” (Figg, Tr. 1975-76).

### III. ANALYSIS

#### A. Overview of the Case

This is the FTC’s first administrative enforcement action challenging an alleged reverse payment patent settlement agreement since the Supreme Court’s decision in *FTC v. Actavis*, 133 S. Ct. 2223 (2013). A reverse payment settlement refers to when a patent holder sues another company for patent infringement and the patent litigation is settled with a payment from the patent holder to the claimed infringer and an agreement from the claimed infringer to stay out of the market until a certain date. *In re Lipitor Antitrust Litig.*, 2018 U.S. App. LEXIS 93, \*5-6 (3rd Cir. Jan. 3, 2018). A distinguishing feature of a reverse payment settlement is that the period in which the patent challenger agrees to stay out of the market falls within the term of the patent at issue, when the patent holder would normally enjoy a government-conferred monopoly. *Id.* at \*6. “[M]ost if not all reverse payment settlement agreements arise in the context of pharmaceutical drug regulation, and specifically in the context of suits brought under statutory provisions allowing a generic drug manufacturer (seeking speedy marketing approval) to challenge the validity of a patent owned by an already-approved brand-name<sup>15</sup> drug owner.” *Actavis*, 133 S. Ct. at 2227.

Prior to 2013, the federal courts of appeal disagreed as to how to assess the legality of reverse payment settlement agreements. Some circuits followed the “scope-of-the-patent” test, which held 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); accord *In re*

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<sup>15</sup> The terms “brand-name drugs,” “branded drugs,” or “brand drugs” are used interchangeably by the courts and the parties and in this Initial Decision.

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*Ciprofloxacin Hydrochloride Antitrust Litig.* (“Cipro”), 544 F.3d 1323, 1336 (Fed. Cir. 2008); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 212-13 (2d Cir. 2006). The Third Circuit, in *In re K-Dur Antitrust Litigation*, held that reverse payment settlement agreements were presumed unlawful, although the presumption could be rebutted by showing that the payment (1) was for a purpose other than delayed entry or (2) offered some pro-competitive benefit. 686 F.3d 197, 218 (3d Cir. 2012), *vacated by, remanded by Merck & Co. v. La. Wholesale Drug Co.*, 133 S. Ct. 2849 (2013), *Upsher-Smith Labs., Inc. v. La. Wholesale Drug Co.*, 133 S. Ct. 2849 (2013). The Supreme Court, in *FTC v. Actavis*, resolved the split in the circuit courts, holding that reverse payment patent settlements are not immune from antitrust scrutiny, anticompetitive effects should not be presumed from the presence of a reverse payment alone, and that reverse payment settlements are to be evaluated under the rule of reason, as more fully explained in Section III.B.2, below.

Antitrust inquiries “must always be attuned to the particular structure and circumstances of the industry at issue.” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004). The distinctive features of the pharmaceutical industry provide the context for assessing the agreement challenged in this case.

### 1. The Hatch-Waxman Act

The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, as amended by the Drug Price Competition and Patent Term Restoration Act of 1984 (the “Hatch-Waxman Act”) and the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 21 U.S.C. §§ 355(b)(2) and 355(j) and 35 U.S.C. § 271(e), establishes procedures designed to facilitate competition from lower-priced generic drugs, while maintaining incentives for pharmaceutical companies to invest in developing new drugs.

A company seeking to market a new pharmaceutical product must file a New Drug Application (“NDA”) with the U.S. Food and Drug Administration (“FDA”), demonstrating the safety and efficacy of the new product. 21 U.S.C. § 355. Pursuant to the Hatch-Waxman Act, the FDA requires a company seeking to

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market a new pharmaceutical product to identify any patents that the company 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 titled, “Approved Drug Products with Therapeutic Equivalence Evaluations” (commonly known as the “Orange Book”). *See King Drug Co. of Florence, Inc. v. SmithKline Beecham Corp.*, 791 F.3d 388, 395 (3d Cir. 2015).

A company seeking to market a generic version of a branded drug may file an Abbreviated New Drug Application (“ANDA”) with the FDA. 21 U.S.C. § 355(j); *Actavis*, 133 S. Ct. at 2228. 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. *Id.* 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. *Id.* If a company makes a Paragraph IV certification, it must notify the patent holder of the filing of its ANDA. *King Drug*, 791 F.3d at 395 n.7.

If the brand-name drug company initiates a patent infringement suit within 45 days of an ANDA filing, the FDA must withhold approval of the generic drug for at least 30 months while the parties litigate the validity or infringement of the patent. *In re Lipitor Antitrust Litig.*, 868 F.3d 231, 241 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 983, 984 (2018) (citing *Actavis*, 133 S. Ct. at 2228; 21 U.S.C. § 355(j)(5)(B)(iii)). If a court decides the infringement claim within this 30-month period, then the FDA will follow that determination. *Id.* However, if the litigation is still proceeding at the end of the 30-month period, the FDA may give its approval to the generic drug manufacturer to begin marketing a generic version of the drug. *Id.* The generic manufacturer then has the option to launch “at risk,” meaning that, if the ongoing court proceeding ultimately determines that the patent was valid and infringed, the generic manufacturer will

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be liable for the brand-name manufacturer's lost profits despite the FDA's approval. *Id.* (citing *King Drug*, 791 F.3d at 396 n.8).

The Hatch-Waxman framework grants the first company to file a Paragraph IV certification ("first filer") a 180-day period of market exclusivity, beginning on the first day of its commercial marketing. *Actavis*, 133 S. Ct. at 2229. The FDA may not grant final approval to any subsequent ANDA filer until the first filer's exclusivity period expires or is forfeited. *Id.* "If the first-to-file generic manufacturer can overcome any patent obstacle and bring the generic to market, this 180-day period of exclusivity can prove valuable, possibly 'worth several hundred million dollars.'" *Id.* (citation omitted).

Although the 180-day exclusivity period enables the first filer to sell its product without competition from other generic companies, it does not prevent the brand-name drug manufacturer from selling its own "authorized generic." *King Drug*, 791 F.3d at 393. An authorized generic, or "AG," is a non-branded version of a brand-name drug that is produced by the brand-name company itself. *In re Wellbutrin XL Antitrust Litig.*, 868 F.3d 132, 158 n.37 (3d Cir. 2017). Brand-name companies often introduce AGs to recoup some of the losses they face once a generic drug has entered the market. *See King Drug*, 791 F.3d at 405.

## 2. Generic drug competition

Generic drugs are unique sources of competition for their brand-name drug counterparts. *See New York v. Actavis PLC*, 787 F.3d 638, 655-56 (2nd Cir. 2015). Generic drugs that are "therapeutically equivalent" to their brand-name counterpart receive an "AB" rating from the FDA. An AB-rated generic drug is the same as a brand-name drug in dosage form, safety, strength, route of administration, quality, performance characteristics, and intended use. F. 14. A generic drug must also contain identical amounts of the same active ingredient(s) as the brand-name drug, although its inactive ingredients may vary. F. 14.

An AB-rated generic drug may be automatically substituted for the brand-name drug at the pharmacy counter. F. 29. All 50

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states and the District of Columbia have enacted laws that either permit or require a pharmacist to substitute an AB-rated generic drug for the brand-name drug, unless a physician directs or the patient requests otherwise. F. 29.

Generic manufacturers typically charge lower prices than branded drug sellers. F. 31 (The first one or two generic products are typically offered at a 10% to 25% discount to the branded product. Subsequent generic entry creates greater price competition, which typically leads to discounts between 50% to 80% off the brand price). Automatic substitution of the generic drug for the branded drug is the primary way that generic drug companies make their sales. F. 32. Because of the price advantages of generic drugs over branded drugs, many third-party payors of prescription drugs (e.g., health insurance plans and Medicaid programs) have adopted policies to encourage the substitution of AB-rated generic drugs for their branded counterparts. F. 30.

### **3. Endo-Impax patent litigation and settlement**

The FTC's Complaint challenges the agreement entered into between Respondent Impax Laboratories, Inc. ("Impax" or "Respondent") and Endo Pharmaceuticals Inc. ("Endo") to settle patent litigation brought by Endo against Impax ("Endo-Impax patent litigation"). The Endo-Impax patent litigation arose in connection with Endo's branded product, Opana ER.

Opana ER is an extended release form of oxymorphone hydrochloride marketed for the relief of moderate to severe pain. F. 46. Endo's NDA for Opana ER was approved by the FDA in June 2006, and Endo launched the product the following month.<sup>16</sup> F. 46-47. In October 2007, Endo listed three additional patents in the Orange Book as covering Opana ER: U.S. Patent Nos. 7,276,250 ("the '250 patent"), 5,662,933 ("the '933 patent"), and 5,958,456 ("the '456 patent"). F. 51-53.

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<sup>16</sup> When Endo launched Opana ER in 2006, it only listed a single patent in the Orange Book as covering Opana ER, U.S. Patent No. 5,128,143 ("the '143 patent"). F. 49. The '143 patent was set to expire in September 2008. F. 50.

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In November 2007, Impax filed an ANDA seeking to market a generic version of Opana ER and submitted a Paragraph IV certification certifying that Endo's patents were not valid and/or would not be infringed by Impax's generic drug. F. 58-59. Impax was the first to file an ANDA for the 5, 10, 20, 30, and 40 milligram ("mg") dosage strengths of Opana ER. F. 173. Thus, Impax was entitled, upon obtaining FDA approval, to a 180-day period of exclusivity for those dosage strengths without competition from other ANDA filers. F. 174.

On January 25, 2008, Endo sued Impax, alleging that Impax's ANDA for generic oxymorphone ER infringed Endo's '456 and '933 patents. F. 61. This suit triggered the statutory 30-month stay, meaning that the FDA could not approve Impax's ANDA until the earlier of the expiration of 30 months or resolution of the patent dispute in Impax's favor. F. 62. The 30-month stay was set to expire on June 14, 2010. F. 63.

After Impax filed its ANDA, other generic companies, including Actavis South Atlantic LLC ("Actavis"), filed ANDAs seeking to market generic versions of Opana ER before the expiration of Endo's patents. F. 82, 84. Endo sued each ANDA filer for alleged patent infringement. F. 83, 85-86.

On May 13, 2010, a month before the 30-month stay was set to expire, the FDA granted tentative approval to Impax's ANDA. F. 63-64. Impax received final approval on the 5, 10, 20, and 40 mg dosage strengths of generic Opana ER on June 14, 2010, upon expiration of the statutory 30-month stay, and was granted final approval by the FDA for the 30 mg dosage strength on July 22, 2010. F. 66-67. Pursuant to the Hatch-Waxman framework, once Impax received final approval from the FDA, Impax had the option to launch its generic oxymorphone ER product "at risk." F. 66-67, 451-452.

On June 3, 2010, the trial in the patent litigation between Endo and Impax began. F. 73. The parties settled the patent litigation on June 8, 2010 by entering into two agreements: a Settlement and License Agreement ("SLA") and (2) a Development and Co-Promotion Agreement ("DCA") (collectively, the "Endo-Impax Settlement" or the "Challenged

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Agreement”). F. 74. The DCA was executed simultaneously with the SLA and is incorporated into the SLA. F. 75, 245.

In summary, pursuant to the SLA, Endo granted Impax a license to the '933, '456, and '250 patents, as well as any additional patents then pending or subsequently issued that could cover Impax's generic oxymorphone ER product (“licensed patents”), and Impax agreed not to launch its generic oxymorphone product before January 1, 2013. F. 124-125. Endo also agreed not to sue Impax for patent infringement with respect to any of the licensed patents. F. 126. In addition, Endo agreed in the SLA that Impax's license to sell generic Opana ER would be exclusive during Impax's 180-day first-filer exclusivity period, meaning that Endo agreed not to sell an authorized generic for Opana ER (in the five dosage strengths covered by Impax's ANDA) until Impax's 180-day exclusivity period ended (the “no-AG provision”). F. 127. Furthermore, pursuant to a provision titled “Endo Credit,” Endo would be obligated to make a cash payment to Impax in the event Endo's Opana ER dollar sales fell by more than 50% of their quarterly peak, prior to Impax's entering the market with its generic drug. F. 129. In addition, the SLA obligated Impax to pay Endo a 28.5% royalty on Impax's generic Opana ER sales during Impax's 180-day exclusivity period in the event that sales of Opana ER grew by a specific percentage. F. 128.

Under the DCA, Impax and Endo agreed to collaborate with respect to the development and marketing of a potential treatment for Parkinson's disease, IPX-203. F. 244, 246. Endo agreed to make an upfront payment to Impax of \$10 million and to make additional “milestone payments” for achieving specified milestone events in the development and commercialization of the product. F. 247-248. If the product was successfully commercialized, Endo would be entitled to a share of the profits resulting from prescriptions by non-neurologists. F. 250. While Endo agreed to take on some of the costs for the development of IPX-203, with a cap on its contributions based on accomplished milestones, Impax was responsible for all IPX-203 development work. F. 248, 365-366.

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## B. Overview of Applicable Law

### 1. Introduction

The Complaint charges that the Endo-Impax Settlement constitutes an agreement to restrain competition and is an unfair trade practice in violation of Section 5(a) of the FTC Act. Complaint ¶¶ 101, 102.<sup>17</sup> 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 of Dentists*, 476 U.S. 447, 451-52 (1986). Accordingly, Sherman Act jurisprudence is appropriately relied upon in determining whether 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).

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.<sup>18</sup> Despite its broad language, the ban on contracts in

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<sup>17</sup> 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 develops, manufactures, and markets pharmaceutical drugs. F. 3. Respondent is a corporation, as “corporation” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Respondent’s challenged activities relating to the sale of pharmaceutical drugs 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. 1-5. The parties have stipulated that the FTC has jurisdiction over the subject matter of this proceeding and over Respondent Impax. (Joint Stipulations of Jurisdiction, Law, Fact, and Authenticity, JX001-002 ¶ 7). Thus, the Commission has jurisdiction over Respondent and the subject matter of this proceeding, pursuant to Section 5 of the FTC Act.

<sup>18</sup> There is no dispute in this case that there was a contract, combination, or conspiracy. The patent litigation between Endo and Impax relating to Impax’s generic Opana ER was settled by agreement of the parties on June 8, 2010. F. 74. “[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).



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restraint of trade extends only to unreasonable restraints of trade, i.e., restraints that unreasonably restrain competition. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

**2. Antitrust scrutiny of reverse payment settlements:  
*Actavis***

In *Actavis*, the Supreme Court held that reverse payment patent settlements are not immune from antitrust scrutiny, can sometimes violate the antitrust laws, and are to be evaluated under the rule of reason. By way of background, the FTC's complaint in *Actavis* had alleged that the defendants violated Section 5 of the FTC Act "by unlawfully agreeing 'to share in [the brand-name drug manufacturers'] monopoly profits, abandon their patent challenges, and refrain from launching their low-cost generic products to compete with [the brand-name drug] for nine years.'" *Actavis*, 133 S. Ct. at 2230 (citation omitted). The district court held that the allegations did not set forth an antitrust law violation, and dismissed the complaint. *In re Androgel Antitrust Litig.*, (*No. II*), 687 F. Supp. 2d 1371, 1379 (N.D. Ga. 2010).

On appeal by the FTC, the Court of Appeals for the Eleventh Circuit affirmed. *Watson Pharms.*, 677 F.3d 1298. The appellate court held that patent holders have a "lawful right to exclude others from the market," and that a patent "conveys the right to cripple competition." *Id.* at 1307, 1310 (internal quotation marks omitted). The appellate court further reasoned that the public policy in favor of settling litigation weighs against requiring parties to continue to litigate in order to avoid any antitrust liability. *Id.* at 1313-14. *See also e.g., Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1072 (11th Cir. 2005) (stating that "[t]he general policy of the law is to favor the settlement of litigation, and the policy extends to the settlement of patent infringement suits"); *Cipro*, 544 F.3d at 1333 (highlighting the "long-standing policy in the law in favor of settlements, . . . [which] extends to patent infringement litigation").

The Supreme Court reversed the lower court's dismissal of the FTC's complaint, holding that "reverse payment settlements . . .

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can sometimes violate the antitrust laws.” *Actavis*, 133 S. Ct. at 2227. It rejected the appellate court’s scope-of-the-patent test, reasoning that “to refer . . . simply to what the holder of a valid patent could do does not by itself answer the antitrust question. The patent . . . may or may not be valid, and may or may not be infringed.” *Id.* at 2230-31. Thus, even though a patent, if valid and infringed, would confer a right to charge supracompetitive prices and exclude competitors, this fact does not “immunize the agreement from antitrust attack.” *Id.* at 2230. Rather, “patent and antitrust policies are both relevant in determining the ‘scope of the patent monopoly’ – and consequently antitrust law immunity – that is conferred by a patent.” *Id.* at 2231. The question of antitrust legality can be answered by “considering traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents.” *Id.* at 2231. Furthermore, the Supreme Court held that the fear “that antitrust scrutiny of a reverse payment agreement would require the parties to litigate the validity of the patent in order to demonstrate what would have happened to competition in the absence of the settlement,” should not be determinative. *Id.* at 2234.

The Court stated that “five sets of considerations lead [the Court] to conclude that the FTC should have been given the opportunity to prove its antitrust claim”: (1) reverse payment settlements have the “potential for genuine adverse effects on competition”; (2) such anticompetitive consequences “will at least sometimes prove unjustified”; (3) patent holders often possess market power; (4) litigating patent validity may not be necessary in order to determine whether a settlement is legal under antitrust laws, as “large and unexplained” reverse payment settlements indicate that the patent holder has doubts about the patent’s ability to withstand scrutiny; and (5) parties can still settle patent litigation, despite the risk of antitrust scrutiny, by avoiding reverse payment settlements. *Actavis*, 133 S. Ct. at 2234-37.

Regarding the “potential for genuine adverse effects on competition,” the Court explained that a reverse payment settlement can amount to “a purchase by the patentee of the exclusive right to sell its product, a right it already claims but

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would lose if the patent litigation were to continue and the patent were held invalid or not infringed by the generic product.” *Id.* at 2234. In such case, the patent holder loses any supracompetitive profits it would have obtained for the remaining life of the patent, which “then would flow in large part to consumers in the form of lower prices.” *Id.*

However, a settlement that provides a “payment in return for staying out of the market – simply keeps prices at patentee-set levels, . . . while dividing that return between the challenged patentee and the patent challenger.” *Id.* at 2234-35. In that instance, “[t]he patentee and the challenger gain; the consumer loses.” *Id.* at 2235. The Court was clear that the relevant anticompetitive harm potentially posed by reverse payment settlements is that the payment is used by the patent holder to avoid the risk of patent invalidation and the resulting generic competition that such patent invalidation would enable. *Id.* at 2236. *See also id.* (stating that the relevant “anticompetitive consequence” is the patent holder’s agreement to share supracompetitive profits with the patent challenger, “rather than face what might have been a competitive market . . .”).

In addition, the Court reasoned that a large and unexplained payment suggests that “the patentee has serious doubts about the patent’s survival.” *Id.* at 2236. The Court therefore rejected the notion that it would necessarily be required to litigate the validity of the patent in order to resolve the antitrust claim, stating that “the size of the unexplained reverse payment can provide a workable surrogate for a patent’s weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.” *Id.* at 2236-37 (citing 12 *Areeda* ¶ 2046, at 350-52).

The Court summarized the considerations supporting antitrust scrutiny of reverse payment settlements as follows:

In sum, a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects; one who makes such a payment may be unable to explain and to justify it; such a firm or individual may well possess market power derived from the patent; a court, by examining the size of the payment, may well be

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able to assess its likely anticompetitive effects along with its potential justifications without litigating the validity of the patent; and parties may well find ways to settle patent disputes without the use of reverse payments. In our view, these considerations, taken together, outweigh the single strong consideration – the desirability of settlements – that led the Eleventh Circuit to provide near-automatic antitrust immunity to reverse payment settlements.

*Id.* at 2237.

Finally, the Court expressly rejected the FTC’s argument that reverse payment settlement agreements “are presumptively unlawful and that courts reviewing such agreements should proceed via a ‘quick look’ approach, rather than applying a ‘rule of reason.’” *Id.* at 2237. “That is because 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.*

### 3. Rule of reason framework generally

*Actavis* holds that the rule of reason applies to evaluating the legality of a reverse payment settlement agreement. 133 S. Ct. at 2237. The rule of reason inquiry asks “whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.” *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 343 (1982). A full 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.” *Realcomp*, 635 F.3d at 825 (citations omitted).

“‘[T]here is always something of a sliding scale in appraising reasonableness,’ [and] ‘the quality of proof required should vary with the circumstances.’” *Cal. Dental Ass’n*, 526 U.S. at 780 (quoting 7 *Areeda* ¶ 1507, at 402 (1986)); *Actavis*, 133 S. Ct. at 2237-38. *See also Cal. Dental Ass’n*, 526 U.S. at 781 (holding that rule of reason analysis looks to “the circumstances, details, and logic of a restraint”). As the Court indicated in *Actavis*, trial

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courts should “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.

Under the traditional burden-shifting framework of the rule of reason, the plaintiff bears the initial burden of proving that the challenged agreement “produced adverse, anti-competitive effects within the relevant product and geographic markets.” *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993). *See also Cipro*, 544 F.3d at 1331-32 (The first step in a rule of reason analysis is for the plaintiff to show that the challenged action has had an actual adverse effect on competition in the relevant market.); *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 506-07 (2d Cir. 2004) (same).

The burden of proving anticompetitive effects in a traditional rule of reason case may be met by proving 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.” *In re Realcomp II, Ltd.*, 2009 FTC LEXIS 250, at \*90 (Oct. 30, 2009) (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 v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) (“[P]laintiff 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.”).

If the plaintiff meets its burden of demonstrating anticompetitive effects, 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

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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. “Ultimately, if these steps are met, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable.” *Id.* The plaintiff bears the overall burden of establishing that the challenged restraints “engendered a net harm” to competition in the relevant market. *Cal. Dental Ass’n v. FTC*, 224 F.3d 942, 957-58 (9th Cir. 2000).

#### 4. Reverse payment cases

A number of courts have addressed the structure for a rule of reason analysis in the reverse payment context, but with somewhat inconsistent results. *In re Aggrenox Antitrust Litig.*, 199 F. Supp. 3d 662, 669 (D. Conn. 2016) (noting that “[v]arious district courts have struggled to fill the gaps that *Actavis* left open, and not always with consistent results.”) Moreover, these courts have opined on a rule of reason framework in the context of motions to dismiss and motions for summary judgment, but have not been called upon to apply the rule of reason to a complete evidentiary record developed after trial.<sup>19</sup>

The Court of Appeals for the Third Circuit described a rule of reason framework in *King Drug*, stating:

The *Actavis* Court provided initial guidance on how to structure rule-of-reason litigation in the reverse payment context. The Court explained that such antitrust questions must be answered “by considering traditional antitrust factors such as likely anticompetitive effects, redeeming

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<sup>19</sup> *In re Nexium (Esomeprazole) Antitrust Litigation*, which was a private cause of action, appears to be the first post-*Actavis* case to be submitted to a jury. *See Am. Sales Co., LLC v. AstraZeneca LP (In re Nexium (Esomeprazole) Antitrust Litig.)*, 842 F.3d 34, 39 (1st Cir. 2016). The appellate court’s review of the special verdict form provided to the jury does not clearly address the elements of a rule of reason analysis, for purposes of the instant case. *Nexium*, 842 F.3d at 50, 60 (holding that jury’s answers to special verdict form questions on market power, “large and unjustified” payment, and anticompetitive effects, indicated jury found an antitrust violation).

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virtues, market power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents.” *Actavis*, 133 S. Ct. at 2231.

First, to prove anticompetitive effects, the plaintiff must prove payment for delay, or, in other words, payment to prevent the risk of competition. “[T]he 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.” *Actavis*, 133 S. Ct. at 2237.

Second, the burden then shifts to the defendant to show “that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason.” *Id.* at 2235-36. The reverse payment, for example, may amount to no more than a rough approximation of the litigation expenses saved through the settlement. That payment may reflect compensation for other services that the generic has promised to perform – such as distributing the patented item or helping to develop a market for that item. There may be other justifications. *Id.* at 2236. The Court does not foreclose other justifications, and we need not decide today what those other justifications might be.

Finally, the plaintiff will have the opportunity to rebut the defendant’s explanation.

791 F.3d at 412. The court remanded to the district court “to proceed with the litigation under the traditional rule of reason, tailored, as necessary, to the circumstances of th[e] case.” *Id.*

In *In re K-Dur Antitrust Litigation*, 2016 U.S. Dist. LEXIS 22982 (D.N.J. Feb. 25, 2016), after examining *Actavis* and subsequent cases, the court adopted the following burden-shifting framework:

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“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 . . . .”

*Id.* at \*46 (quoting *In re Cipro Cases I & II*, 348 P.3d 845, 871 (Cal. 2015)). See also *K-Dur*, 2016 U.S. Dist. LEXIS 22982, at \*44 (“[T]he burden must be on Plaintiffs to show that the settlement delayed the generic company’s entry onto the market, that the brand-name company paid the generic company consideration of some kind, and that the consideration exchanged in the settlement exceeded the estimated cost of litigation and the costs of other services and products, in order to establish a prima facie case.”).

The approach in *In re Nexium*, 42 F. Supp. 3d 231, 262-63 (D. Mass 2014), is somewhat similar to that of *K-Dur*. The court in *Nexium*, evaluating a motion for summary judgment, held that, for the initial burden, the plaintiff must present evidence that the brand-name manufacturer “made a payment to a generic manufacturer that exceeded anticipated future litigation costs, exceeded the costs of other services, and lacked ‘any other convincing justification.’” *Id.* at 262 (quoting *Actavis*, 133 S. Ct. at 2237). Once this showing is made, the burden then shifts to the defendant to show a justification for the payment, “such as avoided litigation costs or fair value for services . . . .” *Id.* (quoting *Actavis*, 133 S. Ct. at 2236). If the defendant justifies the payment, then “the burden shifts back to the [p]laintiff[] to



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establish, under the rule of reason, that the settlement is nevertheless anticompetitive on balance.” *Id.* at 262-63.

Incorporating elements of both *King Drug* and *Nexium*, the district court in *In re Loestrin 24 Fe Antitrust Litigation*, 261 F. Supp. 3d 307 (D.R.I. Aug. 8, 2017), held that the rule of reason in a reverse payment case is applied in a three-step process:

[A] plaintiff must first “prove anticompetitive effects,” by demonstrating “a payment for delay, or, in other words, payment to prevent the risk of competition.” *King Drug Co. of Florence v. Smithkline Beecham Corp.*, 791 F.3d 388, 412 (3d Cir. 2015) (“*Lamictal*”), cert. denied, 137 S. Ct. 446, 196 L. Ed. 2d 328 (2016) (citing *Actavis*, 133 S. Ct. at 2235-36). “[T]he 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.” *Actavis*, 133 S. Ct. at 2237. Second, if the plaintiffs satisfy the first step, “the burden then shifts to the [d]efendants to show that a challenged payment was justified by some precompetitive objective”; and third, “the burden shifts back to the [p]laintiffs to establish, under the rule of reason, that the settlement is nevertheless anticompetitive on balance.” *In re Nexium (Esomeprazole) Antitrust Litig.*, 42 F. Supp. 3d 231, 262-63 (D. Mass. 2014) (“*Nexium II*”).

*Id.* at 329.

The district court in *King Drug Company of Florence v. Cephalon, Inc.* (“*Cephalon*”), 88 F. Supp. 3d 402 (E.D. Pa. 2015), adopted a somewhat different approach. There, the court held that in order to meet the initial burden of proving anticompetitive effects, the plaintiff must demonstrate that the brand-name company made a “large” payment in the settlement agreement and that the brand-name company had market power. *Id.* at 414. The court held that, for purposes of avoiding summary judgment, a payment is sufficiently “large” if there is evidence that the payment exceeded saved litigation costs and a reasonable jury

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could find that the payment was significant enough to induce the generic company to stay off the market. *Id.* at 417. If the plaintiff meets this burden, the burden shifts to the defendant to demonstrate procompetitive justifications for the reverse payment. *Id.* at 416. The plaintiff “must then rebut those justifications and establish that the ‘restraint is not reasonably necessary to achieve the stated objective.’” *Id.* “If the plaintiff provides evidence to rebut the defendant’s justifications, the fact-finder will then weigh the anticompetitive and procompetitive effects, as in other rule of reason cases.” *Id.*

### **5. Contentions of the parties as to structure for rule of reason analysis**

Complaint Counsel acknowledges that it has the initial burden of proving anticompetitive effects. CCB at 21. Complaint Counsel contends that it meets its initial burden by proving that Endo induced Impax to accept a share of Endo’s monopoly profits in exchange for staying out of the market. Complaint Counsel urges that this is demonstrated by proof that: (1) Endo made a large reverse payment to Impax; and (2) Endo possessed market power. CCB at 23-24, citing *Cephalon*. According to Complaint Counsel, if it proves a large payment and market power, the burden then shifts to Respondent to prove a “legitimate, cognizable justification” for the payment. CCB at 28. Complaint Counsel contends next that if Respondent fails to justify the reverse payment, the antitrust inquiry ends and the agreement is condemned. If Respondent justifies the reverse payment, according to Complaint Counsel, Complaint Counsel may prevail by showing that the reverse payment was not reasonably necessary to achieve the stated objectives, and only if Complaint Counsel fails to make this showing is there any weighing of anticompetitive and procompetitive effects.

Complaint Counsel further asserts that it has no obligation to show that the Challenged Agreement resulted in increased prices for consumers or other payors, or caused an actual delay in the onset of generic competition. Complaint Counsel argues that under *Actavis*, the relevant anticompetitive harm is paying the generic challenger to drop its patent challenge and stay out of the market, thereby avoiding the risk of competition from a finding of

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patent invalidation or non-infringement. Complaint Counsel further contends that such an agreement harms the competitive process.

Respondent contends that for Complaint Counsel to prove that the Challenged Agreement constitutes an unreasonable restraint under the rule of reason, Complaint Counsel must prove: (1) that the alleged reverse payment was both “large” and “unjustified”; (2) that Endo had monopoly power in a properly defined relevant market; (3) that the Challenged Agreement caused actual anticompetitive effects; and (4) that any alleged less restrictive alternative to the Challenged Agreement was actually feasible. Respondent further contends that the assessment of procompetitive justifications is not limited to justifications for the payment itself, but that the rule of reason considers procompetitive benefits arising from the Challenged Agreement as a whole. Moreover, Respondent asserts, in order to prevail, Complaint Counsel must prove that the asserted anticompetitive effects outweigh the procompetitive benefits.

## 6. Relevant market

In a traditional rule-of-reason case, the relevant market must be defined to allow a court “to 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).<sup>20</sup> However, several post-*Actavis* cases have evaluated anticompetitive effects of reverse payment agreements without a separate determination of the relevant market. *E.g.*, *King Drug*, 791 F.3d at 410 (describing the “market the agreement is said to have protected”); *Wellbutrin*, 868 F.3d 132 at 165 (no mention of relevant market other than stating that the branded drug company’s patent prevented market entry by the generic); *Lipitor*, 868 F.3d at 250, 258 (referring only to the “patentee’s market”).

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<sup>20</sup> 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). The parties have stipulated that the relevant geographic market is the United States. Joint Stipulations of Jurisdiction, Law, and Fact, and Authenticity, JX001-002 ¶ 10.

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As explained in *In re Cipro Cases I & II*, although “[p]roving that a restraint has anticompetitive effects often requires the plaintiff to “delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly,” i.e., has market power . . . . [P]roof of a sufficiently large payment is a surrogate” in reverse payment settlement cases. 348 P.3d at 869 (citations omitted).

In *King Drug*, the Court of Appeals for the Third Circuit, after stating that *Actavis* explained that antitrust questions must be answered “by considering traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents,” *Actavis*, 133 S. Ct. at 2231, laid out its own rule of reason framework to use in a reverse payment case. *King Drug*, 791 F.3d at 412. Nowhere in the *King Drug* framework for determining the likelihood of anticompetitive effects, summarized above, does the appellate court direct the district court to define the relevant market. *Id.* Instead, it invited the district court to “proceed with the litigation under the traditional rule of reason, tailored, as necessary, to the circumstances of this case.” *Id.* at 412.

As stated by one district court in a reverse payment settlement case, evidence of market power will be available “even without an express articulation of the relevant market definition.” *Aggrenox Antitrust Litig.*, 199 F. Supp. 3d at 665.<sup>21</sup> “[A]s a practical matter, the only ‘relevant’ market in this case, and in similar cases brought under *FTC v. Actavis*, will be the market in which the challenged settlement agreement allegedly acted as an anticompetitive restraint: that is, in this case, it will be implicitly defined by the scope of the disputed patent.” *Id.* at 665-66. It is also noteworthy that while *Actavis* itself did not expressly identify the relevant market, it did refer to patent settlements as “allowing

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<sup>21</sup> The district court certified the ruling regarding the relevance of evidence pertaining to the substitutability of other drugs for the product at issue for interlocutory appeal. *Aggrenox*, 199 F. Supp. 3d at 670. The court of appeals declined to provide interlocutory review. *In re Aggrenox Antitrust Litig.*, Case 3:14-md-02516-SRU (2nd Cir. Jan. 9, 2017).

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the generic manufacturer to enter *the patentee's market*.” *Actavis*, 133 S. Ct. at 2237 (emphasis added).

Thus, in the context of a settlement of patent litigation arising under the peculiar framework of the Hatch-Waxman Act, which promotes generic competition and facilitates patent challenges, and where a valid patent gives the brand holder a legal monopoly, the appropriate market in which to assess the anticompetitive effects of a reverse payment settlement agreement is the market that is the subject of that agreement – the branded pharmaceutical product and its generic equivalents. Accordingly, in the instant case, the relevant market is the market for oxymorphone ER, branded and generic, which is the market that mattered to Impax and Endo, the parties to the Challenged Agreement.

## 7. Conclusion

Having fully considered *Actavis*, subsequent court decisions, and the parties’ arguments, the rule of reason analysis to be applied in the instant case will proceed as set forth below.

First, in order to determine whether the evidence shows any anticompetitive effect in connection with the Challenged Agreement, the analysis will determine whether the Endo-Impax Settlement provided “payment for delay, or, in other words, payment to prevent the risk of competition.” *King Drug*, 791 F.3d at 412. The analysis will consider direct evidence from the parties’ settlement negotiations, as well as inferences reasonably drawn from the payment’s “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.” *Actavis*, 133 S. Ct. at 2237; *King Drug*, 791 F.3d at 412. See Aaron Edlin, *The Actavis Inference*, 67 Rutgers U. L. Rev. 585, 587, 592 (2015) (stating that under *Actavis*, a “reasonable inference of harm to consumers from lessened competition . . . can be established by identifying a large and otherwise unexplained payment of cash or something else of value made by the patent holder to the alleged infringer in exchange for that firm’s agreement not to enter the market for some period of time. . . . [An antitrust plaintiff may also] prove by direct evidence that “the patent holder paid the alleged infringer to

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delay its entry into the market and thereby restrict competition . . . e.g., if there is other contemporaneous evidence indicating that the purpose and effect of a reverse payment was to delay entry.”).

The formulation of the initial burden set forth in *Cephalon*, upon which Complaint Counsel relies, to the extent it holds that anticompetitive effects can be demonstrated solely by proof of a large payment and market power, has not been adopted by any other court<sup>22</sup> and presents an unduly truncated burden of proof. See *Actavis*, 133 S. Ct. at 2238 (noting that trial courts should avoid “the use of antitrust theories too abbreviated to permit proper analysis”). *Realcomp* states that the rationale for substituting proof of market power for proof of actual anticompetitive effects is that proof of market power “when combined with the anticompetitive nature of the [challenged] restraints, provides the necessary confidence to predict the likelihood of anticompetitive effects.” 2009 FTC LEXIS 250, at \*90. However, *Actavis* does not hold that a “large” reverse payment is anticompetitive “by nature.” Rather, it is a large *and unjustified* reverse payment that “can bring with it the risk of significant anticompetitive effects.” *Actavis*, 133 S. Ct. at 2237 (emphasis added). Furthermore, in the context of a reverse payment patent settlement, proof of market power adds little in the way of burden because, as explained further in Section III.D. below, a large payment is already a strong indicator of market power.<sup>23</sup> *Actavis*, 133 S. Ct. at 2236. Accordingly, the formulation of the initial burden set forth in *Cephalon* is rejected.

For the second step of the rule of reason inquiry, the analysis will consider evidence of procompetitive effects arising from the Endo-Impax Settlement. Consistent with the traditional rule of reason framework, the burden of proving such effects is properly placed on Respondent. *Realcomp*, 635 F.3d at 825; *Polygram*,

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<sup>22</sup> Although the Third Circuit in *King Drug* cited the *Cephalon* case in a footnote, it is unclear for what proposition. Furthermore, *King Drug*’s articulation of the initial burden of proving anticompetitive effects is clearly different than that set forth in *Cephalon*.

<sup>23</sup> It is noteworthy that market power was not even at issue in *Cephalon*, as the defendants there had “not challenged [p]laintiffs’ ability to demonstrate market power.” *Cephalon*, 88 F. Supp. 3d at 419.

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416 F.3d at 36 (holding that if the plaintiff meets its burden of demonstrating anticompetitive effects, the burden shifts to the defendant to prove procompetitive justifications for the challenged restraint).

Complaint Counsel's position that the only relevant procompetitive justifications are those that justify the reverse payment, thereby barring all other evidence of procompetitive benefits from the settlement and condemning the settlement on the basis of the reverse payment alone, is inconsistent with *Actavis* and the rule of reason generally. *Actavis* expressly identified "redeeming virtues" of a patent settlement as among the "traditional antitrust factors" that can be considered in evaluating antitrust legality. *Actavis*, 133 S. Ct. at 2231. *See also K-Dur*, 2016 U.S. Dist. LEXIS 22982, at \*46 ("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 . . ."); *see also In re Impax Labs, Inc.*, 2017 FTC LEXIS 130, at \*29-32 (Oct. 27, 2017) (refusing to bar evidence and argument concerning post-settlement events). Focusing only on the reverse payment, without any consideration of offsetting procompetitive benefits arising from the settlement, conflates the initial burden of proving anticompetitive effects with the ultimate burden of proving that an agreement is, on the whole, an unreasonable restraint of trade. The "restraint" in a reverse payment settlement agreement is not the payment alone, but the use of the payment to restrain potential generic competition. Simply put, to condemn an agreement based on the reverse payment term alone is an approach that is "too abbreviated to permit proper analysis." *Actavis*, 133 S. Ct. at 2238.

Third, the analysis will consider whether the evidence proves that the demonstrated procompetitive benefits of the Endo-Impax Settlement could have been achieved with a less restrictive agreement.

Fourth, the analysis will weigh the demonstrated anticompetitive effects against the demonstrated procompetitive

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effects to determine whether the Challenged Agreement is anticompetitive on balance. Such balancing properly considers the extent to which the Endo-Impax Settlement delayed generic competition. *See Impax Labs*, 2017 FTC LEXIS 130, at \*29. As recognized in *In re Cipro Cases I & II*, under *Actavis*, “the relevant benchmark in evaluating reverse payment patent settlements should be no different from the benchmark in evaluating any other challenged agreement: What would the state of competition have been without the agreement?” 348 P.3d at 863.

The analysis now turns to the application of the foregoing principles to the record in this case.

### C. Anticompetitive Harm

*Actavis* explains that a brand patent holder’s use of a payment to induce a generic challenger to drop its patent challenge and agree to stay out of the market, rather than face the risk of patent invalidation and resulting generic competition, is an anticompetitive harm. *Actavis*, 133 S. Ct. at 2236 (for shorthand purposes, alternatively referred to as payment to “prevent” or to “eliminate” the risk of competition). *See also King Drug*, 791 F.3d at 403 (holding that, under *Actavis*, harm occurs when the payment’s objective is to maintain supracompetitive prices to be shared among the patentee and the challenger, rather than face what might have been a competitive market). Complaint Counsel has the initial burden of proving anticompetitive harm which, as noted above, in the reverse-payment context, means the burden of proving that the Endo-Impax Settlement included payment to prevent the risk of competition. Complaint Counsel has met this initial burden, as explained below.

#### 1. Economic theory of anticompetitive harm

A basic economic principle is that consumers benefit from increased competition in the form of lower prices and increased choice. F. 440. Harm to competition is not limited to the certain elimination of competition, but also includes eliminating the possibility that participants on the other side of the market will



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have the opportunity to experience the benefits of competition, such as lower prices. F. 441.

Normally, when a generic drug manufacturer launches a generic version of a branded drug, the competition between the brand-name firm and the generic firm causes the price of the drug to drop, which is a benefit to consumers. F. 442. Reverse payment settlements can harm consumers, to the extent that, by requiring the generic company to forego the possibility of entering at an earlier date, the settlement extends the period in which the brand-name manufacturer is the only seller of a drug. F. 442.<sup>24</sup> Moreover, a large reverse payment can imply that the market entry date in the settlement agreement is later than the date that the patent holder expected the alleged patent infringer to enter the market. This is based on the theory that it is unlikely that a patent holder would agree by settlement to pay an alleged patent infringer anything more than saved litigation costs, only to obtain entry on the date the alleged patent infringer would have entered anyway. F. 446.

A reverse-payment settlement replaces the possibility of entry by the generic drug with the certainty that generic competition will not occur prior to an agreed date. F. 443. To this extent, the brand-name firm is buying an insurance policy, by which it pays the generic company a premium in exchange for the generic firm's guaranteeing it will not compete prior to the date specified in the settlement. F. 443. Payment to an alleged infringer, in exchange for a certain entry date, converts the possibility of substantial loss of profits for the patent-holder, due to generic competition, into the certainty that the brand manufacturer will continue to earn profits as the sole seller of the drug, until the agreed entry date set by the settlement. F. 444. By eliminating the possibility of generic competition for a period of time, reverse-payment settlements interfere with the competitive process and can harm consumers by depriving them of the possible benefits of increased competition in the period prior to the entry date provided under the settlement. F. 445.

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<sup>24</sup> This theory of economic harm assumes that issues of patent validity and/or infringement were pending and unresolved at the time of settlement.

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A brand-name pharmaceutical firm has an economic incentive to pay the generic firm as part of a settlement, to the extent that the payment is less than the profits the brand firm would earn during the period before the agreed-upon generic entry date. F. 447. A generic pharmaceutical firm also has an economic incentive to enter into reverse-payment settlements. F. 448. While the generic firm stands to lose profits it would have earned by launching prior to the agreed-upon date, a sufficiently large payment can compensate for that loss and thereby induce the generic company to forego the opportunity to launch earlier than the agreed-upon date. F. 448.

**2. Size of the payment****a. Applicable legal principles**

Under *Actavis*, the size of the reverse payment is central to the antitrust inquiry, and therefore the reviewing court or factfinder must measure the value of the payment. *Rochester Drug Co-Operative, Inc. v. Warner Chilcott Co. (In re Loestrin 24 Fe Antitrust Litig.)*, 814 F.3d 538, 551-52 (1st Cir. 2016). While *Actavis* refers to “large” and “unexplained,” or “unjustified,” payments as being material to the evaluation of a reverse payment settlement, the Court did not specify what makes a payment “large.” *Cephalon*, 88 F. Supp. 3d at 416 (“*Actavis* did not identify any specific formula for determining whether a reverse payment is sufficiently large.”).

The fact-finder must determine the value of the reverse payment in order to determine the payment’s size. *Loestrin*, 814 F.3d at 551-52. Valuing the payment is particularly important in the case of non-cash payments, such as the no-AG provision challenged in the instant case. Although it is settled that *Actavis* applies to non-cash payments, *see, e.g., King Drug*, 791 F.3d at 403; *Loestrin*, 814 F.3d at 549-50, there must be a reliable calculation of the payment’s value. *Lipitor*, 868 F.3d at 255 (upholding complaint based on plausible allegations that non-monetary payment was worth “hundreds of millions of dollars,” noting that “more detailed, advanced calculations related to those allegations” come later in the proceeding); *In re Aggrenox Antitrust Litig.*, 94 F. Supp. 3d 224, 244 (D. Conn. 2015)

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(“[C]ourts interpreting *Actavis*, while holding that reverse ‘payments’ are not limited to cash transfers, have observed the importance of the court’s ability to calculate the value of any nonmonetary payments . . .”). Furthermore, the value of the payment must be assessed at the time the parties entered into the settlement. *Loestrin 24 Fe Antitrust Litig.*, 261 F. Supp. 3d at 337 (“The deal must be valued at the time the parties entered the deal . . .”).

In addition, the size of a reverse payment is properly determined by considering the total compensation provided under the settlement, as a whole, rather than examining each component of the settlement in a piecemeal fashion. *Loestrin*, 261 F. Supp. 3d at 331. *See also In re Opana ER Antitrust Litig.*, 162 F. Supp. 3d 704, 718 (N.D. Ill. 2016) (refusing to assess components of the settlement in a “piecemeal fashion” to determine whether “each individual payment fails to rise to the level of a large and unjustified payment” in favor of “determin[ing] whether, when taken as a whole, the total payment . . . was large and unjustified”). This is particularly true where, as here, the Challenged Agreement consists of both the SLA and the DCA, executed the same day. *See In re Niaspan Antitrust Litig.*, 42 F. Supp. 3d 735, 752 (E.D. Pa. 2014) (“[D]efendants may not improperly ‘dismember’ [the complaint] by examining each of the three settlement agreements in isolation. Rather, the Licensing Agreement must be read in conjunction with the Co-Promotion and Manufacturing Agreements executed that same day.”).

The fact that a payment exceeds saved litigation costs is a relevant benchmark in assessing whether a payment is “large,” but it is not dispositive. Even if a payment exceeds saved litigation costs, “the *Actavis* factors – the size of the payments, their scale in relation to litigation costs, their independence from other services for which they might be fair consideration, and any other convincing justification – still matter.” *Aggrenox*, 94 F. Supp. 3d at 243.

*Actavis* noted that a large payment may provide “strong evidence that the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits . . . .” 133 S. Ct. at 2235. Interpreting *Actavis*, a number of courts have

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considered whether the payment induced the patent challenger to drop its patent challenge and stay out of the market until the agreed date. *See King Drug*, 791 F. 3d at 411 (upholding allegations of anticompetitive harm, noting that the promise of no authorized-generic competition during the generic's 180-day exclusivity period was alleged to have induced the generic to drop the patent challenge and thereby enabled the brand to avoid the risk of patent invalidation); *Loestrin*, 814 F.3d at 550 (holding that *Actavis* applies to payments that "induce the generic to abandon a patent challenge"). *See also Cephalon*, 88 F. Supp. 3d at 417 (holding that, in addition to considering whether a payment exceeded saved litigation costs, determination of "large" payment must also consider whether the payment was sufficiently large to induce the generic to forfeit its claim and agree to stay off the market).

With the foregoing principles in mind, the analysis now assesses the value of the reverse payment provided under the Endo-Impax Settlement.

**b. Valuation**

The Endo-Impax Settlement provided a cash payment in the amount of \$10 million, pursuant to the terms of the DCA. F. 247. In addition to the \$10 million cash payment under the DCA, pursuant to the terms of the SLA, as further explained below, the Endo-Impax Settlement included a non-cash payment, in the form of a no-AG provision, under which Endo agreed not to compete with Impax during Impax's 180-day exclusivity period by launching an authorized generic. In addition, the Endo-Impax Settlement provided Impax with security for the value conveyed by the no-AG provision in the form of the Endo Credit.

**i. No-AG provision**

Impax was the first company to file an ANDA with Paragraph IV certifications for the 5, 10, 20, 30, and 40 mg dosage strengths of oxymorphone ER. F. 58. As the first filer on these dosages, Impax would be entitled to a 180-day exclusivity period as to the five most popular dosages of Opana ER, comprising 95% of Endo's Opana ER sales. F. 173-174. However, Impax's 180-day

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exclusivity period was not a bar to Endo's launching an authorized generic during that exclusivity period because the Hatch-Waxman Act does not prevent a brand-name drug company from launching an authorized generic. F. 21-22, 176. At the time Endo and Impax reached a settlement of their patent litigation, Impax did not know whether or not, absent the settlement, Endo would launch an authorized generic. F. 186. The no-AG provision guaranteed to Impax that Impax would be the only seller of generic Opana ER during its first 180 days on the market and would not face competition from an Endo authorized generic. F. 187.

The no-AG provision was valuable to Impax. Impax would generally seek a no-AG provision as part of a settlement agreement with a brand-name drug manufacturer. F. 182. Indeed, along with obtaining the earliest possible entry date, a no-AG agreement is among the more important things that Impax would seek in a negotiation. F. 183. A first-filer generic manufacturer makes a substantial portion of its profits during the 180-day exclusivity period, and the introduction of an authorized generic during that exclusivity period reduces the value of the exclusivity period, by causing lower prices and fewer sales for the first filer. F. 172.

Impax witnesses acknowledged that the absence of an authorized generic means more control for the generic company, which can often lead to higher profits for the generic company. F. 182. Conversely, the introduction of an authorized generic during the exclusivity period reduces the value of the 180-day exclusivity period, by causing lower prices and fewer sales for the first filer. F. 172. Specifically, as Impax witnesses testified, an authorized generic competitor during the 180-day exclusivity period generally results in a price decrease of approximately 30 to 35%, and reduces the generic company's share of generic sales. F. 177. Impax executives estimated that if Endo launched an authorized generic when Impax entered the market, Endo's authorized generic would capture as much as half of the sales of generic Opana ER and cause substantially lower generic prices during the exclusivity period than would be the case if Impax was the only generic seller. F. 181.

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In May 2010, Todd Engle, of Impax's sales and marketing team, prepared an analysis that projected lost profits in the amount of \$24.5 million if an Endo AG entered within two to four weeks after Impax's launch of generic oxymorphone ER. F. 191. In addition, in 2010, Impax forecasted the effect of an Endo AG on Impax's expected generic sales. F. 189. In what Impax referred to as the "upside" scenario, Impax assumed that Endo's authorized generic Opana ER would enter the market about two months after Impax's launch of generic Opana ER. F. 189. Under the upside scenario, Impax's share of generic sales was estimated to fall to 60% and Impax's average price was estimated to fall by 36%. F. 189. In what Impax referred to as its "base" scenario, Impax assumed that Endo's authorized generic Opana ER would enter the market simultaneously with Impax. Under the base scenario, it was estimated that Endo would capture half of the market and that prices would fall by the same 36%. F. 189.

Employing the figures from Impax's 2010 forecasts, Complaint Counsel's economic expert witness, Professor Roger Noll, calculated that: (1) under Impax's upside scenario, market entry by an authorized generic during Impax's 180-day exclusivity period would cause Impax's revenues to fall by approximately \$23 million; and (2) under Impax's base assumptions, market entry by an authorized generic during Impax's 180-day exclusivity period would cause Impax's revenues to fall by approximately \$33 million. F. 190.

Respondent contends that, notwithstanding the value to Impax, the no-AG provision had little value to Endo because Endo offered the no-AG agreement as part of its initial settlement offer to Impax. *See* F. 131. However, this fact does not compel the inference that the no-AG agreement was worthless to Endo. Moreover, evidence contemporaneous to the parties' negotiations shows that Endo estimated that, if Impax launched at risk, Endo could recoup \$25 million in lost revenues by launching an authorized generic to compete with Impax. F. 192; *see also* F. 175.

Respondent also contends that it was not guaranteed to receive the value of the no-AG agreement because Endo was planning to reformulate Opana ER and remove original Opana ER from the

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market, which could render the no-AG agreement illusory and potentially defeat Impax's generic market opportunity entirely. However, the evidence shows that Endo agreed to compensate Impax for this possibility, and to insure the value of the no-AG provision, by agreeing to the Endo Credit, as further explained in subsection 2.b.ii below.

Based on the foregoing, the no-AG provision in the SLA was worth between \$23 and \$33 million in projected sales revenue to Impax at the time Impax entered into the SLA. F. 193. By agreeing not to compete with Impax through launching an authorized generic, Endo was promising to provide Impax with a monopoly on generic sales of Opana ER during Impax's 180-day exclusivity period, which would enable Impax to charge a higher price for generic Opana ER compared to a market that had two companies selling generic products. F. 187-189, 191. *See also* F. 190 (expert opinion that the no-AG provision provided substantial value to Impax when the SLA was executed by ensuring that Impax would face no generic competition during its 180-day exclusivity period and would thereby earn greater profits on its generic sales).

**ii. Endo Credit**

Under section 4.4 of the SLA, titled "Endo Credit," Endo agreed to make a cash payment to Impax in the event that Endo's Opana ER sales fell by more than 50% from the "Quarterly Peak" (defined as the highest sales quarter between the third quarter of 2010 and the third quarter of 2012) to the fourth quarter of 2012 (the last quarter before the agreed generic entry date of January 2013). F. 195. The formula for calculating the Endo Credit incorporates a number of factors that relate to Impax's sales of generic Opana ER, multiplied by the market opportunity for the generic product in the quarter of peak sales. F. 196. Specifically, the agreement relies on Impax's "Market Share Profit Value," defined as the product of (1) an assumed generic substitution rate for original Opana ER (90%), (2) an assumed net realized generic price discounted from the brand-name price (75%), (3) an assumed generic profit margin (87.5%), (4) 50% (expressing the 180-day exclusivity period as half of a year), and (5) the annualized sales of Opana ER during the quarter of peak sales for

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Opana ER during the period from the third quarter of 2010 to the third quarter of 2012, divided by 100.<sup>25</sup> F. 196.

**(a) Purpose of Endo Credit**

As further explained below, the intent and the design of the Endo Credit were to provide Impax with a payment approximating the profits Impax would lose if, during the two and a half year time period between the June 2010 settlement and the agreed January 2013 Impax entry date, Endo launched a reformulated version of Opana ER in such a way as to substantially eliminate the market for original Opana ER. In this scenario, Impax stood to lose the value of its 180-day exclusivity period, including the generic monopoly during this period that Endo promised to Impax in the no-AG provision. The Endo Credit was designed to make Impax whole for this potential loss. To understand the role of the Endo Credit in the reverse payment conferred to Impax under the Endo-Impax Settlement, a review of the parties' negotiations is helpful.

Endo sent Impax an initial term sheet for the SLA on May 26, 2010. F. 131. The initial term sheet for the SLA included, among other things, a no-AG provision and a generic entry date of March 2013. F. 131-132. Impax accepted the no-AG offer, but counter-offered a generic entry date of January 1, 2013, plus "certain acceleration triggers, including market degradation to any alternate product." F. 136-137. An acceleration trigger for market degradation would have allowed Impax to launch its generic oxymorphone ER product earlier than January 1, 2013, in the event that Opana ER brand sales fell by a certain amount or percentage. F. 138.

Impax wanted a market acceleration trigger as "protection in case Endo had any intentions of moving the market to a next-generation product." F. 139. Impax had included similar provisions in other patent settlements with brand companies. F. 139. Although Impax did not have specific information about

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<sup>25</sup> Although in 2013, the Endo Credit formula yielded a payment to Impax in the amount of \$102 million, this is not the appropriate measure of the value of the Endo Credit, for the reasons explained in subsection b.ii.(c) below.



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Endo's plans to reformulate Opana ER, Impax had seen analyst reports suggesting that Endo was working on crush-resistant drugs generally.<sup>26</sup> F. 140-141. Impax was aware that the FDA had been encouraging opioid manufacturers to make opioids tamper-resistant, which companies were accomplishing primarily by manufacturing tablets that could not be crushed. F. 142. Impax was also aware that Purdue Pharma, L.P., the manufacturer of the brand-name drug OxyContin, had introduced a reformulated, crush-resistant version of its product and was withdrawing its original formulation. F. 143.

Pharmacists are allowed or sometimes required to dispense an AB-rated generic version of a drug instead of the more expensive branded drug, unless a physician directs or the patient requests otherwise. F. 29. Automatic substitution of the generic drug for the branded drug is the primary way that generics make their sales. F. 32. When brand companies introduce a reformulated drug, they often cease marketing and selling the original product. F. 198. They can also withdraw the original product's reference-listed drug designation, preventing generic products from having AB-rated status. F. 198. By introducing a reformulated drug, the brand company can greatly reduce the ability of generic companies to sell generic versions of the original drug because those generic products are no longer bioequivalent to – and not subject to automatic substitution in place of – the reformulated product. F. 199. For a generic drug to be sold where there is no branded drug for which it is automatically substituted, doctors must actually write out a prescription for the generic product. F. 202-203.

If Endo reformulated Opana ER, Impax's generic Opana ER would not be AB-rated to the reformulated Opana ER product. F. 200. To the extent that original Opana ER disappeared or became insignificant, Impax's opportunity to sell a generic Opana ER would be significantly reduced or even eliminated. F. 204. Impax was concerned that Endo would be able to “subvert the

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<sup>26</sup> At the time of settlement, Endo had not filed any supplemental NDAs for a reformulated version of Opana ER. F. 226. Relevant facts regarding Endo's launching of a reformulated Opana ER are further addressed in subsection b.ii.(c) below.

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value of the deal” being negotiated by introducing a reformulated version of Opana ER. F. 205.

Endo rejected the concept of accelerated entry for Impax and rejected Impax’s demand for a market acceleration trigger. F. 147. This increased Impax’s concern that Endo was going to switch the market to a crush-resistant version of Opana ER, notwithstanding Endo’s denial of such a plan. F. 148. When Endo insisted to Impax that Endo was not planning to move the market to a crush-resistant version of Opana ER, Impax told Endo, “if you’re not telling me the truth, you’re going to pay me what I would have made anyway.” F. 150. If Endo did destroy the market for Impax’s generic Opana ER, Impax wanted “to be made whole for the profits that [it] would have otherwise achieved.” F. 206. *See also e.g.*, F. 207, 213 (If “the market changed substantially before the date that the parties agreed that Impax could launch,” the provision “would be a way of making Impax whole”); F. 151-152 (describing the then-current proposal as including a “make good” payment). Once Endo refused to agree to an acceleration trigger, and agreed instead to the concept of a make-whole payment, Impax stopped pursuing an acceleration trigger. F. 153. Thereafter, Endo and Impax proceeded instead to finalize the terms of this “make-good” or “make-whole” provision, which eventually became the Endo Credit. F. 154, 160-165. In addition, Endo agreed to a January 2013 generic entry date for Impax. F. 154.

As Impax’s then-CFO, Arthur Koch, explained, Impax was “worried about the control” Endo would have during the two and a half year time period before the agreed launch date of January 2013, and was “looking for a way to gain – take back some of that control away from the brand.” F. 149. Impax’s goal was, “if the market changed substantially before the date that the parties agreed that Impax could launch, there would be a way of making Impax whole” by providing Impax with the profits that Impax otherwise would have achieved during its 180-day exclusivity period. F. 213.

Impax described the make-whole provision as “protect[ing] the downside.” F. 154; *see also* F. 208. If Endo’s obligation to pay the Endo Credit were triggered, based on declining sales of

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Opana ER prior to Impax's generic entry, the calculations of the Endo Credit were designed to approximate the net profits Impax would have expected to make during its six-month exclusivity period, with no AG. F. 212; *see also* F. 214. Getting this downside protection for Impax in the event Endo reformulated Opana ER was "super, super important" to Impax's primary negotiator, Mr. Mengler, who testified that "something that didn't protect us from the downside was . . . a deal-breaker." F. 208.

If the market for Opana ER did not decline, the value of the no-AG provision would be higher. F. 210. A sharp decline in the sales of original Opana ER before Impax's generic launch, however, would decrease the value of the no-AG provision, because the total market potential for generic Opana ER would decrease. F. 209. The Endo Credit would then "correct for the loss in the value of the market that had occurred before the generic entry date." F. 209. In this way, the Endo Credit was designed as insurance against the risk of Endo reformulating Opana ER, and thereby degrading the market for Impax's generic drug. F. 211. *See also* F. 213 (The Endo Credit provision "was intended to insulate" Impax from the risk of a substantial decrease in Opana ER sales prior to the agreed generic entry date.).

In summary, the Endo Credit was designed to "back-up" the value of the no-AG provision and provide value to Impax regardless of whether Endo reformulated Opana ER. F. 197. *See also* F. 215 (Impax CFO Mr. Koch in 2011 characterizing the settlement as having "protection [against reformulation] built into the agreement so we should have a reasonable outcome almost no matter what happens").

**(b) Monetary value of Endo Credit**

The evidence shows that the monetary value of the Endo Credit was uncertain at the time of settlement and was contingent on unknown future events that were outside of Impax's control, such as the figure for quarterly peak sales for Opana ER prior to generic entry, which was the biggest "input" in the Endo Credit formula. F. 216.

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Complaint Counsel's economic expert witness, Professor Noll, devised four scenarios to approximate the value of the no-AG provision and the Endo Credit at the time of the settlement, and opined that the value ranged from \$16.5 to \$62 million, depending on his assumptions regarding the sales of Opana ER in the years after the settlement. *See* CX5000 at 240 (Noll Expert Report Appendix F). Professor Noll failed to adequately describe or explain the bases for his assumptions or his calculations, either in his expert report, or in his testimony. Without an understandable and verifiable basis for his estimates, the estimates are unsupported, are conclusory at best, and are, thus, rejected.

Respondent contends that the Endo Credit should be deemed to have added no value to the Endo-Impax Settlement because, by virtue of the contingent nature of the Endo Credit, the Endo Credit did not actually "guarantee" a payment to Impax. Respondent asserts that it was possible that Endo could time the introduction of reformulated Opana ER so as to avoid any payment obligation under the Endo Credit, while still diluting Impax's sales of generic original Opana ER (referred to by Respondent as a "late switch" strategy). Respondent relies on evidence that, prior to the settlement, Impax's director of market planning, Ted Smolenski, told Chris Mengler, Impax's principal negotiator, that there were certain circumstances under which the Endo Credit would not result in a payment to Impax, including a situation in which Endo would withdraw its NDA for original Opana ER and time the elimination of sales in such a way that the Endo Credit would result in zero payment. F. 221. *See also* F. 220 (preliminary calculations by Mr. Cuca of Endo included potential for zero payment under Endo Credit). However, Mr. Smolenski considered this "downside" scenario unlikely to occur. Moreover, Mr. Mengler decided not to pursue the issue further because he did not deem the potential to be likely enough to try to correct for it. F. 221.

Even if there was a theoretical possibility of a zero payment under the Endo Credit, the notion that Impax bargained to obtain a zero payment under the Endo Credit is implausible. It is also against the weight of the evidence, including evidence that the Endo Credit formula was designed to provide an approximation of the net profits Impax would have expected to make during its six-

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month exclusivity period, with no AG; Impax viewed the Endo Credit provision as “super, super important” and a “deal-breaker”; Impax viewed the Endo Credit as insurance; and Impax expected a “reasonable outcome almost no matter what happens.” F. 208, 212, 214-215. Moreover, Impax gave up its request for an acceleration trigger in exchange for the Endo Credit. F. 150-154. In summary, the facts belie the assertion that Impax bargained to obtain nothing.

In addition, the evidence does not support Respondent’s assertion that Endo was in fact planning the above-mentioned “late switch” strategy for introducing reformulated Opana ER in order to avoid payment under the Endo Credit. Respondent points to evidence that Endo’s 2012 budget contemplated a launch date for reformulated Opana ER of August 2012, with a full conversion of the market from original Opana ER to reformulated Opana ER within two to three months, while continuing sales of original Opana ER into the last quarter of 2012. RX094 at 0003. However, the Endo document cited by Respondent clearly states that “significant uncertainties existed around manufacturing capabilities, market acceptance and our ability to transition to the new formulation.” *Id.* The document notes that Endo was “particularly concerned with [transition time], as [Endo] knew that Purdue’s OxyContin transition took 6 months.” *Id.* In fact, an orderly transition from original Opana ER to reformulated Opana ER was expected to take about six to nine months. F. 106.

Moreover, even if sales of original Opana ER continued into the fourth quarter of 2012, it does not follow that this would enable Endo to avoid any payment under the Endo Credit. A cash payment under the Endo Credit was to be triggered if Endo’s original Opana ER dollar sales in the fourth quarter of 2012 fell by more than 50% from the “Quarterly Peak” (the highest sales quarter between the third quarter of 2010 and the third quarter of 2012). F. 129, 195. Having some sales of original Opana ER in the fourth quarter of 2012 would not necessarily be sufficient to avoid triggering an Endo Credit payment. Rather, to avoid triggering an Endo Credit payment, the total dollar sales of original Opana ER in the fourth quarter of 2012 would need to be at least 50% of the Quarterly Peak sales.

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The weight of the evidence is that, at the time of the settlement, Endo's principal interest in the timing of the launch of reformulated Opana ER was to launch as soon as possible, and sufficiently ahead of entry of a generic for original Opana ER to maximize the value of its reformulated product. F. 99-104. The assertion that Endo's priority was instead to avoid payment under the Endo Credit is unsupported and unconvincing, and is, therefore, rejected.

**(c) 2013 payment under Endo Credit**

On April 18, 2013, Impax received a payment pursuant to the Endo Credit in the amount of \$102 million. F. 237. This amount is not, however, the proper measure of the value of the Endo Credit, which must be measured as of the date of settlement. *Loestrin*, 261 F. Supp. 3d at 337. To the extent that any of Professor Noll's estimates of the value of the Endo Credit at the time of settlement are based upon discounting the value of the Endo Credit payment made in 2013 (F. 239) such valuation would be improper and provides an additional reason to reject those estimates.

Furthermore, the evidence shows that the amount of money that Endo eventually paid under the Endo Credit was a function of a number of unforeseen factors that were outside of Impax's control. F. 216, 227-235. At the end of 2011, after discovering manufacturing deficiencies, the FDA shut down the plant where Novartis Consumer Health, Inc. ("Novartis"), another pharmaceutical company, manufactured original Opana ER for Endo. F. 227. The shutdown of the Novartis plant caused a supply chain crisis for Opana ER. F. 228. Thereafter, in or about February 2012, the FDA ordered Endo to cease selling original Opana ER in order to avoid consumer confusion with Endo's reformulated Opana ER, which had just been approved by the FDA in December 2011. F. 225-226, 229. Accordingly, Endo stopped distributing original Opana ER and launched reformulated Opana ER in March 2012. F. 230.<sup>27</sup> It was not until

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<sup>27</sup> Endo also took steps to have original Opana ER removed from the market. In August 2012, Endo filed multiple citizen petitions with the FDA, in which Endo argued that the FDA should (1) determine that original Opana ER was discontinued for safety reasons and could no longer serve as a reference-listed

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after the Novartis supply disruption in late 2011, the FDA's order to stop selling original Opana ER in February 2012, and the launching of reformulated (crush-resistant) Opana ER in March 2012, that Endo first concluded that it would have to make a payment under the Endo Credit provision. In fact, the first time Endo knew that its sales of Opana ER would be zero was in the last quarter of 2012, after the supply interruption caused by the Novartis plant shutdown. F. 231. There is no basis in the record for concluding that anyone at the time of settlement did foresee, or reasonably could have foreseen, the occurrence of all these events.

Although \$102 million is not the appropriate measure of the value of the Endo Credit at the time of settlement, the fact that a payment was made confirms the purpose of the Endo Credit. As noted above in Section III.C.2.b.ii.(b), the purpose of the Endo Credit was to provide Impax the profits it would have received as the sole seller of generic Opana ER during its 180-day exclusivity period, with no AG, in the event of a sharp decline in the market. To the extent that the 2013 Endo Credit payment includes the value of such profits, the Endo Credit payment fulfilled its purpose.

**c. Conclusion as to valuation of reverse payment**

Based on the foregoing, the evidence proves that, at the time of settlement, the value of the no-AG provision, as secured by the Endo Credit, was between \$23 and \$33 million in projected sales, and the actual value of the cash payment under the DCA was \$10 million, for a total reverse payment under the SLA and DCA of between \$33 and \$43 million.

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drug for any ANDA; (2) refuse to approve any ANDA pending for original Opana ER; and (3) withdraw any already-granted approvals for original Opana ER ANDAs. F. 233. Impax formally responded to the petition and offered scientific evidence that the discontinuation of Endo's original Opana ER was unrelated to safety or effectiveness. F. 234. The FDA concluded that Endo did not withdraw original Opana ER for safety or efficacy reasons. F. 235.

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### 3. Scale in relation to litigation costs

Although litigation costs vary substantially among cases, a survey by the American Intellectual Property Lawyers Association estimated that the median litigation cost for all patent cases with more than \$25 million at stake averages about \$5.5 million for each party. F. 77. When such a case is handled by a large firm (with more than 76 attorneys), the median litigation cost average is somewhat higher, at approximately \$7 million for each party. F. 77.

The top end of the range that Impax uses in its budgeting process to estimate costs for generic patent litigation is about \$3 to \$4 million per case. This \$3 to \$4 million estimate represents total expenses from the start of litigation to completion and is based primarily on expenses for outside counsel, such as hourly attorneys' fees. F. 79. In November 2011, Impax represented in a public earnings conference call that it was saving \$3 million in litigation expenses because of recent settlements, including the Endo settlement. F. 80. At the time of the Endo-Impax Settlement, which occurred during the patent trial, Endo had spent between \$6 and \$7 million and Impax had spent about \$4.7 million on litigation in the infringement case. F. 78.

Based on the foregoing, a reasonable estimate of the combined saved litigation costs for both Endo and Impax for settling the patent litigation in June 2010 is approximately \$5 million. F. 81. As set forth above, the value of the no-AG provision, secured by the Endo Credit, was between \$23 and \$33 million, based on projected sales revenue to Impax, and the actual value of the cash payment under the DCA was \$10 million, for a total reverse payment under the SLA and DCA of between \$33 and \$43 million. Therefore, the value of the reverse payment substantially exceeded the estimated saved litigation costs.

### 4. Justifications for reverse payment

#### a. Legal principles

*Actavis* holds that a reverse payment can be justified as “compensation for other services that the generic has promised to



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perform – such as distributing the patented item or helping to develop a market for that item. There may be other justifications.” *Actavis*, 133 S. Ct. at 2236. *See also id* at 2237 (holding that likelihood of anticompetitive effects in connection with reverse payment settlement depends on, among other things, “independence from other services for which it might represent payment, *and the lack of any other convincing justification*”) (emphasis added). Clearly, *Actavis* did not limit the types of justifications for a reverse payment that can be asserted. *See also King Drug*, 791 F.3d at 412 (“The Court does not foreclose other justifications.”).

The parties dispute who has the burden of proof on the issue of justification, with each party placing the burden of proof on the other party. Complaint Counsel points to language in *Actavis* stating that “[a]n antitrust defendant may show . . . that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason,” 133 S. Ct. at 2236, and argues this shows that the defendant bears the burden of proving that a payment was justified. However, *Actavis* also cites “the lack of any . . . convincing justification” as an element of proving anticompetitive effects, 133 S. Ct. at 2237, which indicates that the burden of proving that a payment was unjustified should fall on the plaintiff.

Post-*Actavis* cases have held that the plaintiff challenging a reverse patent settlement must allege plausible facts to support a conclusion that an alleged reverse payment was large and unjustified. *Loestrin*, 814 F.3d at 552. In addition, it has been held that when a defendant comes forward with evidence of justifications for the payment, the burden is on the plaintiff to prove that the asserted justifications are unsupported. *Cipro Cases I & II*, 348 P.3d at 871 (citing *Polygram*, 416 F.3d at 37-38). *See also K-Dur*, 2016 U.S. Dist. LEXIS 22982, at \*46 (holding that plaintiff must “dispel” justifications offered by defendant). As the court in *In re Cipro Cases I & II* explained, if a plaintiff dispels all justifications explaining the reverse payment, “the conclusion follows that the settlement payment must include, in part, consideration for additional delay in entering the market.” 348 P.3d at 871. *See also In re Aggrenox Antitrust Litig.*, 2015 U.S. Dist. LEXIS 94516, at \*37 (D. Conn.

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July 21, 2015) (holding that an antitrust violation requires proof, among other things, “that the settlement included a large and unjustified reverse payment giving rise to an inference of payment in order to avoid the risk of competition”). Other post-*Actavis* cases have held that the burden is on the defendant to prove the justifications for the payment. *See, e.g., King Drug*, 791 F.3d at 412; *Cephalon*, 88 F. Supp. 3d at 416. *See also Lipitor*, 868 F.3d at 256-57 (rejecting the argument that the complaint’s allegations of lack of justification were insufficient, stating that *Actavis* “clearly placed the onus of explaining or justifying a large reverse payment on antitrust defendants”).

In the instant case, the parties have vigorously litigated the question of justification for the reverse payment and have developed a complete record on the issue. Notwithstanding Complaint Counsel’s assertion that the burden of proving justification is on Respondent, Complaint Counsel nevertheless asserts that the reverse payment was unjustified, and offers evidence and argument in an effort to support that claim (*see, e.g., CCB* at 27-31, CCF Section XII). Regardless of which party has the ultimate burden of proof on the issue of justification for the payment, as discussed in detail below, the evidence proves that, of the total payment provided to Impax under the Endo-Impax Settlement: (1) the payment conferred to Impax by the no-AG and Endo Credit provisions of the SLA was unjustified; and (2) the \$10 million payment to Impax pursuant to the DCA was justified.

**b. Payment under the SLA****i. Contentions of the parties**

Respondent argues that, even if the no-AG and Endo Credit provisions of the SLA conferred a large reverse payment to Impax, the payment was not unjustified because the payment was not provided “in return for staying out of the market.” RB at 60.<sup>28</sup> Respondent points to evidence that the no-AG provision was

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<sup>28</sup> Respondent does not assert that the reverse payment conferred to Impax by the no-AG and Endo Credit provisions of the SLA reflects compensation for services provided to Endo by Impax.

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included in Endo's initial offer and that during negotiations, the entry date moved back from Endo's initial proposed entry date of March 2013, to the agreed entry date in the settlement of January 2013. Respondent further argues that the Endo Credit was not tied to the negotiation of the entry date, but rather was coupled with a royalty provision in the SLA designed to (1) encourage Endo to support sales of Opana ER in the time period between the date of the settlement and the date set for entry of Impax's generic product, and (2) discourage Endo from transitioning to a reformulated Opana ER product. Respondent refers to this as a "carrot and stick." RB at 61.

Complaint Counsel contends that the no-AG and Endo Credit provisions are unjustified. Complaint Counsel argues that these provisions were directly linked to the January 2013 entry date provided under the Endo-Impax Settlement, and the fact that the entry date in the settlement was slightly earlier than the March 2013 entry date initially proposed by Endo does not justify these provisions. Further, Complaint Counsel argues, Respondent's assertion that the Endo Credit was part of a "carrot and stick" designed to discourage Endo from transitioning to a reformulated product is legally non-cognizable and factually unsupported.

**ii. Analysis**

Evidence from the parties' negotiations readily supports the conclusion that the reverse payment conferred to Impax by the no-AG provision, secured by the Endo Credit, was directly linked to negotiation of the generic entry date as compensation to Impax for giving up its patent challenge and committing not to launch a generic Opana ER until January 2013. Endo's initial offer included a no-AG provision, but this initial offer was not sufficient to induce Impax to settle the patent litigation and agree to the March 2013 entry date proposed by Endo. F. 131-132. Impax accepted the no-AG provision, but counter-proposed a January 2013 entry date, plus an acceleration trigger that would allow for entry prior to January 2013 in the event of a degradation of the market for Opana ER prior to Impax's entry. F. 136-139. Endo would not agree to an acceleration trigger, but agreed instead to pay Impax a "make-good" payment, the Endo-Credit, and further agreed to the January 2013 entry date requested by

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Impax. F. 147, 151, 154. Once Endo and Impax agreed on the concept of a make-good payment, the parties reached an agreement in principle on the SLA. F. 147-154.

When weighed against the foregoing evidence, the facts that the no-AG provision was included in Endo's initial offer, and that the January 2013 entry date ultimately agreed to was two months earlier than the March 2013 date Endo initially offered, are not significant. Moreover, the issue is not whether the January 2013 entry date in the settlement was earlier than the date Endo initially offered, but whether the no-AG provision, as secured by the Endo Credit, was effectively payment by Endo to Impax for agreeing to drop its patent challenge and commit to staying out of the market prior to January 2013. *See Actavis*, 133 S. Ct. at 2237 (noting that parties may settle with an agreed entry date "without the patentee paying the challenger to stay out prior to that point"). *See also King Drug*, 791 F.3d at 408 (holding that the question is whether entry might have been earlier, and/or the risk of competition not eliminated, had the reverse payment not been tendered). Viewed as a whole, the evidence supports the conclusion that the reverse payment conferred to Impax by the no-AG provision, secured by the Endo Credit, was unjustified.

Respondent's contention that the Endo Credit is not unjustified because it was part of a "carrot and stick" strategy is without merit for several reasons. First, the evidence does not support Respondent's assertion that the Endo Credit and the royalty provision were "coupled." The evidence shows that a royalty proposal was made by Endo, as part of its initial term sheet for the SLA on May 26, 2010. F. 135. The proposal for a "make-good" payment did not occur until on or about June 1, 2010, and was not reduced to writing until June 4, 2010. F. 151, 160. Second, the assertion that the Endo Credit was part of a "carrot and stick" design is against the weight of the evidence, which shows that the Endo Credit was intended as a "make-whole" provision, to provide Impax with the profits Impax would have earned during its 180-day exclusivity period, with no AG, if Endo switched the market to a reformulated Opana ER. *See* Section III.C.2.b.ii.(a) above. While Respondent points to deposition and trial testimony to support the characterization of the Endo Credit as part of a "carrot and stick," *see* RFF 195-198,

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the phrase does not appear in contemporaneous documents from the parties' negotiations. Third, the assertion that the royalty provision was a "carrot" is unconvincing because the royalty imposed costs on Endo in the form of lost sales from its agreement not to launch an authorized generic. Under the SLA, Impax would be obligated to pay Endo a 28.5% royalty on Impax's generic Opana ER sales during Impax's 180-day exclusivity period only in the event that sales of Opana ER in the calendar quarter prior to Impax's entry grew by a specific percentage. F. 128, 194. However, if sales grew enough to require a royalty payment to Endo, the no-AG provision operated to prevent Endo from selling an AG into this increased market. *See* F. 127. Thus, while pursuant to the royalty provision, Endo would receive 28.5% of profits from Impax's generic sales, pursuant to the no-AG provision, Endo still would lose 100% of profits it could have earned from sales of an Endo AG. Moreover, even if Opana ER sales reached a sufficiently high level prior to Impax's generic entry to trigger royalty payments, Impax would be the only seller of a generic oxymorphone ER product, pursuant to the no-AG provision. F. 127-128, 194. Impax stood to gain more in sales of generic oxymorphone ER than Impax would lose in royalty payments. F. 194. For all these reasons, Respondent's contention that the Endo Credit is not unjustified because it was part of a "carrot and stick" strategy is rejected.<sup>29</sup>

**iii. Conclusion**

As explained above, the evidence supports the conclusion that the reverse payment conferred to Impax under the SLA by the no-AG provision, secured by the Endo Credit, was unjustified. The analysis now examines justification for the payment made to Impax under the DCA.

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<sup>29</sup> Because Respondent's "carrot and stick" justification is contrary to the weight of the evidence, it is not necessary to address Complaint Counsel's argument that such justification is not legally cognizable.

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**c. Payment under the DCA****i. Overview**

On June 7, 2010, Endo and Impax executed a Development and Co-Promotion Agreement with respect to a Parkinson's disease treatment known internally at Impax as IPX-203. F. 244. The DCA was executed simultaneously with the SLA and is incorporated into the SLA. F. 245. Under the DCA, Impax and Endo agreed to collaborate with respect to the development and marketing of a potential treatment for Parkinson's disease using an extended release, orally administered product containing a combination of levodopa and carbidopa. F. 246.

The DCA provided for an upfront payment of \$10 million by Endo to Impax, and the possibility of payment of up to \$30 million more, based on achieving specified milestone events in the development and commercialization of the product. F. 247-248. Impax and Endo agreed to share promotional responsibilities, with Impax promoting IPX-203 to its network of neurologists, and Endo promoting IPX-203 to its network of non-neurologists, including primary care physicians who prescribe Parkinson's disease medications. F. 249. If the target product was successfully commercialized, Endo would be entitled to a share of the profits. F. 250. Specifically, Endo would receive a co-promotion fee equal to 100% of gross margins on sales resulting from prescriptions by non-neurologists. F. 250. Endo paid Impax the \$10 million upfront payment on June 24, 2010. F. 250.

Respondent contends that the \$10 million payment by Endo to Impax under the DCA was justified as fair value for profit-sharing rights Endo received under the DCA.<sup>30</sup> Respondent asserts that

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<sup>30</sup> Respondent makes a single assertion in its brief that the \$10 million paid under the DCA reflected fair value compensation for services by Impax. RB at 42. However, Respondent does not expand on the assertion, articulate what services it was to provide to Endo in exchange for the \$10 million payment, or point to any evidence supporting the assertion. Accordingly, the assertion has not been sufficiently raised to warrant consideration. See *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (“[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.”).

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the evidence shows that Endo was interested in Parkinson's disease treatments; Endo's team was familiar with Parkinson's disease treatments; Endo analyzed the merits of the product collaboration; and Endo concluded that the DCA had financial and commercial merit for Endo. In addition, Respondent asserts that, among other things, the DCA entitled Endo to a share of profits without obligating Endo to perform any resource-intensive formulation or development work, the DCA capped Endo's total financial obligations, and, beyond the \$10 million investment, Endo's obligations were contingent on Impax achieving specific milestones, regardless of how much it cost Impax to achieve those milestones.

Complaint Counsel contends that the \$10 million payment from Endo to Impax under the DCA was not justified by Endo's profit-sharing rights. According to Complaint Counsel, the evidence demonstrates that the payment was not part of a bona fide product collaboration, but was instead payment for Impax's agreement under the SLA not to enter the market with its generic Opana ER until January 2013. In support of this argument, Complaint Counsel relies on expert opinion to contend that the DCA and the SLA were not independent agreements, because they were negotiated and executed together, and because, as adversaries, Endo and Impax would be unlikely to collaborate, but for the settlement discussions. In addition, Complaint Counsel asserts that the evidence shows that Endo did not have a genuine interest in developing the drug that was the subject of the collaboration.

Furthermore, relying on expert opinion, Complaint Counsel argues that the negotiation process was unusual in comparison to industry standards, particularly with regard to Endo's due diligence. Complaint Counsel asserts that the evidence shows that Endo offered the same \$10 million upfront payment at the beginning of negotiations of the DCA, despite a change in the product under discussion. Complaint Counsel further asserts that \$10 million was an unusually large payment to make upfront, in light of the drug's early stage of development at the time the DCA was signed.

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**ii. Summary of facts**

The detailed facts concerning the DCA are set forth in Section II.C.3 and are summarized below.

**(a) Background facts**

Endo has entered into many collaboration agreements with other pharmaceutical companies. F. 254. These include early-stage development deals, and potentially speculative deals. F. 255. This is because Endo generally does not research or discover new drug molecules on its own and instead acquires and licenses drugs from other pharmaceutical companies. F. 254. In connection with a collaboration agreement, Endo identifies therapeutic areas of interest and companies that own promising drug molecules in those areas and enters into early-stage development deals. F. 256. Endo also regularly licenses technology from and collaborates with other companies for more developed products. F. 256. For example, for Opana ER, Endo licensed the necessary technology to make both original and reformulated Opana ER. F. 256. Endo's collaboration agreements with other pharmaceutical companies could relate to drugs at every stage of the development lifecycle, including early-stage development agreements. F. 255. Because Endo had no pipeline in place to discover new drugs on its own, Endo would enter into "very early, very speculative agreements." F. 255.

Beginning in 2005, Endo's significant areas of interest included pain, neurology, and movement disorders, including Parkinson's disease treatments. F. 257. In the 2010 timeframe, Endo evaluated collaborations with other companies related to treatments for Parkinson's disease. These included exploring potential Parkinson's disease collaboration opportunities with an Italian company called Newron, which had multiple Parkinson's disease products, and conducting due diligence on a Parkinson's disease product with a novel mechanism of action that was owned by a Finnish company. F. 261. For a number of years, Endo sold an immediate-release Parkinson's disease drug known as Sinemet, which was the original formulation of carbidopa and levodopa.<sup>31</sup>

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<sup>31</sup> A combination of carbidopa and levodopa molecules is the "gold standard" treatment for Parkinson's disease. F. 265.



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F. 260. Thus, the evidence demonstrates that Endo had both an interest in Parkinson's disease treatments and knowledge about such treatments through its experience with Sinemet.

Impax also had a long-standing interest in Parkinson's disease treatments. When Impax's brand division was founded in 2006, it focused its efforts on central nervous system and neurology products, with a specific focus on improved treatments for Parkinson's disease. F. 263. As part of its focus on central nervous system and neurology products, Impax's brand division also concentrated on developing a network of relationships with neurology physicians. F. 263. In addition, in furtherance of its interest in Parkinson's disease treatment, Impax had undertaken attempts to develop an extended release drug for treatment of Parkinson's disease. F. 268-276. The majority of carbidopa-levodopa medications are available only in immediate-release formulations, which requires frequent dosing and often results in patients' losing control of their motor skills as they experience rapid increases and decreases in the concentration of medicine in their bodies, especially as the disease progresses. F. 266-267.

Impax's first attempt to develop an extended-release carbidopa-levodopa treatment for Parkinson's disease was known as Vadova. F. 268. That product was intended to combine carbidopa-levodopa with controlled-release technology to give a much smoother effect to the amount of medication in Parkinson's disease patients' blood, providing for more control over motor symptoms. F. 268. Vadova was never fully developed or marketed. F. 268.

Impax's second attempt to develop an extended-release Parkinson's disease medication was known as IPX-066, which was a combination of carbidopa and levodopa that had been formulated to extend the release profile of Parkinson's disease drugs. F. 269-270. As with Vadova, IPX-066 was intended to better treat Parkinson's disease patients by allowing for less frequent and more consistent dosing of up to six hours, as well as more consistent motor symptom control. F. 271. By significantly extending the absorption of the drug, IPX-066 would provide

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“significant improvement of the patient’s quality of life.” F. 272. IPX-066 had reached Phase III clinical trials in 2010 and was marketed under the name Rytary in 2015. F. 273.

By 2010, Impax had also begun efforts to develop a “next generation” of IPX-066. F. 274. The goal of the next-generation product, which was originally designated by Impax as IPX-066a and later designated as IPX-203, was to further improve treatment for Parkinson’s disease patients by extending dosing time even longer than IPX-066. F. 274.

**(b) Negotiations**

In early 2009, Impax approached Endo about a collaboration with respect to Endo’s central nervous system drug Frova, which treats migraine headaches. F. 275-276. Endo declined. F. 277. Although Endo and Impax again discussed a potential product collaboration on Frova in late 2009, in connection with discussions about settlement of the Endo-Impax patent litigation, these discussions did not result in a collaboration agreement. F. 278-280. However, in the course of these discussions, Endo became aware of Impax’s efforts to develop drugs for Parkinson’s disease and expressed an interest. F. 281. Subsequently, in May 2010, after discussions regarding settlement of the Endo-Impax patent litigation resumed, Impax and Endo began discussing a potential joint development agreement and Endo expressed an interest in marketing IPX-066. F. 283-284.

At Endo, the senior vice president of corporate development, Dr. Robert Cobuzzi, and his team of employees were responsible for evaluating potential pharmaceutical business deals for further development. F. 287. Between May 17 and 26, 2010, the date of Endo’s initial term sheet for the DCA (F. 294), Impax and Endo held two conference calls and exchanged numerous emails and materials regarding IPX-066, including a presentation on the clinical benefits of IPX-066 over Sinemet, which at that time was the leading carbidopa-levodopa brand product. F. 286, 288.

On May 20, 2010, Dr. Cobuzzi directed his team to work on an opportunity evaluation worksheet (“OEW”) to assess a potential collaboration with Impax on IPX-066. F. 289. An OEW

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is Endo's standard method of assessing the science, medical information, commercial opportunity, and related financial considerations behind a potential collaboration project. F. 346. Any time Endo considers a pharmaceutical collaboration, it completes an OEW. F. 346.

On May 21, 2010, Endo asked an outside consulting firm to provide guidance about the potential value of IPX-066. F. 290. In addition, on May 22, 2010, Dr. Paterson, Impax's vice president of business development, provided Dr. Cobuzzi and a number of additional Endo employees access to a "data room" with a large amount of IPX-066 related documents, covering: (i) intellectual property/legal; (ii) chemistry, manufacturing, and controls; (iii) commercial; (iv) regulatory; (v) clinical; (vi) clinical pharmacology; and (vii) Impax's unredacted confidential presentation on IPX-066. F. 291.

On May 26, 2010, Endo sent Impax an initial term sheet for an option agreement concerning IPX-066 "and all improvements, modifications, derivatives, formulations and line extensions thereof." F. 294. Under this proposal, Endo would have the option to receive either the right to co-promote the product to non-neurologists within the United States or to purchase an exclusive license to the product in the United States. F. 294. Endo would pay Impax a \$10 million option fee upon signing the agreement and a \$5 million milestone fee upon the FDA's acceptance of the NDA for the product. F. 294. If Endo exercised the option to co-promote the product, Endo would receive a fee of "50% on the net sales" from prescriptions by non-neurologists in the United States. F. 294. If Endo exercised the option for a license, Endo would pay Impax a fee based on projected sales. F. 294.

Endo's May 26 proposal was not acceptable to Impax. As Impax's vice president of intellectual property litigation and licensing, Margaret Snowden, explained: "Endo was interested in the Parkinson's space and wanted the deal to cover both products, the original IPX-066 and the follow-on product, but Impax wasn't interested in doing the deal on IPX-066." F. 313. Dr. Michael Nestor, the head of Impax's brand division, was "absolutely not" willing to consider an agreement with Endo regarding IPX-066.

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F. 311. In 2010, Impax had already shouldered all development risks and development costs for IPX-066 and it made little sense to Impax to share potential profits from the drug with a partner. F. 310. Furthermore, in 2010, Impax was not looking for a partner in the United States for IPX-066 because Impax planned to market the product domestically on its own, utilizing its established neurologist network. F. 309.

Accordingly, Impax made a counter-offer to Endo on May 27, 2010 for a research and development collaboration for what Impax referred to as IPX-066a, its “next generation” of IPX-066. F. 295, 313-314. Impax advised Endo that Impax would name this product “at signing.” F. 295. IPX-066a, which later became known as IPX-203, was a planned carbidopa-levodopa-based product that Impax hoped would improve the treatment of symptoms and also have more favorable dosing as compared to IPX-066. F. 314.

Contrary to the inferences urged by Complaint Counsel, designation of IPX-066a was not a “late switch” by Impax from IPX-066, but a rejection by Impax of Endo’s proposal for a deal for both IPX-066 and IPX-066a, and a counterproposal by Impax for a collaboration for IPX-066a only. Impax had initially sent IPX-066 materials to Endo to review in order to “help [Endo] frame their evaluation of the market environment into which IPX-203 could be launched as a successor to IPX-066.” F. 328. When Impax sought a partner to market the product outside the United States, it had already established a data room regarding IPX-066. F. 329. Because IPX-203 was a follow-on product to IPX-066, the foundational information in the data room regarding IPX-066 was relevant to show Impax’s plans for IPX-203. F. 329.

Impax’s May 27, 2010 counter-offer for a collaboration for IPX-066a included an upfront payment at signing of \$3 million, and six additional milestone payments, tied to the initiation and completion of Phases II and III development and final FDA approval, for a total of \$60 million. F. 295. Over the next ten days, Endo and Impax traded proposals regarding the timing and total amount of the payments under the DCA, which culminated in the final DCA terms, summarized above. F. 296-308. On June 4, 2010, Impax named IPX-203 as the product previously

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designated as IPX-066a. F. 303. Impax also provided additional information to Endo regarding Impax's research into the IPX-203 product concept, and about how IPX-203 would improve upon existing Parkinson's disease therapies, including IPX-066. F. 322.

**(c) Relationship between IPX-066 and IPX-203**

IPX-203 was intended to be a modification of carbidopa and levodopa, a well-known combination treatment for Parkinson's disease. F. 324. Levodopa generally is not well absorbed in the colon. F. 325. The information Impax provided on IPX-203 made clear that IPX-066 and IPX-203 were intended to be [REDACTED]. F. 323. IPX-203 would have [REDACTED]. F. 326. The information Impax provided Endo on IPX-203 [REDACTED]. F. 327.

Although IPX-203 was in the beginning of the formulation stage, Impax reasonably relied on Dr. Suneel Gupta, the chief scientific officer at Impax in 2010, who believed that the product concept for IPX-203 was "doable." F. 315-316. As early as November 2009, Impax had reviewed [REDACTED]. F. 378. Dr. Gupta had expertise in reformulating existing chemical compounds to create commercial and clinical improvements through reformulation and "is renowned for taking existing compounds and reformulating them and turning those products into very successful drugs in the marketplace that meet significant medical need[s]." F. 316. When Dr. Gupta tells Impax management that a product concept is "doable," Impax's senior management believes him and relies on his judgment. F. 316. Moreover, Impax's expertise has long been the development of extended-release technologies. F. 317.

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The ultimate goal of IPX-203 was to further extend the amount of time patients have control over their motor symptoms after taking the medication. F. 319. IPX-203 would also employ a “much more simplified” dosing regimen than IPX-066, making it more intuitive for doctors to prescribe the product. F. 320. Impax projected that the total cost of development for IPX-203 would be between \$80 and \$100 million by 2017, based on a “natural extrapolation” of the development costs incurred by IPX-066. F. 321.

Impax was planning to withdraw promotion and sampling of IPX-066 (Rytary) once IPX-203 reached the market. F. 318. This would allow patients to continue successful use of IPX-066 while avoiding any division of Impax’s sales force between multiple Parkinson’s disease products, which was consistent with the commercial goal of extending the IPX-066 franchise. F. 318.

**(d) Endo’s evaluation of product  
collaboration for IPX-203**

Endo carefully evaluated the commercial, medical, and risk allocation aspects of the DCA. On June 7, 2010, Dr. Cobuzzi provided the final OEW on IPX-203 to Endo’s executive team. F. 307. In terms of the commercial aspects of the DCA, Endo’s OEW on IPX-203 stated that the DCA was “a good deal for Endo.” F. 307. Endo analyzed the net present value of its initial investment under the DCA and determined that the DCA and IPX-203 had a “very reasonable rate of return” of [REDACTED] under base case assumptions, and a net present value of [REDACTED]. F. 352-353. Such a return would exceed Endo’s general requirement of a 10% rate of return on a development and co-promotion deal. F. 352. Endo thought it could realize this return, notwithstanding that Parkinson’s disease treatments were heavily genericized, because IPX-203 would offer a superior product to other generics. F. 354. In addition, Dr. Cobuzzi recommended the DCA as “an exciting opportunity for Endo” because it “further builds [Endo’s] product pipeline for the future with a drug candidate that fits with [Endo’s] commercial footprint.” F. 349. Endo did not have many products in its commercial pipeline in 2010, and did not have the capacity to develop new products in-house. F. 350.

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Endo's evaluation of the medical aspects of IPX-203 concluded that IPX-203 would extend the period of time over which the drug is absorbed, which would allow doctors to lower the doses needed for effective treatment. F. 357. This would provide an opportunity to address doctor dissatisfaction with existing drugs that tend to begin to lose effectiveness within 10 to 15 years after initiation of therapy, and would meet a need for better control of efficacy over time. F. 356. Endo's OEW for IPX-203 also noted that IPX-203 represented a further improvement over IPX-066, including "faster onset of action, superior management of motor fluctuations and convenient oral dosing in a simplified regimen that could require no more than twice-daily administration, and in some cases even once-daily administration." F. 358. Taking the drug less frequently would be particularly beneficial for Parkinson's disease patients, who can have trouble "even picking up the pill." F. 359. Endo's evaluation team concluded that IPX-203 could move very quickly through development and "was an exciting compound in that it was made up of . . . two compounds that have already been approved by the FDA." F. 361. Endo reasonably believed that there was a path to obtaining FDA approval and bringing IPX-203 to market. F. 361-363.

Endo also evaluated how risk was allocated under the DCA. Endo's analysis in the OEW on IPX-203 explained to Endo's board of directors that the DCA's "deal structure acceptably mitigates Endo's exposure despite the early development stage." F. 364. Endo was entitled to share in the profits from IPX-203 without performing any development work or otherwise expending internal resources. F. 365-366. Moreover, Endo retained the same profit-sharing rights no matter how much Impax spent on IPX-203's development, which Impax had projected could amount to \$100 million by 2017. F. 321, 367. In addition, Endo was obligated to make only a single contribution (\$10 million) to Impax's development work. Endo would be required to make any additional milestone payments only to the extent that there was successful completion of development milestones, such as Phase II clinical trials. F. 365. Furthermore, the \$10 million single investment to buy into the IPX-203 opportunity was "not an uncharacteristically large amount of money" to Endo, compared to other collaboration agreements. F. 370.

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Accordingly, Endo was “comfortable” with the collaboration from the perspective of risk. F. 368.

Dr. Cobuzzi believed that the profit-sharing rights Endo received under the DCA justified Endo’s payment obligations. F. 369. Dr. Cobuzzi and his team concluded that Endo should enter into the DCA and Dr. Cobuzzi made that recommendation to Endo’s CEO, CFO, and board of directors. F. 347.

**(e) Value to Impax of collaboration for IPX-203**

In 2010, Impax did not have the money to begin working on the clinical research for IPX-203. F. 375. Impax could not fund the project internally because its shareholders did not “want to see large sums of money being spent over an extended time period on a single product. They were accustomed to [research and development] investments being made on many individual products that you bring to market as a generic.” F. 375. Thus, Impax needed external funding to move the development of IPX-203 forward, and explored a number of options, including seeking money from venture capital firms. F. 376. Impax’s brand drug development team was “very excited” about the idea of funding IPX-203 through a co-development program with Endo. F. 377.

In negotiating the DCA, Impax initially wanted to retain any profits flowing from prescriptions written by high-prescribing non-neurologists – which were the profits Endo sought and eventually obtained under the DCA – because of the “significant” amount of money those prescriptions represented. F. 372. Impax envisioned promoting IPX-203 to at least “a couple of thousand physicians who were primary care physicians that prescribed [medications to] Parkinson’s patients . . . .” F. 373. Nevertheless, in order to get funding through a co-development program with Endo, Impax agreed to give up a share of the profits for IPX-203.

**(f) Impax’s continued efforts to develop IPX-203**

Since executing the DCA in June 2010, Impax has devoted substantial efforts to IPX-203’s development, including over



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██████████ in employee hours spent working on IPX-203. F. 379. In 2010, Impax commissioned preclinical pharmacokinetic studies testing several relevant compounds and began laboratory research. F. 380. Impax undertook multiple rounds of pharmacokinetic studies to test various IPX-203 formulations in an effort to assess clinical improvements, which were completed as of 2012. F. 381. Since then, Impax conducted additional pharmacokinetic studies and completed Phase I clinical trials. F. 382. Impax manufactured a clinical supply of IPX-203, developed protocols for Phase II clinical trials, submitted those protocols to the FDA, and secured FDA approval for efficacy and safety studies in November 2014. F. 383.

Further development work on IPX-203 was delayed for approximately two years after Impax experienced delays in the development of IPX-066, the drug IPX-203 was intended to extend and improve upon. F. 384. When IPX-066 was delayed, resources were shifted to getting IPX-066 approved and to market. F. 385. Growing the market for IPX-066 would benefit IPX-203. F. 385. Further development work on IPX-203 was also delayed after Impax received an FDA Warning Letter in 2011 relating to Impax's manufacturing processes, which caused Impax to direct its scientific staff to spend their time helping the operations people correct the deficiencies that the FDA noted in its last inspection. F. 386. IPX-203 development was not going to go forward until Impax "got over that hurdle." F. 387.

Notwithstanding the delays and the DCA's termination (discussed below), Impax has continued development work on IPX-203. F. 388. IPX-203 is currently the leading compound in research and development in Impax's brand division. F. 389. Impax has completed Phase II clinical trials for IPX-203, which showed a statistically significant improvement in treatment over IPX-066 and other existing treatments, reducing the amount of time Parkinson's disease patients are without control over their motor symptoms, as compared to both immediate-release carbidopa-levodopa treatments and IPX-066. F. 390-391. Phase II trials suggest that IPX-203 will offer an improvement of over two hours in motor symptom control when compared to immediate-release carbidopa-levodopa treatments and one hour of improvement over IPX-066. F. 392. An improvement of over

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two hours in motor symptom control over existing medications is a “terrific result” that is “highly statistically significant” and “clinically meaningful.” F. 393. Having symptoms under control for a longer time period is “a very important thing” for patients. F. 394. Impax plans to begin Phase III clinical trials in 2018. F. 390.

Impax’s IPX-203 development efforts revealed that the formulation of IPX-203 contemplated by the DCA could not achieve the intended clinical benefits. F. 396. Between 2014 and 2015, Impax’s research team determined that it could not achieve the desired product profile with a [REDACTED] formulation. F. 397. Impax consequently began pursuing alternative approaches to an extended-release formulation of carbidopa and levodopa. F. 397.

After extensive research and testing, [REDACTED] [REDACTED]. F. 398. In April 2015, Impax approached Endo to update it on the status of Impax’s IPX-203 development work, including the change in formulation strategy, and made a presentation describing Impax’s formulation testing and results and [REDACTED]. F. 403.<sup>32</sup>

**(g) Termination of the DCA**

Although the specific formulation of IPX-203 changed, Impax still viewed [REDACTED] [REDACTED] it had been developing since 2009 “[b]ecause it was all towards the same end. It still involved carbidopa-levodopa. It was just a variation in formulation.” F. 400. During the April 2015 meeting between Impax and Endo at which Impax updated Endo on the change in formulation strategy, Impax offered to amend the DCA so that the DCA would cover the [REDACTED]. F. 403, 408.

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<sup>32</sup> In 2014, Impax filed an Investigational New Drug Application with the FDA regarding [REDACTED], which the FDA accepted. F. 399.

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Impax was prepared to amend the DCA to include the new formulation of IPX-203 in the DCA because it wanted to work with Endo in order to move the drug forward and believed the new formulation would give it “an avenue through which we could continue the development of IPX-203.” F. 409. Endo initially agreed to the proposed amendment, noting that it “would like to maintain or even increase [its] involvement with the development program . . . as [it] remain[ed] optimistic this will be a successfully differentiated product, which Endo looks forward to the opportunity to co-promote . . . with Impax.” F. 410. However, Endo subsequently informed Impax that Endo had decided not to amend the existing agreement and would no longer participate in co-development program, which surprised Impax. F. 412. Endo did not provide an explanation. F. 412.

Because Endo retracted its initial expression of interest in amending the DCA to cover the new formulation for IPX-203, Impax and Endo terminated the DCA by mutual agreement, effective December 23, 2015. F. 414.

**iii. Conclusion**

The evidence, summarized above and detailed in Section II.C.3, proves that the DCA was a bona fide product development collaboration, and that the \$10 million payment was justified by the profit-sharing rights given to Endo under the DCA. The product collaboration for IPX-203 was consistent with Endo’s and Impax’s business interests. Both Endo and Impax had a history of interest in Parkinson’s disease treatments, and Endo had entered into many collaboration agreements with other pharmaceutical companies, including risky early stage development collaborations. Impax required outside funding to advance the development of IPX-203, which Impax projected could cost between \$80 and \$100 million by 2017. Moreover, Impax continued its development efforts regarding IPX-203 for years after executing the DCA, which further indicates that the DCA was a bona fide agreement.

In addition, substantial weight is properly given to the fact that Endo analyzed the commercial and medical merits of co-promoting IPX-203, as well as the risk allocation under the DCA,

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and concluded that the DCA was a “good deal” for Endo. The record supports Endo’s conclusion, including the facts that Endo would receive its share of the profits without performing any development work; Endo did not consider the upfront payment of \$10 million to be uncharacteristically large; and the projected rate of return ██████ was nearly ██████ Endo’s minimum requirements for a co-development deal.

**iv. Complaint Counsel’s arguments as to lack of justification**

All of Complaint Counsel’s arguments in support of a conclusion that the \$10 million payment was unjustified have been fully reviewed, and have been rejected as either contrary to the weight of the evidence or insufficiently supported.<sup>33</sup> Only a few of Complaint Counsel’s arguments require further elaboration, and are discussed below.

**(a) Asserted “switch” from IPX-066 to IPX-203**

Complaint Counsel asserts that the evidence shows that the \$10 million upfront payment in the DCA was the same as the amount of the payment in Endo’s initial offer, despite a “switch”

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<sup>33</sup> For example, Complaint Counsel contends that Endo and Impax “understood” the DCA to be a payment for the Opana settlement, relying on two documents. Neither document warrants the inference urged by Complaint Counsel. The first document, an internal Endo document drafted by Dr. Cobuzzi, listed the “license deal completed with Impax” as adding “topline revenue for Opana.” CX1701 at 005. However, although given the opportunity, Complaint Counsel did not elicit any testimony from Dr. Cobuzzi on the meaning of this document. The second document, an internal Impax document, listed \$10 million as cash flow from the “Endo Settlement.” However, when this document was shown to Impax’s former CFO, Mr. Koch, he testified that he did not recognize the document, that it did not appear to be an accounting document, that other aspects of the document were inconsistent with Impax’s common budgeting practices, and that it could have been referring to the research and development collaboration. CX2701 at 004; CX4018 (Koch, Dep. at 147-48). Furthermore, Complaint Counsel’s assertion that the parties “understood” the DCA to be a payment for delay is not only unsupported, but is also against the weight of the evidence, which, as set forth above, demonstrates that the DCA was a bona fide product collaboration.

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from IPX-066 to IPX-203, which, according to Complaint Counsel, reduced the value of the deal to Endo. Thus, Complaint Counsel argues, the \$10 million upfront payment was not in fact an exchange for value received by Endo under the DCA. However, the evidence shows that, while Endo's initial term sheet included a \$10 million upfront payment for a proposed deal on IPX-066, it also contained more limited profit-sharing terms than those agreed upon in the DCA. Under Endo's May 26, 2010 initial term sheet co-promote proposal, Endo would receive 50% of the profits from sales generated by non-neurologists. F. 294. Under the final DCA, Endo received a right to 100% of those profits. F. 250. Moreover, as explained in Section III.C.4.c.ii.(b) above, designation of IPX-066a (IPX-203) was not a "switch" by Impax from IPX-066, but a rejection by Impax of Endo's proposal for a deal regarding both IPX-066 and IPX-203, and a counterproposal by Impax for a collaboration on IPX-203 only. The evidence shows that Impax was never interested in partnering on IPX-066. Thus, Complaint Counsel's assertion that this "switch" shows the payment was unjustified is rejected.

**(b) Due diligence**

Complaint Counsel contends that Endo did not perform appropriate due diligence as to the merits of IPX-203 or the DCA. However, the evidence shows that Impax provided Endo with information regarding Impax's research into the IPX-203 product concept and about how IPX-203 would improve upon existing Parkinson's disease therapies, including IPX-066. F. 322. Impax had provided information to Endo about IPX-066, and the information Impax provided on IPX-203 made clear that IPX-066 and IPX-203 were intended to be [REDACTED]. F. 323.

In addition, the materials Impax sent to Endo to review regarding IPX-066 were, as stated by Dr. Cobuzzi, "tremendously" helpful to Endo in assessing IPX-203. F. 330. As Dr. Cobuzzi explained, both IPX-066 and IPX-203 were based on carbidopa and levodopa. The only difference in IPX-203 [REDACTED], which Endo viewed as "relatively simple," notwithstanding that this was a change in the chemistry. F. 330. Endo's chief operating officer at the time of

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settlement and the individual responsible for assessing the commercial opportunity of any product, also deemed IPX-066 an appropriate commercial proxy for assessing IPX-203. F. 331. The IPX-066 materials, as well as Endo's experience with other Parkinson's disease treatments, including Sinemet, suggested to Endo that the successful development of IPX-203 would more effectively treat Parkinson's disease symptoms. F. 260, 332, 343. Endo's reliance on information about a related drug when evaluating IPX-203 was not unusual. F. 335. Rather, the evidence shows that Endo routinely relied on information about one pharmaceutical asset to assess another, related pharmaceutical asset. F. 335. Indeed, when information about related pharmaceutical assets is available, it is "much easier" to evaluate a proposed drug than it is to evaluate a new chemical entity on its own. F. 336.

Finally, as noted above, Dr. Cobuzzi was the lead scientist on the team that evaluated the commercial and scientific merits of the DCA for Endo. F. 337. Dr. Cobuzzi holds a Ph.D. in molecular and cellular biochemistry and wrote his dissertation on Parkinson's disease. F. 339. In addition, Dr. Cobuzzi's team included at least one other scientist with a background in Parkinson's disease treatments, Dr. Kevin Pong. F. 340. Dr. Pong, who was in charge of evaluating Endo's scientific licenses, had a "significant amount of experience" in the area of Parkinson's disease treatments. F. 340. Endo knew the underlying molecules, the carbidopa and levodopa, had looked at a number of Parkinson's disease opportunities in the past, and knew the general commercial landscape. F. 344. Dr. Cobuzzi's belief that Endo had sufficient time to assess IPX-203 before entering into the DCA is entitled to substantial weight, given his qualifications, his and Endo's familiarity with Parkinson's disease treatments, and the detailed nature of the information Impax provided on IPX-066. F. 342-345. Accordingly, Complaint Counsel's assertion that Endo did not perform proper due diligence with regard to the DCA is rejected.

**(c) Expert opinions**

Complaint Counsel's argument that the \$10 million payment under the DCA was unjustified because it was negotiated as part

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of the patent litigation settlement discussions, not as a standalone agreement, is based largely on the opinion of its proffered expert in negotiations, Professor Max Bazerman. Professor Bazerman opined that the adversarial relationship between Impax and Endo would have made independently negotiating the DCA highly unlikely, unless the business transaction was linked to settlement discussions. CX5001 (Bazerman Expert Report at 021-22 ¶ 43). This opinion ignores the significant facts that Impax and Endo had discussed a potential collaboration on Frova (another central nervous system drug) in early 2009, months before settlement discussions began (F. 275), that Endo had been looking for an opportunity in the Parkinson's disease area for a number of years (F. 257-261), and that Impax had been exploring a number of approaches to get external funding to move the IPX-203 product forward in development (F. 376). Even though the evidence shows that the DCA was negotiated and executed contemporaneously with the SLA and is incorporated into the SLA (F. 123, 245), this neither compels the conclusion that the \$10 million payment under the DCA was unjustified, nor precludes the conclusion that the \$10 million payment under the DCA was justified as fair value for the profit-sharing rights Endo received under the DCA.

Complaint Counsel's argument that the \$10 million payment under the DCA should be deemed unjustified because the DCA was not consistent with Endo's, or the industry's, usual business development practice, is based largely on the opinion of its proffered expert in pharmaceutical business development, Dr. John Geltosky.<sup>34</sup> Although he opined that Endo did not perform a comprehensive and integrated due diligence analysis of IPX-203 before agreeing to the terms of the DCA (CX5003 (Geltosky Expert Report at 023-24 ¶ 37)), Dr. Geltosky did not offer an opinion regarding whether Endo exercised good business judgement in its due diligence. F. 427. Furthermore, Dr.

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<sup>34</sup> Dr. Geltosky has worked on a handful of development deals in their early stages and has never negotiated a development and co-promotion agreement similar to the DCA. The majority of Dr. Geltosky's experience with pharmaceutical collaboration agreements relates to his employment with large pharmaceutical companies and Dr. Geltosky admitted that he could not speak to how the universe of small or mid-sized pharmaceutical companies approach partnerships for early-stage products. F. 415.

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Geltosky admitted that information about IPX-066 provided useful information for IPX-203 and that Impax provided Endo with comprehensive information regarding IPX-066, including clinical information regarding safety and efficacy, intellectual property, technical due diligence, and financial analysis. F. 425-426. The opinion offered by Dr. Geltosky is outweighed by documentary evidence and fact witness testimony summarized above showing the sufficiency of the due diligence steps taken by Endo.

In addition, although Dr. Geltosky testified that the DCA was not consistent with the normal practice in the pharmaceutical industry, he did not offer an opinion regarding whether the DCA was a bona fide scientific collaboration or whether Endo exercised good business judgement in entering the DCA. F. 417. Indeed, Dr. Geltosky acknowledged that Endo's senior vice president of corporate development (Dr. Cobuzzi) is better qualified to assess the strategic fit of the DCA for Endo than he is. F. 416.

Expert opinion that a process was unusual for the industry, even if accepted, does not warrant the inference that the DCA was a pretext, and not a bona fide side deal for value, because such inference would be contrary to the weight of the evidence showing that the DCA was justified as fair value for profit-sharing rights. See *Schering*, 402 F.3d at 1069-71; *In re Schering-Plough Corp.*, 2002 FTC LEXIS 40 at \*\*254-55 (June 27, 2002), *rev'd by In re Schering-Plough Corp.*, 2003 FTC LEXIS 187 (2003), *rev'd by Schering-Plough*, 402 F.3d 1056. In *Schering*, the FTC argued that a \$60 million payment from a branded drug manufacturer to a generic drug manufacturer, pursuant to a patent litigation settlement agreement through which the branded drug company obtained licenses for the generic company's products, was not a bona fide royalty payment, but instead was an inducement for the agreement by the generic to delay generic entry. 402 F.3d at 1068. Complaint Counsel in the administrative litigation had relied on expert opinion that the parties' diligence was "strikingly superficial," *Schering*, 2002 FTC LEXIS 40, at \*\*254-55, and "fell astonishingly short of industry standards." *Schering*, 402 F.3d at 1069. The Court of Appeals in *Schering* rejected these arguments, and held that "substantial and overwhelming



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evidence” weighed against the conclusion that the licenses were not worth the payment made and were exchanged for delay. *Id.* at 1070-71.

The evidence presented in *Schering* is analogous to the evidence in the instant case. Similar to the brand drug manufacturer in *Schering*, Endo had a demonstrated, ongoing interest in the type of product that was the subject of the collaboration, F. 257-261; *see Schering*, 402 F.3d at 1069, and was well-familiar with the relevant commercial environment. F. 337-345; *see Schering*, 2002 FTC LEXIS 40, at \*\*251-52. And, as in *Schering*, Complaint Counsel’s experts’ criticisms of the diligence process in the instant case did “nothing to refute that [the brand’s] payments [for the licensed products were] a fair price.” F. 428-436; *see Schering*, 402 F.3d at 1071.

Dr. Geltosky also opined that the payment structure of the DCA was unusual because, in his opinion, the DCA payment structure was “frontloaded” with a large upfront payment with decreasing milestone payments, while early-stage development deals are typically “backloaded.” However, Dr. Geltosky did not compare the payment terms in the DCA to the payment terms in other pharmaceutical collaboration agreement agreements. F. 431. Moreover, expert opinion that the payment was “unusual” does not warrant an inference that the payment was unjustified. For purposes of justification, the issue is whether the payment was fair value for what was received. Dr. Geltosky did not opine on that value. F. 430, 432.

Indeed, Dr. Geltosky did not conduct any valuation analysis of the DCA, did not calculate a net present value of the DCA at the time it was executed, and did not conduct any other form of empirical analysis regarding the DCA. F. 429. Dr. Geltosky did not offer any opinion about the actual value of the DCA to Endo and did not address the actual value of the profit-sharing rights acquired by Endo or whether Endo’s profit-sharing rights justified its DCA payment obligations. F. 430, 432. *See also* F. 417, 419, 421, 427, 434. These shortcomings incurably undermine Dr. Geltosky’s opinions. *See Schering*, 402 F.3d at 1069 (stating that the court was “troubled” by expert opinion that a payment was “grossly excessive” and that Schering’s due diligence fell short of

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industry standards, where the expert had “arrived at his conclusions without performing a quantitative analysis” of the licensed products).

Moreover, Complaint Counsel’s economic expert, Professor Noll, who relied on Dr. Geltosky’s “analysis of the degree to which the \$10 million payment and co-development deal represented the acquisition of an asset that was approximately valued at a \$10 million price,” agreed that if Dr. Geltosky did not offer an opinion regarding the actual value of the DCA to Endo at the time it was executed, then Professor Noll “would not include the \$10 million as part of the large payment that was unjustified.” F. 437-438. Professor Noll also acknowledged that, if a payment from a brand company to a generic company is used to purchase a bundle of rights at a fair market price, the payment is justified. F. 435. Indeed, Professor Noll testified that if Dr. Geltosky did not provide a “sufficiently well-documented rationale for the conclusion that the payment was unjustified, then you would pull [the DCA] out of the case.” F. 439.

**(d) Conclusion**

As explained above, the evidence proves that the \$10 million payment made by Endo to Impax under the DCA was justified as fair value for profit-sharing rights Endo received under the DCA.

**5. Conclusion on initial burden of proof**

Of the total reverse payment conferred under the Endo-Impax Settlement, the \$10 million payment under the DCA was justified. However, the value conferred to Impax by the no-AG provision of the SLA, secured by the Endo Credit, totaling \$23 to \$33 million in projected sales revenue for Impax, was an unjustified reverse payment. The value of this unjustified reverse payment substantially exceeded the estimated saved litigation costs. In addition, the evidence supports the inference that Endo and Impax agreed to this reverse payment as an inducement to Impax, to compensate Impax for giving up its patent challenge and committing not to launch a generic Opana ER until January 2013. Therefore, based on the totality of the record, viewed as a whole, the evidence supports the inference that the SLA included a

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payment to prevent the risk of competition. Accordingly, Complaint Counsel has met its initial burden of proving an anticompetitive harm.

**D. Market Power**

Market power is “the power to control prices or exclude competition.” *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). It is unclear whether proof of market power is a necessary element of a reverse payment settlement challenge. Although *Actavis* referred to market power as one of several traditional antitrust considerations, market power is not expressly included among the factors listed in *Actavis* as determining the likelihood of anticompetitive effects. *Actavis*, 133 S. Ct. at 2237 (stating that “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”); *see also King Drug*, 791 F.3d at 412 (same). Regardless of whether proof of market power is mandatory, in the instant case the evidence supports the conclusion that Endo had market power in the relevant oxymorphone ER market at the time of the Endo-Impax Settlement, as explained below.

By their nature, pharmaceutical patents often carry with them market power. *In re Wellbutrin XL Antitrust Litig.*, 133 F. Supp. 3d 734, 755 (E.D. Pa. 2015), *aff’d* 868 F.3d 132 (3d Cir. 2017). As the court explained in *Aggrenox*, a patent “grant[s] the legal right to exclude generic competition and the practical ability to profitably charge higher prices than generic competitors would charge.” 199 F. Supp. 3d at 668. *Accord Lipitor*, 2018 U.S. App. LEXIS 93, at \*6 (“A distinguishing feature of a reverse settlement is that the bargained-for abstention period falls within the term of the patent at issue, when the patent holder would normally enjoy a government-conferred monopoly.”).

*Actavis* recognizes that market power is often associated with a pharmaceutical patent, and further holds that proof of that power, derived from the patent, can be found in the reverse payment settlement itself:

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[W]here a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice. At least, the “size of the payment from a branded drug manufacturer to a prospective generic is itself a strong indicator of power” – namely, the power to charge prices higher than the competitive level. An important patent itself helps to assure such power. Neither is a firm without that power likely to pay “large sums” to induce “others to stay out of its market.”

*Id.* at 2236 (citations omitted). *Accord Loestrin*, 814 F.3d at 552 n.12 (“*Actavis* explains how to evaluate the market power question: ‘the size of the payment from a branded drug manufacturer to a prospective generic is itself a strong indicator of power.’”). The court in *In re Cipro Cases I & II* further explained:

Logically, a patentee would not pay others to stay out of the market unless it had sufficient market power to recoup its payments through supracompetitive pricing. Consequently, proof of a reverse payment in excess of litigation costs and collateral products and services raises a presumption that the settling patentee has market power sufficient for the settlement to generate significant anticompetitive effects.

348 P.3d at 869. *See also Aggrenox*, 199 F. Supp. 3d. at 662 (stating that, while it is conceivable that a patent might be worthless, “[i]t is vanishingly unlikely . . . that a large reverse payment would be made in such a case, which is why a large reverse payment is such a strong indicator of market power”).

In the instant case, as held in Section III.C.2.c above, the evidence proves that Endo made an unjustified reverse payment to Impax that was sufficiently large to induce Impax to drop its patent challenge and agree not to enter the relevant oxymorphone ER market until January 2013. Under *Actavis*, this is strong proof of Endo’s market power in the relevant market.

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Other evidence also supports the conclusion that Endo had market power in the relevant oxymorphone ER market. The evidence shows that in 2010, Endo had a 100% share of the market for oxymorphone ER. F. 90. In addition to the intellectual property barriers to entry associated with Endo's patents, there are regulatory barriers created by the Hatch-Waxman Act. F. 92. For instance, the Hatch-Waxman Act imposes a 30-month stay on FDA approval of an ANDA, if a branded drug company files a patent infringement suit against a Paragraph IV ANDA filer. F. 93. Moreover, the first filer's 180-day exclusivity period provided by the Hatch-Waxman Act serves as a barrier to entry by barring later ANDA filers from entering until the period expires. F. 93. These barriers gave Endo the power to exclude competitors even if its patents eventually were found not to be valid or infringed. F. 95.

Based on the foregoing, the evidence demonstrates that Endo had market power in the relevant market for oxymorphone ER. The analysis next turns to the procompetitive benefits of the SLA.

## **E. Procompetitive Benefits**

### **1. Overview**

Respondent argues that the SLA granted Impax a broad patent license, which enabled Impax to sell its generic Opana ER uninterrupted since Impax entered the market in January 2013, while all other generic manufacturers have been enjoined as a result of patent infringement litigation by Endo. Respondent argues that, therefore, the SLA provided substantial procompetitive benefits.

Complaint Counsel's opposing argument – that Respondent's asserted procompetitive benefits cannot be considered because the only legally cognizable procompetitive effects are those that arise from the reverse payment – is without merit, as explained in Section III.B.7 above. The "restraint" at issue in a reverse payment settlement case is not the payment itself, but the use of the payment in such a way as to restrain the onset of generic competition. Thus, procompetitive benefits arising in connection with the settlement agreement as a whole are properly considered

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as part of a well-structured rule of reason analysis. *See K-Dur*, 2016 U.S. Dist. LEXIS 22982, at \*46 (“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.”); *Cipro Cases I & II*, 348 P.3d at 871 (same); *see also In re Impax*, 2017 FTC LEXIS 130, at \*27-33 (Commission rejecting Complaint Counsel’s request to preclude consideration of entry prior to termination of patent and effect of post-settlement events as potential procompetitive justifications).

## 2. Relevant provisions

The SLA granted Impax a broad patent license and a covenant not to sue that covered not just the Opana ER patents owned by Endo at the time of the Endo-Impax patent litigation, but all patents “that would ever be owned by [Endo] that would cover the Impax product.” F. 567. Specifically, pursuant to section 4.1(a) of the SLA, Impax obtained a license to the ’933, ’456, and ’250 patents, and to any pending patents “that cover or could potentially cover the manufacture, use, sale, offer for sale, importation, marketing or distribution of” Impax’s generic Opana ER product (collectively, the “licensed patents”). F. 568-569.

Furthermore, section 4.1(b) of the SLA included a “covenant not to sue,” which prohibited Endo and its affiliates from suing Impax for patent infringement on any of the licensed patents. F. 570. This provision meant that Endo could not sue Impax for infringement based on Endo’s Opana ER patents listed in the Orange Book at the time of settlement, as well as any continuations, continuations in part, or divisions of those patents or patent applications owned or controlled by Endo, that could cover Impax’s generic Opana ER. F. 570. (The broad patent license and covenant not to sue provided in the SLA are at times referred to collectively herein as the “broad license agreement” or “broad patent license.”)

Impax would regularly seek a broad patent license in its settlement negotiations with brand-name drug companies whenever it intended to launch and continue to sell its generic product indefinitely, in order to provide Impax with as much

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flexibility as possible. F. 565. In any negotiation where the brand company tried to narrow the scope to the patents being litigated, Impax was “very firm,” explaining that “this is not about the patents being litigated. This is about a product, and we want the ability to operate.” F. 565. For Impax, every settlement agreement must cover all the patents that could affect the generic product, existing and future, “otherwise you end up with [a] launch [of] the product and still have to be under the [patent] risk, and that doesn’t really help [Impax].” F. 566.

Given the possible effects of Endo’s additional patent applications relating to Opana ER, a reasonable litigant would have been concerned with Endo’s future patents. F. 168. Consistent with Impax’s regular practice, in the Endo-Impax negotiations, Impax proposed broadening the patent license that Endo had offered in the SLA to include “any patents and patent applications owned by or licensed to Endo . . . that cover or could potentially cover” Impax’s generic oxymorphone ER product. F. 169. Endo accepted Impax’s proposed language. F. 170.

### **3. Post-settlement patents and patent litigation**

After entering into the SLA, Endo obtained additional patents and patent licenses that it has asserted cover both original and reformulated Opana ER (the “after-acquired patents”). F. 571. Endo acquired its first post-settlement patent – U.S. Patent No. 7,851,482 – from Johnson Matthey in March 2012 (the “Johnson Matthey patent”). F. 573. In addition, between November 2012 and October 2014, the Patent and Trademark Office issued the following patents to Endo: Patent Nos. 8,309,060 (“the ’060 patent”); 8,309,122 (“the ’122 patent”); Patent No. 8,329,216 (“the ’216 patent”); Patent No. 8,808,737 (“the ’737 patent”); and Patent No. 8,871,779 (“the ’779 patent”). F. 575-576, 579-581.

In December 2012, Endo began asserting the ’060, ’122, and ’216 patents in litigation against drug manufacturers seeking to market generic versions of both original and reformulated Opana ER. F. 577. At that time, Endo did not assert these patents against Impax’s generic version of original Opana ER. F. 577. Endo did, however, assert these patents against a generic version of reformulated (crush-resistant) Opana ER, which was covered

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by an ANDA filed by Impax. F. 577. In August 2015, the 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 all companies', including Impax's, generic versions of reformulated Opana ER. F. 578. That court issued an injunction barring all defendants, except Impax, from selling their generic versions of original Opana ER until 2023. That ruling is currently on appeal to the Federal Circuit. F. 578.

In addition, Endo asserted the '737 and '779 patents in litigation in the district court of Delaware against drug manufacturers seeking to market generic versions of both original and reformulated Opana ER. F. 583. Endo did not assert these patents against Impax's generic version of original Opana ER because of the SLA's broad patent license; however, Endo did assert the patents against Impax's ANDA for a generic version of reformulated (crush-resistant) Opana ER. F. 584. In October 2016, the Delaware court held that the '779 patent was not invalid and was infringed by a generic version of reformulated Opana ER. F. 586. That ruling is currently on appeal to the Federal Circuit. F. 586. In August 2017, the Delaware court again ruled that the '779 patent was not invalid, following a bench trial against other ANDA filers. F. 587. In September 2017, the Delaware court entered its final order, enjoining all defendants from selling generic Opana ER until the last of Endo's patents expires in 2029. F. 587-588.

#### **4. Effect of broad license agreement**

The broad license agreement gave Impax protection against any of Endo's future patents being asserted against Impax for its generic version of original Opana ER. F. 593. Thus, these provisions gave Impax freedom to sell its generic Opana ER under both the litigated patents and any future patents that Endo might obtain in this product area. F. 592. The January 2013 entry date provided in the SLA, together with the broad license agreement, enabled a generic Opana ER to enter the market eight months before the original patents expired, and sixteen years before Endo's after-acquired patents expired, and to continue with the sale of that product up to the present day, without threat of



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patent infringement litigation relating to original Opana ER. F. 594.

Impax's product is the only generic Opana ER available to consumers. F. 596. Although every other Opana ER ANDA filer settled patent claims asserted by Endo related to Opana ER, no other drug manufacturer negotiated rights to future Opana ER patents similar to the broad license agreement that Impax obtained in the SLA. F. 595. Endo's acquisition and successful litigation of additional patents has led to all generic manufacturers, other than Impax, being enjoined from selling a generic version of Opana ER until the last of Endo's patents expires in 2029. F. 588, 596. Impax, in contrast, has sold generic Opana ER without interruption since launching its product in January 2013. F. 597.

## 5. Analysis

### a. Procompetitive benefits

The Supreme Court has held that “enabl[ing] a product to be marketed which might otherwise be unavailable . . . widen[s] consumer choice . . . and hence can be viewed as procompetitive.” *NCAA v. Board of Regents*, 468 U.S. 85, 102 (1984); accord *Brown Univ.*, 5 F.3d at 675 (“Enhancement of consumer choice is a traditional objective of the antitrust laws and has also been acknowledged as a procompetitive benefit.”).

The evidence shows that Endo's acquisition of additional patents, and successful assertion of those additional patents in litigation, has led to all generic manufacturers, other than Impax, being enjoined from selling a generic version of Opana ER until the last of Endo's patents expires in 2029. F. 592-598. This is clear evidence of the strength of the after-acquired patents, and supports the inference that, absent the SLA, such after-acquired patents also would have been successfully asserted to enjoin Impax from selling generic Opana ER – even if Impax had gone to trial and won its challenge to the patents at issue in the Endo-Impax patent litigation. Instead, as a result of the broad license agreement in the SLA, Impax has sold generic Opana ER without interruption since launching the product in January 2013. F. 598. This is despite Endo's efforts, through filing FDA citizen petitions

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with the FDA, to have original Opana ER removed from the market for alleged safety reasons. F. 233-235.

The case of *In re Wellbutrin XL Antitrust Litigation* is additional authority supporting the conclusion that the broad patent license in the SLA is procompetitive. In *Wellbutrin*, as part of a reverse payment patent settlement, the brand drug manufacturer, GlaxoSmithKline (“GSK”), granted to the generic manufacturers a sublicense to certain patents (the “Andrx patents”) acquired by GSK in connection with the settlement of a separate patent lawsuit among GSK, Andrx, and the generic manufacturers. 133 F. Supp. 3d at 737, 747. The Andrx patents were not due to expire for 15 more years. *Id.* at 759. The court held that the sublicense provided under the settlement agreement was a cognizable procompetitive justification for the agreement because the sublicense “eliminat[ed] an independent and substantial hurdle to generic entry” and removed “the possibility that Andrx could prevent generic Wellbutrin XL from being marketed for the 15 years remaining on its patent.” *Id.* at 758-59. The court further held that the plaintiffs had failed to present a genuine factual dispute as to this procompetitive justification. *Id.*

In the instant case, as in *Wellbutrin*, Impax negotiated for a broad license agreement in order to ensure that it had the freedom to sell generic Opana ER without concern of patent infringement liability going forward. F. 167, 169, 565-566. In addition, as in *Wellbutrin*, the SLA eliminated a separate, and substantial, hurdle that Endo could have imposed on Impax’s sale of generic Opana ER by asserting after-acquired patents against Impax – patents that Endo successfully did assert against other generic manufacturers. F. 575-587.

In summary, the evidence proves that consumers have benefitted from the SLA by having uninterrupted and continuous access to generic Opana ER since January 2013. The real-world effect of the SLA is that there is a product on the market and available to consumers today that would not be there had Impax not had the foresight to negotiate licenses to future patents. F. 600. This is procompetitive. *See NCAA*, 468 U.S. at 102; *Brown Univ.*, 5 F.3d at 675.

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Furthermore, the Challenged Agreement settled litigation, which is favored in the law. *American Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986) (“Few public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute.”); *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (noting “the paramount policy of encouraging settlements”). Although *Actavis* held that the policy in favor of settlement was not a sufficient reason to bar antitrust review, *see* Section III.B.2 above, nothing in the language of *Actavis* holds that this factor is precluded from consideration. In addition, the fact that the SLA enabled Impax to enter the market prior to the expiration of Endo’s Opana ER patents, while not dispositive, can be considered in assessing the competitive consequences of the Challenged Agreement. *See In re Impax*, 2017 FTC LEXIS 130, at \*29. In the instant case, the SLA enabled Impax to enter the market in January 2013, nine months before expiration of the initial Opana ER patents in September 2013, and sixteen years before the expiration of Endo’s after-acquired patents in 2029.

For all the foregoing reasons, Respondent has met its burden of proving that the SLA had procompetitive benefits.

**b. Less restrictive alternative**

Because Respondent has met its burden of proving that the SLA had procompetitive benefits, the burden shifts to Complaint Counsel to demonstrate that these benefits could have been achieved with a less restrictive settlement agreement. *See Law*, 134 F.3d at 1019. Complaint Counsel contends that Endo and Impax could have entered into a settlement that did not include any payment to stay off the market. However, Complaint Counsel fails to demonstrate that such hypothetical settlement could have, or would have, included the broad patent license.<sup>35</sup> Accordingly, Complaint Counsel has failed to meet its burden of proving that

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<sup>35</sup> With respect to the likelihood of a hypothetical alternative settlement with no reverse payment and an entry date earlier than January 2013, it is noteworthy that Impax twice proposed a simple settlement with a 2011 entry date and no reverse payment, which Endo rejected. F. 116, 155.

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the demonstrated procompetitive benefits of the SLA in this case could have been achieved through a less restrictive settlement agreement.

The final step of the rule of reason analysis, set forth below, weighs the anticompetitive and procompetitive effects of the SLA, to determine whether, on balance, the agreement is anticompetitive.

#### **F. Balancing of Anticompetitive and Procompetitive Effects**

Where the evidence proves that an agreement poses both anticompetitive harm and procompetitive benefits, “the 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. Plaintiffs have the burden of establishing that “the settlement is nevertheless anticompetitive on balance.” *Nexium*, 42 F. Supp. 3d at 262-63; *Loestrin*, 261 F. Supp. 3d at 329.

As the court recognized in *In re Cipro Cases I & II*, “the relevant benchmark in evaluating reverse payment patent settlements should be no different from the benchmark in evaluating any other challenged agreement: What would the state of competition have been without the agreement?” 348 P.3d at 863. Regardless of whether Complaint Counsel must prove actual delay in the onset of generic competition to meet its initial burden as to anticompetitive effect, it is appropriate to assess the magnitude and/or extent of delayed generic competition in order to balance anticompetitive harm against demonstrated procompetitive benefits. *See Impax Labs*, 2017 FTC LEXIS 130, at \*29-30 (holding that a settlement providing for 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, which “[a]t a minimum . . . affects the magnitude of any anticompetitive effect”). Complaint Counsel bears the overall burden of establishing that the Challenged Agreement “engendered a net harm.” *Cal. Dental Ass’n*, 224 F.3d at 957-58.

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Respondent argues that the Endo-Impax Settlement expedited generic competition, as compared to litigating the Endo-Impax patent dispute, regardless of the eventual outcome of that litigation. Respondent asserts that even if Impax had prevailed, the Endo-Impax patent litigation would have delayed generic competition until as late as January 2013.

Complaint Counsel urges rejection of Respondent's evidence as to the expected duration of the patent litigation. Complaint Counsel further argues that, regardless of when the underlying litigation might have ended, the evidence proves that, absent the Endo-Impax Settlement, Impax might have launched its generic Opana ER "at risk" to compete with Endo as early as June 2010, after Impax received final FDA approval of its generic Opana ER. These arguments are analyzed below.<sup>36</sup>

## 1. Entry by at-risk launch

### a. Background

As explained in Section III.A.3 above, Endo's patent infringement suit against Impax, filed on January 25, 2008, triggered the Hatch-Waxman 30-month stay on approval of Impax's ANDA for generic oxymorphone ER, meaning that the FDA could not approve Impax's ANDA until the earlier of the expiration of 30 months or resolution of the patent dispute in Impax's favor. F. 61-62. If litigation is still pending at the end of the 30-month period, the FDA may give its approval to the generic drug manufacturer to begin marketing a generic version of the drug. *Lipitor*, 868 F.3d at 241; 21 U.S.C. § 355(j)(5)(B)(iii). Pursuant to the Hatch-Waxman framework, once Impax received final approval from the FDA in June 2010, Impax had the option

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<sup>36</sup> It is undisputed that the outcome of the Endo-Impax patent litigation was uncertain at the time of settlement. F. 553. The duration of continued litigation, as the alternative to the Endo-Impax Settlement, is relevant to the magnitude and/or extent of the anticompetitive effects of the Endo-Impax Settlement. Such analysis does not require, and does not include, an assessment of the merits of the underlying patent dispute. See *Actavis*, 133 S. Ct. at 2236 (stating that "it is normally not necessary to litigate patent validity to answer the antitrust question").

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to launch its generic oxymorphone ER product “at risk.” F. 66-67, 451-452.

Launching at risk refers to the risk of liability for the brand-name manufacturer’s lost profits, if the generic challenger launches its product prior to a non-appealable decision in the underlying patent litigation and ultimately loses its patent challenge. F. 452-453; *Lipitor*, 868 F.3d at 241; *King Drug*, 791 F.3d at 396 n.8. Lost profits are measured by the profits the patent owner would have made on sales of its branded product, but for the launch of the generic product. F. 453. Damages can be trebled if the infringement is found to be willful, for instance, if the generic product is launched before the district court rules on the patent dispute. F. 453. In addition, if the brand company wins its action against a generic company that has launched at risk and the generic company’s actions are deemed “exceptional,” courts may award attorney’s fees to the brand company. F. 457.

Generic companies often risk far more in infringement liability than they earn from each sale when launching at risk. F. 454. Damages are not measured by the generic’s sales revenue, but by the profits the brand company would have earned on such sales. F. 454. Thus, potential damages for launching at risk can represent “bet-the-company” stakes and can “take [away] the solvency of the company entirely.” F. 455. Damages can be in the billions of dollars, if the sales of the branded drug are high enough, and “would almost always be greater than the total revenues that the generic company receives” from launching at risk. F. 455.

Moreover, launching at risk jeopardizes a first filer’s 180-day exclusivity period, which is “extremely valuable.” F. 456. If the generic company launches at risk and is enjoined from making sales, the generic company forfeits some of its 180-day exclusivity because the 180-day time period continues to run during the period the generic is enjoined. F. 456. Even if the injunction is eventually lifted or the infringer prevails in the underlying patent litigation, the patent infringer can never recover the forfeited part of its 180-day exclusivity period. F. 456.

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At-risk launches are fairly uncommon across the entire pharmaceutical industry. F. 458. At-risk launches are most common when there are multiple ANDA filers who have received approval from the FDA, no ANDA filer has exclusivity, and there subsequently is a race to the market by generic firms. F. 459. When at-risk launches do occur, they generally are undertaken by large pharmaceutical companies that can absorb significant financial risk in the event they are found to infringe. F. 460. Complaint Counsel's expert witness, Professor Noll, identified 48 at-risk launches over a 15-year period (August 2001 thru April 2015). Twenty-one of those forty-eight at-risk launches were conducted by Teva, which, Professor Noll explains, "is by far the most likely company to do at-risk launches." F. 461. Teva is a "very large pharmaceutical company" and, as a result, can undertake at-risk launches more regularly. F. 462. Of the 48 at-risk launches identified by Professor Noll, only 4 were conducted by companies with less than \$1 billion in revenue. F. 463. Impax's revenues in 2010 were less than \$1 billion. F. 465.

**b. Analysis**

The evidence supports the conclusion that Impax would not have launched its generic Opana ER at risk, as further explained below. F. 451-548.

First, the evidence supports the conclusion that it would have been economically disadvantageous for Impax to launch its generic Opana ER at risk. Unlike the overwhelming majority of companies that Professor Noll identified as undertaking at-risk launches, Impax is a small pharmaceutical company, with revenues in 2010 of less than \$1 billion. F. 463, 465. Mr. Koch, Impax's CFO at the time of the Endo-Impax Settlement, explained that "being a small company," Impax "could not bet the company on any one product." F. 467. The potential liability for damages from launching a generic version of Opana ER at risk would have exceeded any profits Impax realized from the launch. F. 544. Impax's potential liability for Endo's lost profits could total as much as \$54 million for six months of sales. F. 546. If it was ultimately determined that Impax's infringement was willful and Endo was awarded treble damages, Impax could be liable for as much as \$162 million for six months of sales. F. 546. In

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contrast to this potential liability, potential sales of oxymorphone ER over six months in 2010, based on an at-risk launch, as projected by Impax, would total only \$28 million. F. 545. In addition, if Impax launched at risk and was then enjoined, Impax would forfeit part of its 180-day exclusivity period. F. 547. Under these circumstances, it “was perfectly reasonable for Impax to view a launch at risk as a losing proposition.” F. 548.

Second, Impax had no relevant history of at-risk launches. Impax is “incredibly conservative” with respect to at-risk launches and only “infrequently” considers the possibility. F. 466-468. Prior to the Endo-Impax patent litigation, Impax had launched a product at risk only once. F. 469. That at-risk launch was for one dosage strength of a generic version of oxycodone. F. 469. Impax limited its risk of damages by capping its potential sales at \$25 million, which, in turn, limited the lost profits it would have had to pay to the branded drug company. F. 469. In fact, Impax launched at risk only after it received a favorable district court decision holding the relevant patents unenforceable and after Teva, the first ANDA filer for the relevant dosage, had launched at risk six months earlier. F. 469. Since the Endo-Impax Settlement in 2010, Impax has undertaken only one at-risk launch, and did so in a limited manner. F. 471. Specifically, Impax and Perrigo, the ANDA holder and marketer of a nasal spray antihistamine named azelastine, entered a partnership agreement through which Impax would share development costs and litigation expenses in return for a share of the drug’s profits. F. 472. In 2014, Perrigo notified Impax that it intended to launch azelastine at risk. F. 472. Under the terms of the Impax-Perrigo partnership agreement, Impax could participate in the launch and earn a share of the profits or could not participate, in which case Perrigo would receive all azelastine profits. F. 472. Impax participated in Perrigo’s at-risk launch, but limited its exposure to potential damages by capping its participation at 150,000 units. F. 472.

Third, Impax did not seek, or obtain, approval for an at-risk launch from Impax’s board of directors, which was an absolute prerequisite. F. 473, 481, 486. *See, e.g.*, F. 482 (Impax has “to have sign off from the Board, because [Impax is] such a small company, and a launch at risk would . . . potentially cause [the]



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company problems” if found liable for substantial damages). Indeed, Impax has an extensive internal process for evaluating an at-risk launch, including a detailed review of the potential product launch by Impax’s new product committee, legal team, marketing team, operations department, and division heads. F. 474-477. Thereafter, Impax’s CFO must present a risk analysis profile to Impax’s executive committee, which has to approve any at-risk launch. F. 477. Impax’s CEO also must approve any decision to launch at risk. F. 478. If Impax’s CEO and executive committee approve a possible at-risk launch, a presentation is made to Impax’s board of directors by Impax’s CFO, legal department, president of the generics division, and the manufacturing department. F. 479-480. Thus, in the case of azelastine, discussed above, Impax senior management, including the president of Impax’s generics business, Impax’s general counsel, and Impax’s in-house attorney responsible for intellectual property, made a presentation and a recommendation regarding the at-risk launch at a special board of directors meeting. F. 484. A resolution was then placed before the Board, and the Board voted to approve the resolution. F. 484. With respect to generic Opana ER, in contrast, Impax’s senior management never decided to pursue an at-risk launch, and the question was never submitted to the board for approval. F. 486-487.

**c. Complaint Counsel’s arguments**

The evidence fails to prove Complaint Counsel’s assertion that, absent a settlement of the Endo-Impax patent litigation, Impax would have launched its generic Opana ER at risk, as explained below.

**i. Consideration of at-risk launch**

Complaint Counsel argues that Impax was “considering” an at-risk launch in 2010. CCB at 45-46. Even if true, however, this fact does not warrant an inference that Impax planned to launch at risk, or was likely to launch at risk. Such an inference is against the weight of the contrary evidence, summarized above, that supports the conclusion that Impax was not going to launch its generic Opana ER at risk.

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Moreover, the evidence upon which Complaint Counsel relies to support is argument lacks probative weight. Complaint Counsel points to evidence that Mr. Mengler, president of Impax's generics division, created a presentation for the May 2010 board of directors meeting, in which he listed an at-risk launch of oxymorphone as a "current assumption" for projecting sales of oxymorphone ER, and that according to the minutes of the meeting, Mr. Mengler "expressed the view that [o]xymorphone was a good candidate for an at-risk launch." F. 493-494. However, Mr. Mengler's assumptions with respect to possible sales numbers did not "imply or mean that any legal decision ha[d] been made to clear the way for a launch." F. 493. There was no substantive discussion of an at-risk launch at the May 2010 board of directors meeting; and Impax's senior management did not make a recommendation to the board for an at-risk launch, did not discuss the risk or benefits of an at-risk launch, and did not ask the board to approve an at-risk launch at the May 2010 board meeting. F. 498-499. In 2010, senior management was looking at various possible scenarios and modeled an at-risk launch to forecast how that might impact Impax's budget if the decision to launch at risk were made. F. 488. Mr. Mengler raised oxymorphone ER at the May 2010 Board meeting to put oxymorphone ER "on the radar" of the Board and to "alert the board as to the product being out there that might get to the point of an at-risk launch." F. 495. As Impax's CEO, Dr. Hsu, explained, senior management "want[s] to alert the board that we are considering this [as] one of the scenario[s] so that if we do come up with a final recommendation to the board, there will be no surprise. . . . [T]his is very typical." F. 497. Impax's then CFO, Mr. Koch, who wrote the minutes of the meeting of the May 2010 board of directors meeting, explained that Mr. Mengler was communicating his evaluation of the oxymorphone market and sharing that information with the Board because senior management was unsure of what direction it would "ultimately take and . . . [did not] want to come back to the board seeking an at-risk launch with them never having heard of it before." F. 496.

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**ii. Launch preparedness**

Complaint Counsel also argues that Impax prepared a “launch inventory build” in 2010, and argues that such evidence shows that Impax was planning to launch at risk. This argument is not supported by the evidence.

The evidence shows that it was Impax’s general practice to have its products that have been filed with Paragraph IV certifications ready to launch after the expiration of the Hatch-Waxman Act’s 30-month stay. F. 503. When a product is 18 months away from its earliest theoretical launch, Impax’s supply chain group begins prelaunch preparation activities. F. 506. This includes requesting a quota from the U.S. Drug Enforcement Agency (“DEA”) to purchase any active pharmaceutical ingredients (“API”) that are controlled substances; purchasing the API and other unique materials necessary to produce the finished product; conducting “process validation” to prove that Impax’s manufacturing process is repeatable and makes the product in a satisfactory manner; and producing a “launch inventory build,” to ensure that Impax has enough product to meet expected demand on the launchable date. F. 508.

The evidence further shows that Impax’s practice is to begin process validation six months before FDA approval of the relevant drug is expected, even if the product is the subject of active litigation. F. 511. Impax may build pre-launch quantities of products in its planning pipeline before either FDA approval is granted or a formal launch decision is made. F. 512. Impax considers its production of pre-launch quantities “routine” and consistent with industry practice. F. 514. Moreover, because Impax’s operations team prepares products for launch before FDA approval or a formal decision about launch timing, it is not unusual for Impax to discard and write off some of the products and raw materials in its inventory. F. 516, 542-543.

Consistent with Impax’s general practice, Impax’s operations team sought to be ready to launch its generic oxymorphone ER product at the expiration of the Hatch-Waxman Act’s 30-month stay on June 14, 2010. F. 503, 517. Impax requested a procurement quota from the DEA for oxymorphone, which was a

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necessary step before it could purchase oxymorphone API for any reason, including to conduct process validation of its oxymorphone ER product. F. 523. The initial allotment of oxymorphone quota was for product development manufacturing. F. 524. In January 2010 and in April 2010, Impax submitted additional requests for oxymorphone procurement quota, which were approved. F. 525-526. By May 20, 2010, Impax had completed process validation for the 5 mg, 10 mg, 20 mg, and 40 mg dosages of generic oxymorphone ER. F. 529. These process validation batches that Impax had built were not sufficient, however, to meet the market demand for a full launch (“launch inventory”). F. 530. The time required to produce the necessary amount of oxymorphone ER would have made a product launch soon after FDA approval in mid-June 2010 impossible. F. 536.

Moreover, Impax never completed a launch inventory build for its oxymorphone ER product. F. 533. Impax’s operations team does not build launch inventory without management approval. F. 531. In the case of oxymorphone ER, the Impax operations team never even received instructions from senior management to begin a launch inventory build. F. 532. Although Impax had solicited letters of intent from four customers asking customers for their good faith estimate of how much product they likely would buy if generic oxymorphone ER came on the market, Impax did not have any pricing contracts or agreements to purchase with those customers. F. 537.

**d. Conclusion regarding at-risk launch**

The evidence supports the conclusion that, absent a settlement, Impax would not have launched its generic Opana ER at risk, and fails to prove Complaint Counsel’s assertion that, absent a settlement of the Endo-Impax patent litigation, Impax might have launched its generic Opana ER at risk.

**2. Entry after litigation**

If Impax and Endo had not settled, their patent litigation would have continued. F. 555. Respondent’s contention as to when the patent litigation would likely have concluded relies on the opinions of its intellectual property expert, E. Anthony Figg.

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Mr. Figg's extensive experience in litigating patent matters in the federal courts makes him well qualified to opine on this issue. Mr. Figg is an attorney specializing in intellectual property, primarily involving the chemical, pharmaceutical, healthcare and biotechnology industries. His principal emphasis is patent litigation. He has served as lead counsel in numerous complex patent litigation matters, including Hatch-Waxman litigation, in federal district court and the Federal Circuit Court of Appeals, among other venues. Mr. Figg has practiced patent law since 1978. F. 557. Accordingly, Mr. Figg's opinions on the likely duration of the Endo-Impax patent litigation are entitled to, and are given, substantial weight. Complaint Counsel's arguments that Mr. Figg's opinions on this issue should be rejected as unreliable and/or against the weight of the evidence (*see, e.g.*, CCRB 73-74; CCRFF 1075-1091) have been considered and have been determined to be without merit.

The evidence shows that, following a trial in the Endo-Impax patent litigation, the parties would have had to wait for the district court to issue findings of fact, conclusions of law, and an order. Based on Mr. Figg's review of Hatch-Waxman cases from the district court in New Jersey, a decision would have been issued approximately four to five months after completion of trial, in or around November 2010. F. 556. Regardless of when the district court would have issued its decision in the Endo-Impax patent litigation, however, an appeal was likely, and would take 30 days to be docketed in the Federal Circuit Court of Appeals. F. 588. Based on Mr. Figg's review of statistics maintained by the Federal Circuit, the median time from docketing an appeal to issuance of a final decision was approximately 11 months in 2010 and 2011. F. 559. Applying these statistics, Mr. Figg estimated that an appellate decision in the Endo-Impax litigation would have been issued in November 2011. F. 559. Mr. Figg's estimate of a November 2011 issuance of an appellate decision is "very conservative," however, because the median time from docketing to a final decision, reported in the Federal Circuit statistics, includes settlements and summary affirmances. F. 559. In addition, the Federal Circuit is generous with briefing extensions, which increases the time it takes to receive a decision. F. 560.

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Moreover, if Impax had lost at the trial level, the “centerpiece” of the appeal would have been the trial court’s claim construction ruling, issued on April 5, 2010, which adopted Endo’s proposed constructions for “hydrophobic material” and “sustained release.” F. 71, 561. Impax would have had substantial arguments regarding this ruling on appeal. F. 561. If the appellate court agreed with Impax’s arguments, it is likely that the appellate court would remand to the trial court for further development of the evidentiary issues. F. 562. This is because the parties would need to litigate infringement and validity under Impax’s construction of the claims. F. 562. Because the trial court’s claim construction ruling was in favor of Endo, Endo never developed a record that Impax infringed its patents under Impax’s construction of the claims. F. 562. Thus, lacking a record on the issue of infringement and validity, the Federal Circuit would not decide these issues itself, but would instead direct such decision to the trial court via remand. F. 562. If the appellate court ruled in favor of Impax and remanded the case to the trial court, the evidentiary proceedings on remand would likely have taken up to 18 months to complete, and therefore would not be concluded until a date close to January 2013. F. 563. If Impax lost the appeal in the Federal Circuit, Impax would have been enjoined and would not have been able to launch its oxymorphone ER product until Endo’s patents expired in September 2013. F. 564.

In conclusion, as explained above, the evidence proves that, absent the settlement, ongoing litigation would have prevented Impax’s entry until November 2011 at the earliest, and more likely until a date close to January 2013, assuming Impax ultimately prevailed. If Impax ultimately lost its patent challenge against Endo, Impax would not have been able to launch its oxymorphone ER product until the litigated patents expired in September 2013.

### **3. Weighing of anticompetitive effects against procompetitive benefits**

As explained in detail in Section III.C., the evidence proves that the Endo-Impax Settlement included payment to prevent the risk of competition, which, under *Actavis*, is an anticompetitive

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harm. Under the facts of the instant case, however, the magnitude or extent of such harm is largely theoretical, based on an inference that Impax's entry date, and therefore generic competition, would have been earlier than January 2013, had the reverse payment not induced the settlement. *See, e.g.*, CCB at 47 (asserting that Challenged Agreement "eliminated risk" of generic competition "for over two years"). Although the Endo-Impax Settlement foreclosed the hypothetical possibility of Impax launching its generic Opana ER earlier than the date set forth in the SLA – either at risk or after litigation – the fact is that such earlier entry was unlikely. Moreover, pursuing litigation, which was the alternative to the Endo-Impax Settlement, would not have guaranteed the continued availability of Impax's generic Opana ER, even if Impax had prevailed on its patent claim, because, as explained in Section III.E., it is likely that Endo would have successfully asserted after-acquired patents to enjoin Impax, as it had against all other sellers of generic Opana ER.

In contrast to the largely theoretical anticompetitive harm asserted by Complaint Counsel, the real world procompetitive benefits of the Endo-Impax Settlement are substantial. As detailed in Section III.E, the January 2013 entry date provided in the SLA, together with the broad patent license provisions, enabled a generic Opana ER to enter the market eight months before Endo's original Opana ER patents expired, and sixteen years before Endo's after-acquired patents expired, and to continue selling generic Opana ER up to the present day, without threat of patent infringement litigation relating to original Opana ER. F. 592-596. Impax has sold generic Opana ER without interruption for more than five years, since launching its product in January 2013. F. 597. Furthermore, Impax's product is not only the sole generic oxymorphone product available to consumers, F. 596, but the only available oxymorphone ER product.<sup>37</sup> F. 598. These actual consumer benefits outweigh the theoretical anticompetitive harm demonstrated in this case.

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<sup>37</sup> In March 2012, after a supply disruption affecting production of original Opana ER, Endo launched reformulated Opana ER and, at the direction of FDA, stopped distributing original Opana ER. F. 227-230. On September 1, 2017, at the request of FDA, Endo also ceased sales of reformulated Opana ER. F. 111.

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Indeed, Complaint Counsel's economic expert witness, Professor Noll, admits that consumers are better off today because Impax is selling oxymorphone ER. F. 599. These actual consumer benefits are even more pronounced if it is accepted, as Complaint Counsel urges, that patients cannot readily switch to an alternative long acting opioid. *See, e.g.*, CCFE Section VIII.E., F.

Even if it is assumed that Impax would have entered the market as early as June 2010, and that the settlement therefore delayed generic entry (and extended Endo's patent monopoly) for two and a half years, the demonstrated consumer benefits of the settlement still outweigh the anticompetitive harm because the settlement enabled and allowed uninterrupted and continuous access to generic Opana ER for more than five years. Similarly, to the extent that Complaint Counsel argues that the no-AG provision of the SLA deprived consumers of the benefit of competition from an Endo authorized generic drug, such harm would be limited to the duration of the 180-day exclusivity period to which the no-AG provision applied, and is far outweighed by the more than five years of uninterrupted and continuous access to generic Opana ER.

Accordingly, having weighed and balanced the anticompetitive effects and the procompetitive benefits of the Endo-Impax Settlement, the evidence fails to prove the "presence of significant unjustified anticompetitive consequences," *Actavis*, 133 S. Ct. at 2238, or that the agreement "engendered a net harm." *Cal. Dental Ass'n*, 224 F.3d at 957-58. Rather, the evidence proves that the Endo-Impax Settlement was, on balance, procompetitive. Thus, the evidence fails to demonstrate that Endo-Impax Settlement constituted an unreasonable restraint of trade.

**G. Conclusion**

Having fully considered the applicable law, the arguments of the parties, and the entire record in this case, and for all the foregoing reasons, the evidence fails to prove a violation of Section 5 of the FTC Act.

Therefore, the Complaint must be DISMISSED.



## Initial Decision

**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 pharmaceutical drugs 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 Commission 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. 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.
8. The Supreme Court, in *FTC v. Actavis*, 133 S. Ct. 2223 (2013), held that reverse payment patent settlements are not immune from antitrust scrutiny, anticompetitive effects should not be presumed from the presence of a reverse payment alone, and that reverse payment settlements are to be evaluated under the rule of reason.
9. The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, as amended by the Drug Price Competition and Patent Term Restoration Act of 1984 (the “Hatch-Waxman Act”) and the Medicare Prescription Drug,

## Initial Decision

Improvement, and Modernization Act of 2003, 21 U.S.C. §§ 355(b)(2) and 355(j) and 35 U.S.C. § 271(e), establishes procedures designed to facilitate competition from lower-priced generic drugs, while maintaining incentives for pharmaceutical companies to invest in developing new drugs.

10. In a traditional rule-of-reason case, the relevant market must be defined to allow a court to determine the effect that an allegedly illegal act has on competition. However, where a settlement of patent litigation arises in the context of the peculiar framework of the Hatch-Waxman Act, and where a valid patent gives the brand holder a legal monopoly, the appropriate market in which to assess the anticompetitive effects of a reverse payment settlement agreement is the market that is the subject of that agreement – the branded pharmaceutical product and its generic equivalents.
11. The relevant market in which to analyze the effects of the Challenged Agreement in the instant case is the market for oxymorphone ER, branded and generic, which is the market that mattered to Impax and Endo, the parties to the Challenged Agreement.
12. In a rule of reason analysis, Complaint Counsel has the initial burden of proving anticompetitive effects.
13. A brand patent holder's use of a payment to induce a generic challenger to drop its patent challenge and agree to stay out of the market, rather than face the risk of patent invalidation and resulting generic competition, is an anticompetitive harm under *Actavis*.
14. To meet the initial burden of proving anticompetitive effects in a reverse payment case, Complaint Counsel must prove payment for delay, or, in other words, payment to prevent the risk of competition. 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

## Initial Decision

other services for which it might represent payment, and the lack of any other convincing justification.

15. Under *Actavis*, a reasonable inference of harm to consumers from lessened competition can be established by identifying a large and otherwise unexplained payment of cash or something else of value made by the patent holder to the alleged infringer in exchange for that firm's agreement not to enter the market for some period of time, or by direct evidence that the patent holder paid the alleged infringer to delay its entry into the market and thereby restrict competition, e.g., evidence indicating that the purpose and effect of a reverse payment was to delay entry.
16. The formulation of the initial burden of proving anticompetitive effects in a reverse payment case set forth in *King Drug Company of Florence v. Cephalon, Inc.*, 88 F. Supp. 3d 402 (E.D. Pa. 2015), upon which Complaint Counsel relies, is rejected, to the extent it holds that anticompetitive effects can be demonstrated solely by proof of a large payment and market power. This formulation has not been adopted by any other court and presents an unduly truncated burden of proof.
17. *Actavis* did not state that a "large" reverse payment is by nature anticompetitive. Under *Actavis*, it is a large *and unjustified* payment that can bring the risk of anticompetitive effects.
18. By their nature, pharmaceutical patents often carry with them market power. A valid patent grants the legal right to exclude generic competition and the practical ability to profitably charge higher prices than generic competitors would charge.
19. If the initial burden of proving anticompetitive effects is met, the Respondent in a reverse payment case may demonstrate that the Challenged Agreement had offsetting procompetitive benefits.

## Initial Decision

20. Complaint Counsel's position that the only relevant procompetitive justifications are those that justify the reverse payment, thereby barring all other evidence of procompetitive benefits from the settlement and condemning the settlement on the basis of the reverse payment alone, is inconsistent with *Actavis* and the rule of reason generally.
21. Procompetitive benefits arising in connection with a reverse payment settlement agreement as a whole are properly considered as part of a well-structured rule of reason analysis.
22. Enabling a product to be marketed that might otherwise be unavailable widens consumer choice and is therefore procompetitive.
23. The fact that a reverse payment settlement agreement allows generic entry prior to patent expiration, while not dispositive, can be considered in assessing the competitive consequences of the agreement.
24. Where the evidence proves that an agreement poses both anticompetitive harm and procompetitive benefits, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable.
25. Where the evidence proves that an agreement poses both anticompetitive harm and procompetitive benefits, Complaint Counsel has the burden of establishing that the settlement is nevertheless anticompetitive on balance.
26. The relevant benchmark in evaluating reverse payment patent settlements should be no different from the benchmark in evaluating any other challenged agreement: What would the state of competition have been without the agreement?
27. It is appropriate to assess the magnitude and/or extent of delayed generic competition attributable to a reverse

## Initial Decision

payment settlement agreement in order to balance anticompetitive harm against demonstrated procompetitive benefits.

28. A settlement providing for entry prior to patent expiration might enable generic competition on or prior to the entry date that would have resulted, on average, from litigating the patent suit to conclusion, which at a minimum affects the magnitude of any anticompetitive effect.
29. Based on weighing and balancing the anticompetitive effects and the procompetitive benefits of the Challenged Agreement, the evidence fails to prove the presence of significant unjustified anticompetitive consequences, or that the agreement engendered a net harm.
30. The evidence fails to demonstrate that the Challenged Agreement constituted an unreasonable restraint of trade.
31. The evidence fails to prove a violation of Section 5 of the FTC Act.
32. This Initial Decision makes no findings concerning alleged competitive effects of the 2017 settlement agreement between Endo and Impax, and Endo's arguments as intervenor opposing any remedy that would order the nullification or otherwise affect Endo's rights under that agreement are moot.

**ORDER**

For the reasons stated above, **IT IS ORDERED** that the Complaint be, and hereby is, **DISMISSED**.

Complaint

**IN THE MATTER OF****PAYPAL, INC.**

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE  
GRAMM-LEACH-BLILEY ACT, THE PRIVACY RULE, REGULATION P,  
AND THE SAFEGUARDS RULE

*Docket No. C-4651; File No. 162 3102*  
*Complaint, May 23, 2018 – Decision, May 23, 2018*

This consent order addresses PayPal, Inc.'s peer-to-peer payment service, Venmo, that incorporates a social networking component through a social "news feed" that shares information about a consumer's Venmo transactions. The complaint alleges that PayPal, through its operation of Venmo, has violated Section 5 of the FTC Act and the Gramm-Leach-Bliley Act's Privacy and Safeguards Rules. The consent order prohibits PayPal from making misrepresentations regarding material restrictions, limitations, or conditions to use any payment and social networking service.

*Participants*

For the *Commission: Gregory A. Ashe, Cora Han, Ben Rossen*  
and *Lisa Rothfarb*.

For the *Respondent: Eric Mogilnicki, Covington & Burling*  
*LLP*.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that PayPal, Inc., a corporation, ("Respondent") has violated Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a); the Privacy of Consumer Financial Information ("Privacy Rule"), 16 C.F.R. Part 313, recodified at 12 C.F.R. Part 1016 ("Reg. P"), and issued pursuant to 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:

### Complaint

1. Respondent PayPal, Inc. is a Delaware corporation with its principal place of business at 2211 North First Street, San Jose, California 95131.

2. Respondent operates Venmo, a payment and social networking application and website that allows consumers to make peer-to-peer payments and to share information regarding such payments through a social network feed.

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 FTC Act.

## **VENMO’S BUSINESS PRACTICES**

### **Background on the Venmo Peer-to-Peer Payment System**

4. Venmo has offered its peer-to-peer payment service to consumers since 2011. The service was previously provided by a Delaware corporation of the same name, and, since an acquisition in 2013, has been provided by Respondent operating as Venmo.

5. Consumers can download the Venmo application (the “app”) onto their mobile devices and use Venmo through its website, Venmo.com. Consumers create a Venmo account to which they may connect external bank accounts, debit cards, or credit cards. The Venmo account can receive money—creating a Venmo “balance”—from other Venmo users or from linked external sources. Consumers can send money from their Venmo balance to other Venmo users, and, if they do not have enough money in their Venmo balance to cover a transaction, the funds are drawn from their attached external account. Consumers can also transfer money from their Venmo balance to their external bank accounts.

6. To initiate a Venmo transaction, a Venmo user may either send money to another Venmo user or submit a “charge request” that asks the recipient to pay money to the requesting user. Users must also include a short message that accompanies each transaction.

## Complaint

7. As described further below, by default, Venmo publicly shares the names of the participants of a transaction, the date of the transaction, and any accompanying message regarding the transaction on a social news feed on the Venmo service.

8. As Venmo explains prominently on its website and in mobile application stores, consumers can use the service for a variety of purposes including to “make purchases” and that they can use the service “with anyone.” For example, at various times, the “How it works” page of the Venmo website has stated that consumers can “Use Venmo with anyone,” “Pay anyone with a Venmo account instantly,” and “Pay family and friends ... .” Venmo also has noted that “anyone” includes individuals who are not yet Venmo users.

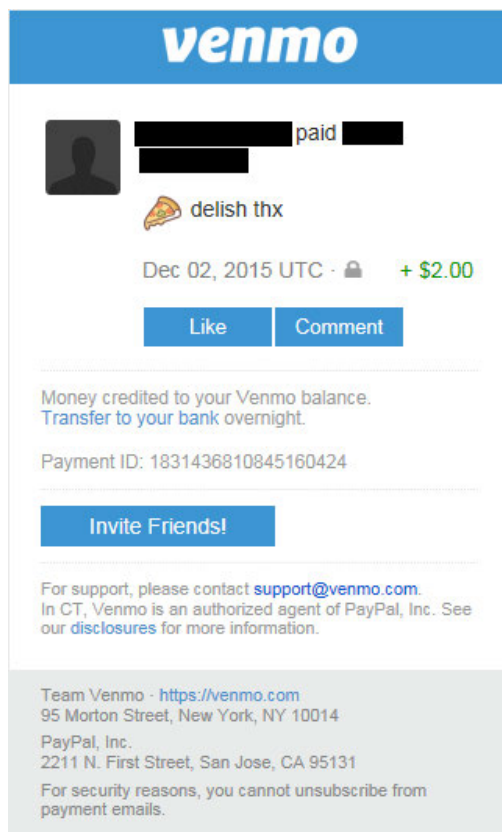
9. Venmo’s public social network feed is visible on its homepage and has shown consumers conducting transactions such as “tickets,” “baby watching,” “lunch,” “bills,” “rent,” “taxi,” and “iphone repair.”

**Venmo’s Representations About Money Transfers**

10. When a Venmo user sends money through Venmo to another user, the recipient receives a notification within seconds of the sender initiating the transfer. These notifications appear within the Venmo app, and consumers can additionally choose to receive these notifications via text message, email, or “push notifications” that appear on the screen of the consumer’s mobile device. In numerous instances, the notifications have informed the recipients that they have been paid and they can transfer money to their external bank accounts. For example, at various times, the notifications have read “Money credited to your Venmo balance. Transfer to your bank overnight.” Other notifications have told consumers that someone “paid \$[X] to your Venmo balance [description of transaction.] -- Leave it in Venmo or transfer it to your bank account.” An example of an email notification that Venmo has used appears as follows:



## Complaint



11. In addition to these transaction-specific representations, Venmo has represented generally that consumers can transfer funds to their bank within a specific time frame, often “overnight.” For example, at various times Venmo’s homepage has stated that consumers who were sent funds through the Venmo system could “cash out to any bank overnight.” Venmo has used a similar description in the Google Play store website, which stated “Transfer money to any bank overnight,” and the Google Play store on consumers’ mobile devices stated “Cash out to any bank overnight.” Similarly, the Venmo description on the Apple store for mobile devices and on the Apple store on consumers’ personal computers has stated “Transfer to any bank overnight.” More recently, Respondent’s “How It Works” page has stated “Quickly transfer money to your bank” and “Move money from Venmo to your bank account in as little as one business day.”

## Complaint

12. As a result of these representations, many consumers believe that, when they receive payment notifications from Venmo, the funds are ready to be transferred to an external bank account.

**Problems Transferring Funds Out of Venmo**

13. Despite these claims, in numerous instances, consumers have been unable to transfer funds to their bank accounts as promised. Venmo has waited until a consumer attempts to transfer funds to his or her external bank account to review the transaction for fraud, insufficient funds, or other problems. This review has resulted in Venmo delaying the transfer or reversing the transaction, including in circumstances that the sender is a new user (notwithstanding Venmo's representations that consumers can use Venmo with "anyone"), that the consumer has engaged in a "business transaction" (notwithstanding Venmo's representations that consumers can use Venmo for "purchases"), or that the transaction has involved an amount of money above a certain threshold. In numerous instances, Venmo has required consumers to provide documentation or other information as part of its review. In numerous instances, Venmo has frozen consumers' accounts during the review. When Venmo reverses a transaction, it removes the funds from that transaction from the consumer's Venmo balance.

14. Despite its claims that money has been credited and can be transferred to consumers' external bank accounts, Venmo has not verified or approved consumer transactions until after consumers have initiated a transfer of funds to an external account, which could result in either substantial delays in the transfer or the reversal of the transaction. Venmo has failed to disclose this fact.

**Venmo Was Aware of Consumer Confusion**

15. Many thousands of consumers have complained to Venmo about the delays or loss of funds from their Venmo balance when they tried to transfer funds to their bank accounts. News articles from several media outlets since at least 2015 have highlighted the harm to consumers, which is sometimes in the thousands of dollars. Many consumers have reported suffering significant

### Complaint

financial hardship due to not being able to transfer funds, including the inability to pay rent or bills with funds they expected to transfer out of Venmo. Other consumers have relied on the notifications indicating a sender paid them and supplied event tickets or other valuable items to the sender in exchange for funds, and consequently incurred a financial loss when Venmo removed the funds from their balance. In numerous instances, consumers who have attempted to contact Venmo have been unable to reach a representative or have not been provided with an explanation for or resolution to the problem with their account.

16. Internal company emails also have demonstrated that at least as early as mid-2015 Venmo was aware of “user frustration” and confusion experienced by consumers whose accounts were frozen or who suffered financial loss when transactions were reversed. Nevertheless, Venmo has continued representing, without qualification, that once money is credited to consumers’ Venmo accounts, consumers can transfer the money to their bank accounts.

### **Venmo’s Representations About Privacy**

17. By default, all peer-to-peer transactions on Venmo are displayed on the Venmo social news feed. On this news feed, Respondent displays the names of the payer and recipient, the date of the transaction, and a message written by the user that initiated the transaction, to anyone using Respondent’s service. In addition, each Venmo user has a profile page on Respondent’s website that lists the user’s Venmo transactions. A user’s five most recent public Venmo transactions are visible, by default, to anyone who views the user’s Venmo web page, including to visitors who do not have a Venmo account.

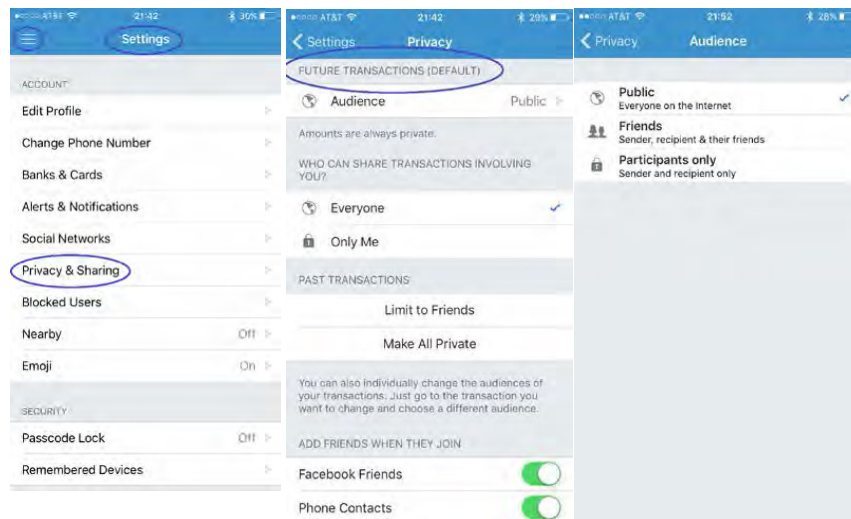
18. Consumers who do not want to share their Venmo transactions may restrict the visibility of their transactions through privacy settings available in a “Settings” menu or by configuring settings for an individual transaction.

19. Consumers who wish to generally restrict the visibility of all of their future transactions may do so through Venmo’s “Settings” menu. To ensure that all payments remain private, a

## Complaint

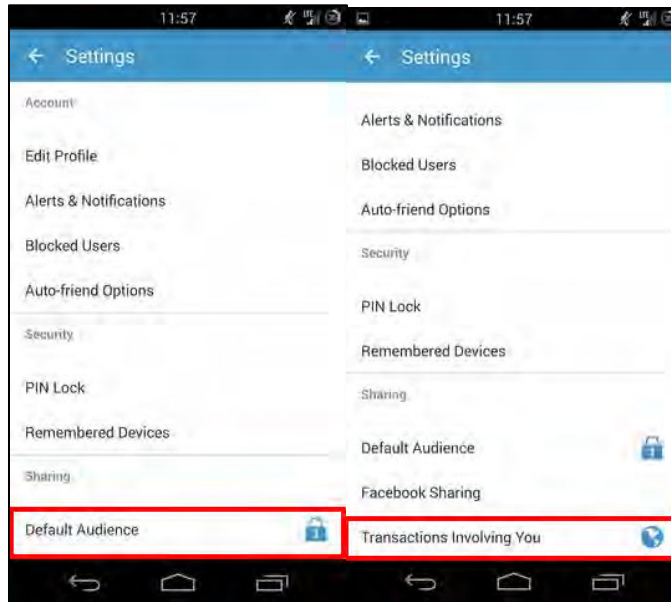
consumer must change two similarly labeled settings. The first setting in this menu limits the “default audience” for “future transactions” (hereinafter, the “Default Audience Setting”). A second setting, described in more detail below, controls “who can share transactions involving” the Venmo user (hereinafter, the “Transaction Sharing Setting”). Although these two settings appear on the same screen on both the iOS and the web-based version of the service, on some Android devices the Transaction Sharing Setting is only accessible if the user scrolls down below the Default Audience Setting.

20. On Venmo’s iOS app, privacy settings are accessible from a “Settings” menu, the same or similar to the one depicted below, from which a user may select “Privacy & Sharing.” The Default Audience Setting is labeled “Future Transactions (Default).” The Transaction Sharing Setting is labeled “Who Can Share Transactions Involving You?”

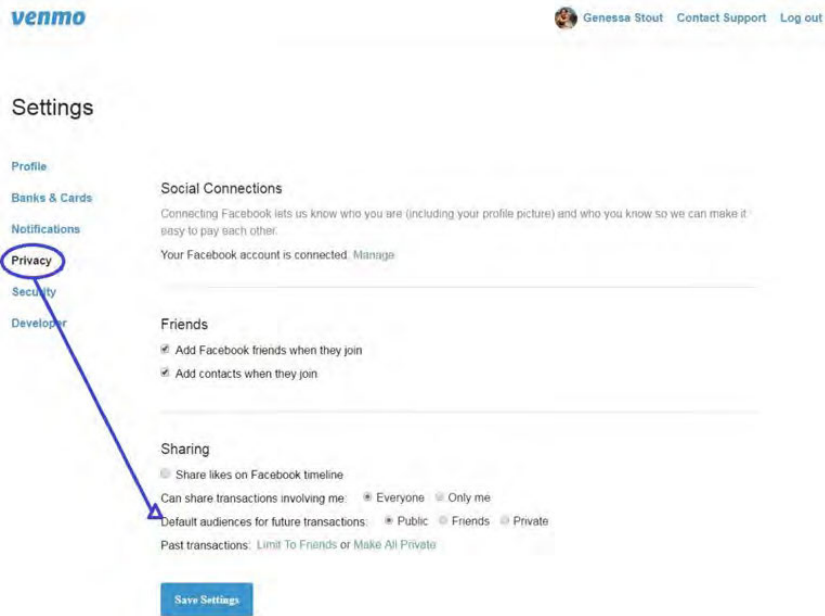


21. On Venmo’s Android App, the privacy settings menu appears the same or similar to the screenshots depicted below:

Complaint



22. On the Venmo webpage, the privacy settings menu appears the same or similar to the screenshot depicted below:



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23. The Default Audience Setting purports to allow the user to select the “audience” for all future transactions. It contains three options, identified as:

- a. Public (Everyone on the Internet);
- b. Friends (Sender, recipient & their friends); and
- c. Participants only (Sender and recipient only).

24. The label describing the Default Audience Setting would lead a reasonable consumer to believe that she could limit the visibility of all of her future transactions by restricting this setting. Thus, a consumer who sets the Default Audience Setting to “Participants Only” would likely assume that, by default, all of her transactions will be viewable only by the participants of the transaction, regardless of whether she is the initiator or recipient of a transaction.

25. In fact, however, a consumer must also change Venmo’s second setting, the Transaction Sharing Setting, in order to ensure that all of her transactions are private. As depicted in the screenshots above, the Transaction Sharing Setting contains two options: “Everyone” or “Only Me.” By default, it is set to “Everyone.” If a consumer fails to change the Transaction Sharing Setting to “Only Me,” some of her transactions will still be published publicly even if she has chosen a “private” default audience through the Default Audience Setting.

26. For example, suppose User A changes the Default Audience Setting to “Participants Only” but does not change the Transaction Sharing Setting to “Only Me.” User B, meanwhile, leaves the Default Audience Setting set to “Public” and the Transaction Sharing Setting set to “Everyone.” This configuration has the effect of overriding User A’s clearly expressed privacy preferences in at least two ways:

- a. First, this configuration does not affect the privacy of any transactions where User A is the *recipient* of a transaction rather than the *initiator*. Thus, if User A sends a payment to User B, the transaction will be

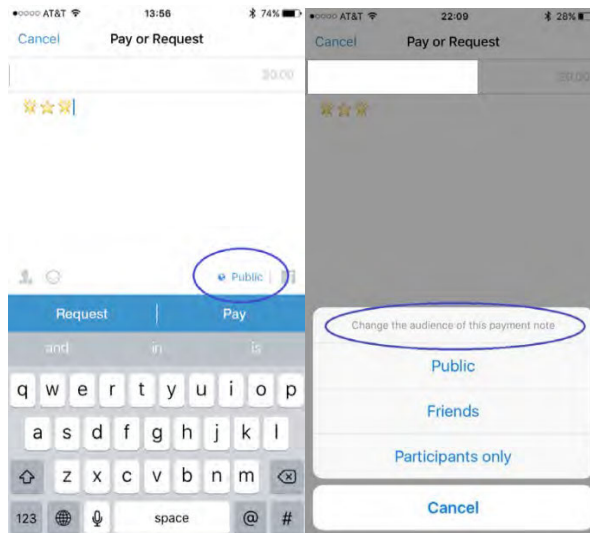
## Complaint

visible only to the participants, but if User B sends a payment or a charge request to User A, the transaction will be public and show User A as a recipient of User B's public transaction.

- b. Second, even where User A initiates a private transaction, this configuration permits User B to retroactively make that transaction publicly viewable at any time after the transaction is complete, without providing any notice to User A.

27. Venmo has not informed consumers that the Transaction Sharing Setting permits another Venmo user to override the consumer's default audience or to retroactively make a private transaction public. These results are directly contrary to the expectations of a reasonable consumer.

28. Venmo also allows consumers to change the audience for individual transactions without engaging with the "Settings" menu. Thus, if a user only wants a particular transaction to be kept private, she could change the audience setting for an individual transaction at the time she sends a payment (hereinafter, the "Individual Audience Setting"). On Venmo's iOS app, the Individual Audience Setting appears the same or similar to the screenshot depicted below:



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29. As with the Default Audience Setting, the Individual Audience Setting does not ensure that a transaction remains private unless a user has separately changed the Transaction Sharing Setting to “Only Me.” If a user has not changed both settings, the other participant in the transaction may retroactively make the transaction public, as described in Paragraph 26(b).

30. Venmo has never informed consumers that the Transaction Sharing Setting permits retroactive changes to the visibility of a transaction, even where one participant has specifically intended for a transaction to be private. In fact, Venmo exacerbates these problems by incorrectly describing its privacy settings in its Privacy FAQs. For example, until at least December 2015, as depicted below, Venmo’s Privacy FAQ included a graphic that incorrectly described the settings necessary to make a user’s transactions private. Specifically, the graphic only restricts the Default Audience Setting while leaving the Transaction Sharing Setting unchanged.

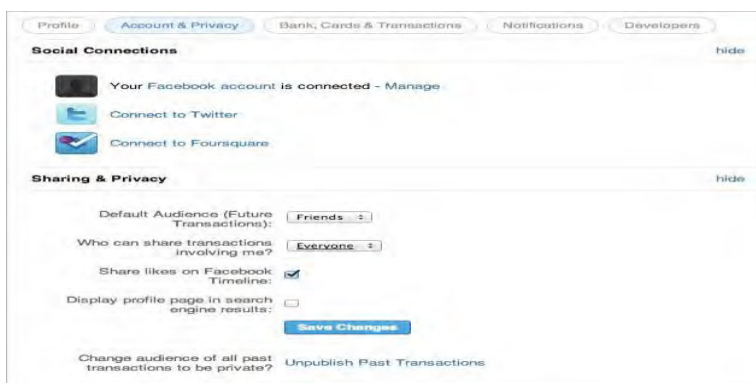
**FUTURE PAYMENTS**

You can set up your Venmo account so that all future payments are private, to do so, follow these instructions:

- Log in to [venmo.com](https://venmo.com/)  
([/web/20150525161659/https://venmo.com/](https://web/20150525161659/https://venmo.com/))
- Navigate to **Account -> Account & Privacy -> Sharing & Privacy -> Edit**
- Choose your desired settings
- **Save**



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31. In addition, in early 2017, Venmo revised this Privacy FAQ to state that “[s]etting your default audience to “Private” or “Participants Only” will ensure that your payments are only visible to you and the other participant in the payment.” As described in paragraphs 25, 26 and 30, this statement is false.

### **Venmo’s Representations About Security**

32. Venmo has disseminated public statements on its mobile app and website about its information security practices, including the following:

- a. “Venmo uses bank-grade security systems and data encryption to protect your financial information.”
- b. “Venmo uses bank grade security systems and data encryption to protect you and guard against unauthorized transactions and access to your personal or financial information.”

33. Despite these representations, until approximately March 2015, Venmo failed to implement sufficient safeguards to protect the security, confidentiality, and integrity of consumer information. For example, Venmo failed to provide consumers with security notifications regarding changes to account settings from within the consumer’s Venmo account, including informing a consumer that her password or e-mail address had changed, that a new email address had been added, or that a new device was added to her account. As a result, in some instances, unauthorized users successfully took over consumer accounts, changed the

## Complaint

passwords and/or e-mail addresses associated with the accounts, and withdrew funds out of the accounts – all without any notifications to the affected consumers.

34. In addition, due to Venmo’s failure to maintain adequate customer support capabilities, as noted above in Paragraph 15, Venmo was often slow to respond to reports of unauthorized transactions.

**VENMO’S GRAMM-LEACH-BLILEY ACT VIOLATIONS**

35. Respondent is a financial institution, as that term is defined by Section 509(3)(A) of the Gramm-Leach-Bliley (“GLB”) Act, 15 U.S.C. § 6809(3)(A), and is subject to the GLB Act. The GLB Act defines a financial institution as “any institution the business of which is engaging in financial activities as described in Section 1843(k) of Title 12 (The Bank Holding Company Act of 1956).” 15 U.S.C. § 6809(3)(A). Among other things, Respondent is significantly engaged in “transferring money,” one of the activities listed as financial in nature under the Bank Holding Company Act of 1956, 12 U.S.C. § 1843(k)(A). Respondent is also significantly engaged in data processing and transmission, financial activities listed by the Consumer Financial Protection Bureau (“CFPB”) in Regulation Y, 12 C.F.R. § 225.28(b)(14), as covered by GLB. Respondent collects nonpublic personal information, as defined by 16 C.F.R. § 313.3(n). Because Respondent is a financial institution that collects nonpublic personal information, during the relevant time period it was subject to the requirements of the GLB Privacy Rule, 16 C.F.R. § 313.1 *et seq.*, and is subject to the requirements of Reg. P, 12 C.F.R. Part 1016, and the GLB Safeguards Rule, 16 C.F.R. § 314.1 *et seq.*

**Privacy Rule and Reg. P**

36. The Privacy Rule, which implements Sections 501-503 of the GLB Act, 15 U.S.C. §§ 6801-6803, was promulgated by the 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 CFPB became responsible for implementing the Privacy Rule, and accordingly promulgated the

## Complaint

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 FTC to enforce Reg. P. 15 U.S.C. § 6805.

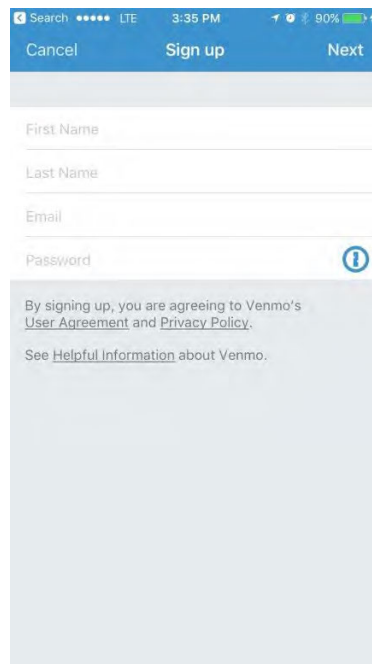
37. Both Reg. P and the Privacy Rule require financial institutions to provide customers with an initial and annual privacy notice. Among other things:

- a. These privacy notices must be “clear and conspicuous.” 16 C.F.R. §§ 313.4 and 313.5; 12 C.F.R. §§ 1016.4 and 1016.5. “Clear and conspicuous means that a notice is reasonably understandable and designed to call attention to the nature and significance of the information in the notice.” 16 C.F.R. § 313.3(b)(1); 12 C.F.R. § 1016.3(b)(1);
- b. These privacy notices must “accurately reflect[] [the financial institution’s] privacy policies and practices.” 16 C.F.R. § 313.4 and 313.5; 12 C.F.R. §§ 1016.4 and 1016.5. They 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; and
- c. These privacy notices must be provided “so that each consumer can reasonably be expected to receive actual notice.” 16 C.F.R. § 313.9; 12 C.F.R. § 1016.9. For example, for the consumer who conducts transactions electronically, a financial institution may 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(b)(1)(iii); 12 C.F.R. § 1016.9(b)(1)(iii).

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38. Venmo has failed to comply with the requirements described in Paragraph 37 since it began providing its mobile payment service in 2011. Specifically:

- a. Venmo failed to provide a clear and conspicuous initial privacy notice to its customers. Rather, at all times relevant to the complaint, users of Venmo's mobile applications have seen a screen during the signup process the same as or similar to the screenshot depicted below:



This screen informs users that “[b]y signing up, you are agreeing to Venmo’s User Agreement and Privacy Policy.” As shown in the screenshot above, this disclosure is printed in grey text on a light grey background and does not provide a clear and conspicuous initial privacy notice designed to call attention to the nature and significance of the information in the notice, as required by the Privacy Rule and Reg. P;

## Complaint

- b. Venmo's privacy notice is not accurate, as required by the Privacy Rule and Reg P. Venmo represents in its Privacy Policy that it shares a user's personal information with the user's "social web, if [the user's] Venmo account transactions are designated as 'public' or friends-only payments . . . ." In fact, as described in Paragraphs 17-23, Venmo shares a consumer's personal information by default with "everyone on the Internet," including persons who do not have a Venmo account, and not just members of the consumer's "social web"; and
- c. Venmo has failed to deliver the initial privacy notice so that each customer could reasonably be expected to receive actual notice, as required by the Privacy Rule and Reg P. For example, users of Venmo's mobile app may click on a link to Venmo's Privacy Policy to find a description of the company's practices regarding the collection and sharing of personal information, including personal financial information, but Venmo does not require customers to acknowledge receipt of an initial privacy notice as a necessary step to obtaining a particular financial product or service.

**Safeguards Rule**

39. The Safeguards Rule, which implements Section 501(b) of the GLB Act, 15 U.S.C. § 6801(b), requires financial institutions to protect the security, confidentiality, and integrity of customer information by developing a comprehensive written information security program that contains reasonable administrative, technical, and physical safeguards, including: (1) designating one or more employees to coordinate the information security program; (2) 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; (3) 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; (4) overseeing service

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providers and requiring them by contract to protect the security and confidentiality of customer information; and (5) 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.16 C.F.R. §§ 314.3 and 314.4. Violations of the Safeguards Rule are enforced through the FTC Act. 15 U.S.C. § 6805(a)(7).

40. Until approximately March 2015, Venmo failed to comply with the requirements described in Paragraph 39. Specifically,

- a. Through at least August 2014, Venmo failed to have a written information security program;
- b. Until at least September 2014, Venmo failed to assess reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information; and
- c. Until approximately March 2015, Venmo failed to implement basic safeguards to protect the security, confidentiality, and integrity of consumer information, including:
  - i Failing to provide security notifications to consumers, such as notifications that a consumer's password or e-mail address has changed, or that a new device was added to the consumer's account; and
  - ii Failing to maintain adequate customer support to timely investigate and respond to users' reports concerning account compromise or unauthorized transactions.

**VIOLATIONS OF THE FTC ACT****COUNT I**

41. Through the means described in Paragraphs 4 – 16, Respondent, through Venmo, has represented, directly or

## Complaint

indirectly, expressly or by implication, that money is credited to a consumer's Venmo account and can be transferred to an external bank account.

42. In fact, in numerous instances in which Respondent has made the representation set forth in Paragraph 41, Respondent has failed to disclose or disclose adequately to consumers that funds could be frozen or removed because Respondent has not yet approved the underlying transaction. This additional information would be material to consumers in their decision to use Respondent's payment and social networking service.

43. Respondent's failure to disclose or disclose adequately the material information described in Paragraph 42, in light of the representation described in Paragraph 41, is a deceptive act or practice.

**COUNT II**

44. As described in Paragraphs 17 – 24, 27, and 30 – 31, Respondent, through Venmo, has represented, directly or indirectly, expressly or by implication, that through the Default Audience Setting, consumers can restrict the visibility of future transactions to specific groups, such as "Participants Only" or "Friends."

45. Respondent failed to disclose, or failed to disclose adequately, that the Default Audience Setting does not ensure that future transactions are visible only to friends or to the participants of the transaction, as described in Paragraphs 25 – 26. This fact would be material to consumers in their decision to use Respondent's services.

46. Respondent's failure to disclose or disclose adequately the material information described in Paragraph 45, in light of the representation set forth in Paragraph 44, is a deceptive act or practice.

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**COUNT III**

47. As described in Paragraphs 17 – 24, 28, and 30 – 31, Respondent, through Venmo, has represented, directly or indirectly, expressly or by implication, that through the Individual Audience Setting, consumers can restrict the visibility of any single transaction to specific groups, such as “Participants Only” or “Friends.”

48. Respondent failed to disclose, or failed to disclose adequately, that the Individual Audience Setting does not ensure that any single transaction is visible only to friends or to the participants of the transaction, as described in Paragraph 29. This fact would be material to consumers in their decision to use Respondent’s services.

49. Respondent’s failure to disclose or disclose adequately the material information described in Paragraph 48, in light of the representation set forth in Paragraph 47, is a deceptive act or practice.

**COUNT IV**

50. As described in Paragraph 32, Respondent, through Venmo, has represented, directly or indirectly, expressly or by implication, that Respondent protected consumers’ financial information with “bank grade security systems.”

51. In fact, as described in Paragraphs 33 – 34, Respondent did not secure consumers’ financial information with “bank grade security systems.” Therefore, the representation set forth in Paragraph 50 is false or misleading.

**VIOLATION OF THE PRIVACY RULE AND REG. P****COUNT V**

52. As described in Paragraphs 36 – 37, the Privacy Rule and Reg. P require financial institutions to provide customers with a clear and conspicuous initial privacy notice that accurately reflects the financial institution’s privacy policies and practices,



## Complaint

and to deliver the privacy notice so that each customer could reasonably be expected to receive actual notice.

53. Respondent is a financial institution, as defined in Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A).

54. As described in Paragraph 38, Respondent, through Venmo, did not provide users with a clear and conspicuous initial privacy notice. Therefore, Respondent violated the Privacy Rule, 16 C.F.R. § 313.4(a), and Reg. P, 12 C.F.R. § 1016.4.

55. As described in Paragraph 38, Respondent, through Venmo, has disseminated an initial privacy notice that does not accurately reflect its policies and practices in violation of the Privacy Rule, 16 C.F.R. § 313.4(a), and Reg. P, 12 C.F.R. § 1016.4(a).

56. As described in Paragraph 38, Respondent, through Venmo, 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.

**VIOLATION OF THE SAFEGUARDS RULE****COUNT VI**

57. As described in Paragraph 39, the Safeguards Rule 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.

58. Respondent is a financial institution, as defined in Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A).

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59. As set forth in Paragraph 40, Respondent, through Venmo, failed to have a written comprehensive information security program until approximately August 2014;

60. As set forth in Paragraph 40, Respondent, through Venmo, failed to assess reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information until approximately September 2015; and

61. As set forth in Paragraph 40, Respondent, through Venmo, failed to implement safeguards to protect the security, confidentiality, and integrity of consumer information until at least March 2015.

62. Therefore, the conduct set forth in Paragraphs 59 – 61 is a violation of the Safeguards Rule, 16 C.F.R. § 314.4.

63. The acts and practices of Respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act.

**THEREFORE**, the Federal Trade Commission this twenty-third day of May, 2018, has issued this complaint against Respondent.

By the Commission.

**DECISION**

The Federal Trade Commission (“Commission”) initiated an investigation of certain acts and practices of 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

## Decision and Order

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 the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

**FINDINGS**

1. Respondent PayPal, Inc., operating as Venmo, is a Delaware corporation with its principal office or place of business at 2211 North First Street, San Jose, California 95131.
2. The Commission has jurisdiction over the subject matter of this proceeding and over Respondent, and the proceeding is in the public interest.

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**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.

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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. “Covered information” means information from or about a User, including: (a) a first and last name; (b) a physical address; (c) an email address or other online contact information, such as a user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a financial institution account number; (g) credit or debit card information; or (h) transaction information.
- D. “Privacy setting” shall include any control or setting provided by Respondent that allows a user to limit or restrict which individuals or entities can access or view covered information.
- E. “Respondent” means PayPal, Inc. and its successors and assigns.
- F. “Transaction information” means information from or about a Payment and Social Networking Service transaction, including (a) the participants to the transaction; (b) the date of the transaction; or (c) any

## Decision and Order

accompanying message or other descriptor related to the transaction.

- G. “User” means any person with a Payment and Social Networking Service account.
- H. “Payment and Social Networking Service” means any app or website owned and operated by Respondent that allows consumers to make payments and to share information regarding such payments with other Users through a social network owned and operated by Respondent.
- I. “Venmo” means the wholly or partially owned subsidiary, unincorporated division or business unit, or affiliate of PayPal, Inc., however denominated, that operates the Payment and Social Networking Service currently branded as Venmo.

**ORDER****I. PROHIBITED MISREPRESENTATIONS**

**IT IS ORDERED** that Respondent, and Respondent’s officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, sale, or use of any Payment and Social Networking Service must not misrepresent or assist others in misrepresenting, expressly or by implication:

- A. Any material restriction, limitation, or condition to use any Payment and Social Networking Service; and
- B. The extent to which Respondent, in connection with any Payment and Social Networking Service, protects the privacy, confidentiality, security, or integrity of any covered information, including:

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1. The extent to which a consumer may exercise control over the disclosure of any covered information from or about a User and the steps a User must take to implement any such controls; and
2. The extent to which Respondent implements or adheres to a particular level of security.

**II. REQUIRED DISCLOSURES****IT IS FURTHER ORDERED** that:

- A. Within one hundred and fifty (150) days of the effective date of this Order, 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, when making any representation through any Payment and Social Networking Service, expressly or by implication, about the availability of funds to be transferred or withdrawn to a bank account (1) must disclose, clearly and conspicuously, and in close proximity to such representation (a) that the transaction is subject to review and (b) the fact, if true, that funds could be frozen or removed as a result of transaction reviews performed during the bank transfer or withdrawal process, and (2) the representation must not be otherwise misleading.
- B. Respondent must issue a notice to Users, within one hundred and fifty (150) days of the effective date of this Order as follows: (i) for Users who have installed a Payment and Social Networking Service as an app, through the app such that the notice appears when the User next opens the app or (ii) for Users who have not installed a Payment and Social Networking Service as an app, through a text message, email, or other communication sufficient to provide clear and conspicuous notice prior to the User's next transaction.

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The notice shall disclose, clearly and conspicuously, and separate and apart from any “privacy policy,” “terms of use,” “end user license agreement,” or similar document, the fact, if true, that when a User attempts to transfer or withdraw funds to a bank account, Respondent (1) will perform transaction reviews, and (2) based on such review, may (i) block or delay the transfer or withdrawal, and/or (ii) reverse a payment transaction.

### III. ADDITIONAL PRIVACY DISCLOSURES

**IT IS FURTHER ORDERED** that, within one hundred and fifty (150) days of the effective date of this Order, and continuing thereafter, 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 Payment or Social Networking Service, must clearly and conspicuously disclose to each User, through the Payment and Social Networking Service, and separate and apart from any “privacy policy,” “terms of use,” “blog,” “helpful information” page, or similar document: (1) how the User’s transaction information will be shared with other Users; and (2) how the User can use privacy settings to limit or restrict the visibility or sharing of the User’s transaction information on the Payment and Social Networking Service. For Users that have already created an account when this disclosure is first issued, this disclosure must occur at or immediately prior to the time that the User next engages in a transaction through the Payment and Social Networking Service. For Users that have not created an account when this disclosure is first issued, this disclosure must occur at the time the User opens an account. This disclosure must not contain any other information.

### IV. GLB RULE PROVISIONS

**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



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indirectly, in connection with any Payment and Social Networking Service, are hereby permanently restrained and enjoined from violating any provision of:

- A. 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.

#### **V. BIENNIAL ASSESSMENT REQUIREMENTS**

**IT IS FURTHER ORDERED** that Respondent, and its successors and assigns, in connection with their compliance with Section IV(A) and (B) of this Order, shall obtain initial and biennial assessments and reports (“Assessments”) of the Venmo Payment and Social Networking Service 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 covered information collected from or about consumers;

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- C. Explain how the safeguards that have been implemented meet or exceed the protections required by Section IV(B) of this Order; and
- D. Certify that Respondent's security program(s) is operating with sufficient effectiveness to provide reasonable assurance that the confidentiality, security, and integrity of covered 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.

## VI. ACKNOWLEDGMENTS OF THE ORDER

**IT IS FURTHER ORDERED** that Respondent obtains acknowledgments of receipt of this Order:

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

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- B. For 20 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.
- C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 60 days, a signed and dated acknowledgment of receipt of this Order.

**VII. COMPLIANCE REPORTS AND NOTICES**

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

- A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order

## Decision and 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 provides a Payment and Social Networking Service.
- 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 PayPal.

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**VIII. 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 Payment and Social Networking Services sold;
- B. personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;
- C. copies or records of all consumer complaints regarding any Payment and Social Networking Service, whether received directly or indirectly, such as through a third party, and any response;
- D. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;
- E. a copy of each unique Payment and Social Networking Service advertisement or other marketing material making a representation subject to this Order; and
- F. for 3 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.

## Decision and Order

**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 May 23, 2038, 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:

## Analysis to Aid Public Comment

- 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 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 ("Commission") has accepted, subject to final approval, an agreement containing a consent order from PayPal, Inc. ("PayPal").

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 30 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

## Analysis to Aid Public Comment

This matter involves Venmo, a peer-to-peer payment service owned and operated by PayPal. Venmo has offered its peer-to-peer payment service to consumers since 2011, and was acquired by PayPal in 2013. Consumers can use Venmo to transfer money to one another using a mobile application or through a website at [www.venmo.com](http://www.venmo.com). Venmo's payment service incorporates a social networking component through a social "news feed" that shares information about a consumer's Venmo transactions.

The Commission's proposed complaint alleges that PayPal, through its operation of Venmo, has violated Section 5 of the FTC Act and the Gramm-Leach-Bliley ("GLB") Act's Privacy and Safeguards Rules.

First, the proposed complaint alleges that Venmo has represented to consumers that money is credited to their Venmo account and can be transferred to an external bank account after other Venmo users have sent funds to those consumers, but has failed to disclose, or failed to disclose adequately, that funds could be frozen or removed because Venmo has not yet approved the underlying transaction. As alleged in the proposed complaint, Venmo has made representations to consumers that they have been paid and they can transfer money from Venmo to an external bank account. For example, Venmo has sent users notifications that have stated "Money credited to your Venmo balance. Transfer to your bank overnight." Despite these claims, the proposed complaint alleges that, in numerous instances, consumers have been unable to transfer funds to their bank accounts as promised. Venmo has waited until a consumer attempts to transfer funds to an external bank account to review the transaction for certain issues. This review has resulted in Venmo delaying the transfer or reversing the transaction in numerous instances.

Second, the proposed complaint alleges that Venmo has failed to disclose material information to consumers about the operation of Venmo's privacy settings. As alleged in the proposed complaint, by default, all Venmo transactions are shared on Venmo's social news feed, which displays the names of the payer and recipient, the date of the transaction, and a message written by the user that initiated the transaction. Venmo offers privacy



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settings that consumers can use to limit the visibility of their transactions. However, to ensure that all future payments remain private, a consumer must change two similarly labeled settings. The first setting, referred to in the proposed complaint as the “Default Audience Setting,” would lead a reasonable consumer to believe that they can restrict the visibility of their future transactions on the news feed to specific groups, such as “Participants Only” or “Friends.” In fact, however, a consumer must also change a second setting, referred to in the proposed complaint as the “Transaction Sharing Setting,” to ensure that all of her transactions are private. If a consumer fails to restrict this second setting, in some circumstances, transactions will still be published publicly even if the consumer has chosen a “private” default audience.

Venmo also offers a privacy setting to control the visibility of an individual transaction, referred to in the proposed complaint as the “Individual Audience Setting.” The proposed complaint alleges that Venmo failed to disclose, or failed to disclose adequately, that the Individual Audience Setting does not ensure that an individual transaction remains private unless a consumer also separately restricts the Transaction Sharing Setting described above. If a consumer has not changed both settings, there are circumstances where the other participant in the transaction can retroactively change a transaction from private to public.

Third, the proposed complaint alleges that Venmo represented until approximately March 2015 that it protected consumers’ financial information with “bank grade security systems” but in fact failed to implement basic safeguards necessary to secure consumer accounts from unauthorized transactions and did not provide “bank grade security.” For example, Venmo failed to provide consumers with security notifications about changes to account settings from within the consumer’s Venmo account, such as when a consumer’s email address or password had been changed. The proposed complaint alleges that Venmo’s representation that it provided “bank grade security systems” constitutes a deceptive act or practice under Section 5 of the FTC Act.

## Analysis to Aid Public Comment

Fourth, the proposed complaint alleges that Venmo violated the GLB Act's Privacy Rule and Regulation P by failing to provide users with a clear and conspicuous initial privacy notice, disseminating an initial privacy notice that does not accurately reflect its policies and practices, and failing to deliver the initial privacy notice so that each customer could reasonably be expected to receive actual notice.

Finally, the proposed complaint alleges that Venmo violated the GLB Act's Safeguards Rule by failing to have a comprehensive written information security program before August 2014, failing to identify 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 before September 2014, and failing to design and implement information safeguards to control the known risks to the security, confidentiality, and integrity of customer information.

The proposed order contains injunctive provisions addressing the alleged deceptive conduct and Rule violations in connection with PayPal's operation of a payment and social networking service. Part I of the proposed order prohibits PayPal from making misrepresentations regarding material restrictions, limitations, or conditions to use any payment and social networking service. It also prohibits misrepresentations about data security and privacy, including misrepresentations regarding the extent of control provided by any privacy settings and the extent to which PayPal implements or adheres to a particular level of security.

Part II of the proposed order requires PayPal, when making any representations through any payment and social networking service about the availability of funds to be transferred or withdrawn to a bank account, to provide clear and conspicuous disclosures that transactions are subject to review and, if true, that funds could be frozen or removed as a result of transaction reviews. Part II also requires PayPal to issue a one-time notice informing current Venmo users that when they attempt to transfer or withdraw funds to a bank account, Venmo will perform

Analysis to Aid Public Comment

transaction reviews and based on such review, may block or delay the transfer or withdrawal, and/or reverse a payment transaction.

Part III of the proposed order requires PayPal to provide clear and conspicuous disclosures to users related to how any payment and social networking service shares transaction information with other users and how a consumer can limit the visibility or sharing of transaction information through privacy settings.

Part IV of the agreement prohibits violations of the GLB Privacy and Safeguards Rules.

Part V requires PayPal to obtain biennial data security assessments for ten years.

Parts VI through IX of the proposed order are reporting and compliance provisions, which include recordkeeping requirements and provisions requiring PayPal to provide information or documents necessary for the Commission to monitor compliance. Part X states that the proposed order will remain in effect for 20 years, with certain exceptions.

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

Complaint

IN THE MATTER OF

**NORTHROP GRUMMAN CORPORATION  
AND  
ORBITAL ATK, 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-4652; File No. 181 0005  
Complaint, June 5, 2018 – Decision, June 5, 2018*

This consent order addresses the \$7.8 billion acquisition by Northrop Grumman Corporation of certain assets of Orbital ATK, 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 the competition in the United States market for missile systems. The consent order requires Northrop to (1) continue to act as a non-discriminatory merchant supplier of Orbital ATK's solid rocket motors ("SRMs") rather than favor its now-vertically integrated missile system business, and (2) protect SRM and missile system competitors' competitively sensitive information from improper use or disclosure.

*Participants*For the *Commission*: James E. Southworth.For the *Respondents*: Thomas O. Barnett and Deborah A. Garza, Covington & Burling LLP; Joseph Krauss, Hogan Lovells US 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 Northrop Grumman Corporation ("Northrop"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Orbital ATK, Inc. ("Orbital"), 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

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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 Northrop Grumman 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 2980 Fairview Park Drive, Falls Church, Virginia 22042.

2. Respondent Orbital ATK, Inc. 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 45101 Warp Drive, Dulles, Virginia 20166.

3. Respondents, among other things, are engaged in the research, development, manufacture, and sale of missile systems. Respondent Orbital ATK is also engaged in the research, development, and manufacture of solid rocket motors (“SRMs”) for missile systems, as well as for commercial and scientific applications.

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

### **II. THE PROPOSED ACQUISITION**

5. Pursuant to an Agreement and Plan of Merger dated September 17, 2017, Northrop agreed to acquire 100 percent of the issued and outstanding voting securities of Orbital ATK for approximately \$7.8 billion (the “Acquisition”).

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

**III. THE RELEVANT MARKETS**

7. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are (1) SRMs and (2) missile systems.

- a. SRMs provide the thrust to propel tactical, missile defense, and strategic missiles to their intended targets. SRMs are used for virtually all missile systems purchased by the United States Government because they offer numerous advantages over all other existing propulsion technologies.
- b. Missile systems provide essential national defense capabilities for the United States Government. The United States armed services use multiple types of missile systems, including short-range tactical missiles, longer-range strategic missiles, and missile defense systems to intercept enemy missiles, each of which has unique capabilities and is designed to perform specific mission(s).

8. For the purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Acquisition is the United States. The missile systems that are the subject of this complaint are purchased by the United States Government, which also typically funds their development. Federal law, national security, and other considerations also usually dictate that missile system prime contractors procure the required SRMs from domestic suppliers.

**IV. THE STRUCTURE OF THE MARKETS**

9. The United States markets for SRMs and missile systems are highly concentrated. Orbital ATK is the world's largest producer of SRMs and is one of only two United States companies with the capability to develop and produce SRMs for most United States Government missile systems. Northrop is one

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of only a few companies capable of competing as a prime contractor in the highly concentrated missile system market. Northrop has demonstrated its technical, financial, and organizational ability to compete for complex United States Government missile systems by, among other things, being one of two suppliers awarded Technology Maturation and Risk Reduction phase contracts to develop preliminary designs for the Ground Based Strategic Deterrent program, the nation's next intercontinental ballistic missile system.

## **V. ENTRY CONDITIONS**

10. New entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. There are significant barriers to entry into the development, manufacture, and sale of both SRMs and missile systems in the United States. It would be extremely difficult and costly for a new entrant to establish the technological expertise and specialized facilities necessary to compete successfully in either of these markets.

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

11. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant market for missile systems in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. The Acquisition would provide Northrop with the ability and incentive to foreclose missile system prime contractor competitors by denying them access to Northrop's SRMs or by making pricing, personnel, schedule, investment, design, and other decisions that disadvantage those competitors. If Northrop were to withhold effective access to its SRMs, or increase the price of those SRMs, to its prime contractor competitors, competition would be lessened because the foreclosed prime contractors would be forced to raise the prices of their missile systems, decide not to compete, or invest less aggressively to win missile programs, which, in turn, would decrease competitive pressure on Northrop.

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12. If Northrop were to foreclose its missile system prime contractor competitors in any of these ways, the United States Government would be harmed because cost of missile systems may increase, innovation may be lessened, and/or quality would be reduced because the United States Government would be less likely to obtain the best possible combination of missile system prime contractor and SRM supplier.

**VII. VIOLATIONS CHARGED**

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

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

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission, on this fifth day of June, 2018, issues its Complaint against said Respondents.

By the Commission.

**DECISION**

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent Northrop Grumman Corporation, (“Northrop”) of the voting securities of Respondent Orbital ATK, Inc., (“Orbital”), collectively “Respondents.” The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the



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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.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Order” or “Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission’s Rules, and (4) a proposed Decision and Order.

The Commission considered the matter and 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. The Commission accepts the executed Consent Agreement and places 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 jurisdictional findings, and issues the following Decision and Order (“Order”):

1. Respondent Northrop Grumman 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 2980 Fairview Park Drive, Falls Church, Virginia 22042.
2. Respondent Orbital ATK, Inc. 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 45101 Warp Drive, Dulles, Virginia 20166.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over

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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. “Northrop” means Northrop Grumman Corporation, its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Northrop Grumman Corporation, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. After the Acquisition, Northrop will include Orbital.
- B. “Orbital” means Orbital ATK, Inc., its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Orbital ATK, Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each.
- C. “Respondent(s)” means Northrop and Orbital, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquisition” means Northrop’s acquisition of Orbital pursuant to the Agreement and Plan of Merger dated September 17, 2017, among Northrop and Orbital that was submitted by the Respondents to the Commission.
- F. “Acquisition Date” means the date on which the Acquisition is consummated.

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- G. “Collaborative Agreement” means any written agreement to collaborate on a proposal or other competitive efforts for the supply of SRMs and Related Services for a Missile Competition.
- H. “Compliance Officer” means the Person appointed pursuant to Paragraph V. of this Order, as well as his or her designees.
- I. “Compliance Program” means a program (including, but not limited to, an effective in-person or web-based training program) designed to ensure compliance with the requirements and prohibitions of this Order.
- J. “Discriminate” or “Discriminating” means to advantage Northrop relative to a Third Party Prime Contractor or to disadvantage a Third Party Prime Contractor relative to Northrop for any reason or in any way that is likely to or would limit, impair, hinder, delay, reduce or degrade, directly or indirectly, a Third Party Prime Contractor’s proposal or performance, where the Third Party Prime Contractor and Northrop are competitors with respect to a specific Missile Competition, in connection with: an Offer or the negotiations of an Offer by the Northrop SRM Business; providing SRM Information by the Northrop SRM Business; staffing, resource allocation, or design decisions in connection with SRM Products and Services offered by the Northrop SRM Business; entering into or negotiating Collaborative Agreements by the Northrop SRM Business; or making available technologies for SRMs and Related Services developed by the Northrop SRM Business, including Discriminating in price, schedule, quality, data, personnel, investment, technology, innovation, design, and risk; *provided, however*, that the determination of compliance or non-compliance with the non-discrimination provisions of this Order shall take into account that different Prime Contractors may choose to take different competitive approaches that may result in differences, individually and collectively, in

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the provision of SRMs and Related Services, including in terms of cost, schedule, design, performance, and the other parameters listed above, and that such differences do not reflect discrimination; and *provided further*, that nothing in this Order shall be interpreted to require Northrop to invest its own funds in support of a Third Party Prime Contractor (other than costs normally incurred by Northrop to prepare a proposal or otherwise respond to a Request for Information, Request for Proposal or similar request), and nothing in this Order shall be interpreted to preclude Northrop from charging a Third Party Prime Contractor a fee on the sale of SRMs and Related Services.

- K. “DoD” means the United States Department of Defense or any component thereof, *provided, however*, that where this Order requires that any information be provided to DoD, such information shall be provided to: (i) the Office of the Under Secretary of Defense for Acquisition and Sustainment, and (ii) the Office of the General Counsel of the Department of Defense.
- L. “Firewalled SRM Customer Team” means a specified group of Northrop Personnel that is dedicated to supporting a Prime Contractor (including Northrop where Northrop is a Prime Contractor) by providing SRMs and Related Services in pursuit of a particular Missile Competition.
- M. “Government Customer” means a United States government agency procuring Missiles or Missile Systems.
- N. “Management Oversight Group” means a specified group of Northrop Personnel selected from the Respondents’ corporate, sector or division (or their equivalents) leadership teams who require access to specified Third Party Non-Public Information in order to make enterprise decisions to fulfill their oversight and fiduciary responsibilities, including to ensure (i) that an Offer is consistent with Northrop’s financial

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guidelines and risk management constructs, accounting requirements, SEC disclosure and reporting obligations, and responsible management of a public company; and (ii) Northrop can effectively execute the Offer as expected, if it is accepted. The Management Oversight Group may also include specified Northrop Personnel who perform appropriate support functions, such as audit and legal functions. Specifically, the Management Oversight Group shall consist of Northrop Personnel in roles of the nature identified in Non-Public Appendix A who perform the oversight and fiduciary functions described above.

- O. “Missile(s)” means any air, sea, and/or land-based missile propelled by one or more SRM(s), including tactical missiles, missile defense interceptors, and strategic missiles; *provided, however*, Missile(s) does not include launch vehicles for satellites and other space systems.
  
- P. “Missile Competition” means a pending or future competition for one or more Missiles or Missile Systems to be procured by a Government Customer from the initiation of the DoD procurement and acquisition process through the award of the applicable full-rate production contract or, if a determination is made by the Government Customer not to award the applicable contract, through the time such a determination is made, including, but not limited to, any and all activities related to formulating, finalizing, and submitting proposals, whether or not accepted by the Government Customer and/or Prime Contractor, and negotiations with the Government Customer and/or Prime Contractor.
  
- Q. “Missile Information” means all information (such as, but not limited to, prime contract proposal cost or pricing, proposed designs, business pursuit strategies, and technical data) regarding a specific offer, or possible offer, for a Missile Competition that a Prime Contractor provides to, requests from, or otherwise

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exchanges with a supplier or potential supplier of SRMs to enable the SRM supplier to fully support the efforts of the Prime Contractor in connection with the research, development, manufacture, and delivery of Missiles and/or Missile Systems for the Missile Competition.

- R. “Missile System” means any system or series of systems comprised primarily of a Missile or Missiles, including all corresponding subsystems and ground systems components, software, and technical data procured with the Missile or Missiles.
- S. “Non-Public Information” means all confidential and proprietary non-public information (*i.e.*, information that is not generally known or otherwise publicly available), including, but not limited to, all intellectual property, know-how, designs, drawings, sketches, creative materials, specifications, models, samples, studies, analyses, analytical models, data, databases, records, simulations, tests, test results, assessments, evaluations, reports, documentation, computer programs, practices, processes, plans, estimates, proposals, and other technical, financial, economic, business strategy, or other documents, information, data, computer files (including files stored on a computer’s hard drive or other storage media), electronic files, books, records, papers, instruments, and all other materials and information, whether located, stored, or maintained in paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, and by whatever means, form, or format received or transmitted (*e.g.*, physically, orally, visually, by document, email, computer disks, magnetic tape, photograph, handwritten notes, draft, drawings, or any other type of media).
- T. “Non-Public Missile Information” means all Missile Information owned or licensed by a Third Party Prime Contractor that is furnished or otherwise submitted by

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the Third Party Prime Contractor to Respondents, is Non-Public Information, and has been, and continues to be, maintained in confidence by the Third Party Prime Contractor:

1. *Provided, however*, that (i) all written information must be designated by the Third Party Prime Contractor as proprietary information on the face thereof; and (ii) all oral, visual, or other non-written information must be identified as proprietary information by the Third Party Prime Contractor at the time of disclosure and confirmed in writing within 30 days of its disclosure;
  2. *Provided further* that Non-Public Missile Information shall not include information:
    - a. that becomes known or publicly available through no violation of this Order or any other existing agreement with Northrop intended to protect confidentiality;
    - b. that becomes known from a Third Party not known by Northrop to be in breach of a confidentiality or non-disclosure agreement with respect to such information;
    - c. independently known or developed by the recipient without reference to Non-Public Missile Information; or
    - d. after five years from the end of the period for disclosing information under the relevant Collaborative Agreement;
  3. In the event of a dispute, Missile Information shall be treated presumptively as Non-Public Information pending confirmation of its status.
- U. “Non-Public SRM Information” means all SRM Information owned or licensed by a Third Party SRM

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supplier that is furnished or otherwise submitted by the Third Party SRM supplier to Northrop, is Non-Public Information and has been, and continues to be, maintained in confidence by the Third Party SRM supplier:

1. *Provided, however*, that (i) all written information must be designated by the Third Party SRM supplier as proprietary information on the face thereof; and (ii) all oral, visual, or other non-written information must be identified as proprietary information at the time of disclosure and confirmed in writing within 30 days of its disclosure;
2. *Provided further* that Non-Public SRM Information shall not include information:
  - a. that becomes known or publicly available through no violation of this Order or any other existing agreement with Northrop intended to protect confidentiality;
  - b. that becomes known from a third party not known by Northrop to be in breach of a confidentiality or non-disclosure agreement with respect to such information;
  - c. independently known or developed by the recipient without reference to Non-Public SRM Information; or
  - d. after five years from the end of the period for disclosing information under the relevant Collaborative Agreement;
3. In the event of a dispute, SRM Information shall be treated presumptively as Non-Public Information pending confirmation of its status.



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- V. “Northrop Missile Business” means that portion of Northrop, or the Orbital entities acquired by Northrop, that is engaged in the research, development, manufacture, or sale of Missiles or Missile Systems as a Prime Contractor.
- W. “Northrop Personnel” means any directors, officers, employees, agents, representatives, consultants, or other Persons designated, hired, retained, or otherwise representing Respondents.
- X. “Northrop SRM Business” means the research, development, manufacture, or sale of SRMs as conducted by Orbital immediately prior to the Acquisition and as that Orbital business may subsequently be conducted by Northrop after the Acquisition.
- Y. “Offer” means and includes any proposal by Northrop, on specified terms and conditions, including specified pricing and costs, in response to a Request for Proposal, Request for Information, or other similar written request from a Prime Contractor to provide SRMs and Related Services for a Missile Competition.
- Z. “Person” means any individual, partnership, joint venture, firm, corporation, limited liability company or partnership, association, trust, unincorporated organization, or other business or government entity.
- AA. “Prime Contractor” means any Person engaged in the research, development, manufacture, sale and/or integration of Missiles or Missile Systems that sells or competes to sell Missiles or Missile Systems directly to a Government Customer.
- BB. “Remedial Costs” means those costs, incurred by Respondents, relating directly to the administration of measures to remedy conduct of Respondents in violation of this Order.

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- CC. “SRM” means any solid rocket motor used to propel a Missile.
- DD. “SRM Information” means all information (such as, but not limited to, technical data) that a Prime Contractor requests from, provides to, or otherwise exchanges with a supplier or potential supplier of SRMs to compete in a Missile Competition. SRM Information includes all related technical data and information that the Northrop SRM Business normally provides to a Prime Contractor prior to entering into, or in the course of working pursuant to, an Offer, a Collaborative Agreement, or otherwise supporting the Prime Contractor’s efforts in connection with a Missile Competition. Data and information provided include, but are not limited to, the types of data and information provided by the Northrop SRM Business to the Northrop Missile Business in connection with a Missile Competition.
- EE. “SRMs and Related Services” means one or more SRMs and services related to the research, development, manufacture, delivery, and support of the SRMs reasonably required to support a Prime Contractor’s proposal for a Missile Competition.
- FF. “TAS Group” means Technical and Administrative Support Group and refers to Northrop Personnel who may provide support services to more than one Firewalled SRM Customer Team on a particular Missile Competition. The TAS Group may include personnel providing engineering and technical support or general administrative and/or management support services.
- GG. “Third Party” means any Person other than Respondents.

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**II.****IT IS FURTHER ORDERED THAT:**

- A. Respondents shall not Discriminate in any Missile Competition where Northrop: (i) is currently competing to be the Prime Contractor; or (ii) has the capability to compete and has taken the steps identified in Paragraph IV. and continues to take steps to compete as a Prime Contractor. By way of example, Respondents shall:
1. Not Discriminate in developing or providing an Offer requested by or made to a Third Party Prime Contractor, or in supporting the proposal of the Third Party Prime Contractor in connection with the Offer;
  2. Not Discriminate in providing SRM Information;
  3. Not Discriminate regarding staffing, resource allocation, or design decisions in connection with SRM Products and Services to be provided to any Third Party Prime Contractor;
  4. Not Discriminate in making any Offers to, or entering into Collaborative Agreements or other similar arrangements with, any Third Party Prime Contractor, or in the negotiation of such Offers, agreements, or other arrangements with Third Party Prime Contractors;

*Provided, however,* that no provision of this Order shall require Respondents to provide products, services or technologies, including SRMs and Related Services, to any Third Party without commercially reasonable terms or if it is commercially unreasonable because (i) the Northrop SRM Business does not have the technical capability to supply the Third Party Prime Contractor or (ii) the Northrop SRM

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Business does not have the capacity (and it is not commercially reasonable to expand its capacity) to provide SRMs or a Firewalled SRM Customer Team to one or more Prime Contractors that have requested such services or team because the number or burden of Prime Contractors seeking the benefit of Paragraph II.A. of this Order becomes unreasonably large, so long as Respondents are providing SRMs and Related Services to at least one Third Party Prime Contractor in the applicable Missile Competition;

5. Not Discriminate in making available for use in Missile Competitions any technologies for SRMs and Related Services developed by the Northrop SRM Business under independent research and development funding, government-funded research and development activities or other funds expended by the Northrop SRM Business; *provided, however*, that Respondents shall be under no obligation to disclose or offer the products or other results of any joint investment or development activity engaged in with one Prime Contractor (including Northrop) to any other Prime Contractor in the applicable Missile Competition;
6. Establish and maintain separate Firewalled SRM Customer Teams as required by Paragraph III. of this Order to support each Third Party Prime Contractor; and
7. As to each separate Firewalled SRM Customer Team, take all steps reasonably necessary to ensure that a Prime Contractor's Non-Public Missile Information is kept confidential and protected from unauthorized disclosure and use, including such steps as Respondents would take to protect their own Non-Public Information and as required pursuant to Paragraph III.

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- B. The provision of any protected information, technology, or product to the Respondents by any Third Party, or to any Third Party by the Respondents, pursuant to this Order shall be subject to appropriate customary confidentiality agreements on the treatment of competitively-sensitive, national security-sensitive, ITAR-controlled, and/or proprietary information. Notwithstanding any other provision of this Order, Respondents shall not be required to provide any information to any Persons, including at the DoD or a Third Party Prime Contractor, if they do not have the security clearance required to be eligible to receive such information.
- C. As to each Missile Competition, Respondents' obligations under the provisions of Paragraphs II.A.-B. of this Order shall cease to apply upon the occurrence of any of the following events: (i) the award of the applicable contract or, if a determination is made by the Government Customer not to award the applicable contract, the date such a determination is made; (ii) Respondent Northrop has been eliminated from consideration of being the Prime Contractor; (iii) Respondent Northrop has provided notice that it has withdrawn from consideration of being the Prime Contractor; (iv) Respondent Northrop's SRM Business has been eliminated from consideration of being the SRM supplier to all Third Party Prime Contractors (*provided*, that such obligations shall cease to apply with respect to a particular Third Party Prime Contractor's proposal if and when Northrop's SRM Business has been eliminated from consideration by that Prime Contractor); or (v) Respondent Northrop becomes the sole remaining Prime Contractor being considered in the Missile Competition, whichever occurs first.
- D. The purpose of the provisions of Paragraph II. of this Order is to assure that the Northrop SRM Business continues to provide its services to Third Party Prime Contractors in any Missile Competition after the

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Acquisition on a non-discriminatory basis and in the same manner and of the same performance level and quality as before the Acquisition, 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 protect a Third Party Prime Contractor's Non-Public Missile Information and Non-Public SRM Information in any Missile Competition where Northrop (i) is currently competing to be the Prime Contractor or (ii) has the capability to compete and has taken the steps identified in Paragraph IV. and continues to take steps to compete as a Prime Contractor. Specifically, Respondents shall take all actions as are reasonably necessary and appropriate to prevent access to, or the disclosure or use of, any Non-Public Missile Information or Non-Public SRM Information by or to any Person(s) not authorized to access, receive, or use such Non-Public Information pursuant to the terms of this Order, and shall develop and implement procedures and requirements to protect such Non-Public Information and to comply with the prohibitions and requirements of this Order, including, but not limited to, taking the following actions in any such Missile Competition covered by Paragraph II. of this Order to protect such Non-Public Information:

- A. Northrop Firewalled SRM Customer Teams shall maintain firewalls and confidentiality protections, consistent with company practices and industry standards, and in compliance with the following requirements and prohibitions:
  1. Northrop Personnel assigned to the Firewalled SRM Customer Teams shall receive training on the restrictions on the disclosure, use, and dissemination of Non-Public Information and, following completion of the relevant Missile Competition, will be reminded of their ongoing

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obligations with respect to such Non-Public Information;

2. Northrop Personnel assigned to the Firewalled SRM Customer Teams shall sign appropriate non-disclosure or equivalent agreements providing written acknowledgement of their responsibilities regarding the restrictions on the use and dissemination of Non-Public Information;
3. Northrop shall keep separate and limit access to Non-Public Missile Information and Non-Public SRM Information of the respective Firewalled SRM Customer Teams, *e.g.*, by separating data in information systems; physically separating, securing, and/or shielding prototypes, models, and hard copies of such Non-Public Information; utilizing identification badge hangers to identify members of Firewalled SRM Customer Teams; and employing other processes designed to confine the flow of such Non-Public Information to personnel who have permission to see it in connection with the Missile Competition;
4. No member of a Firewalled SRM Customer Team supporting a Third Party Prime Contractor in a Missile Competition where Northrop is currently competing to be the Prime Contractor or has the capability to compete and has taken the steps identified in Paragraph IV. and continues to take steps to compete as a Prime Contractor (i) may participate in any way, directly or indirectly, in support of Respondents' efforts to participate as a Prime Contractor in the Missile Competition, including the preparation or review of a proposal or other response to a Request for Information, Request for Proposal or similar inquiry from the Government Customer or (ii) disclose any Non-Public Missile Information to any Northrop Personnel outside the Firewalled SRM Customer

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Team, except as permitted in Paragraph III.A.5. or Paragraph III.D. of this Order;

5. The Management Oversight Group shall not receive or be provided the Non-Public Missile Information of a Third Party Prime Contractor by members of a Firewalled SRM Customer Team, and members of a Firewalled SRM Customer Team shall not directly or indirectly disclose Non-Public Missile Information of a Third Party Prime Contractor to the Management Oversight Group, unless and solely to the extent necessary for the Management Oversight Group to perform the functions described in Paragraph I.N. of this Order and permitted under any applicable confidentiality agreement between Respondents and the Third Party Prime Contractor. In this regard, the Management Oversight Group:
  - a. Shall not be provided Non-Public Missile Information that does not relate directly to the Offer they are evaluating and does not relate directly to the provision of SRMs and Related Services;
  - b. May be informed of (i) the requirements of a Third Party Prime Contractor for SRMs and Related Services, including technical, interface and performance specifications, subcontract deliverables, evaluation criteria, schedule and terms; and (ii) the Firewalled SRM Customer Team's proposed approach to design, development and production, test, supply chain, cost and pricing, risks, schedule, quantity, terms and conditions; in each case, to enable the Management Oversight Group to evaluate and approve an Offer:
    - i. if and solely to the extent necessary for the Management Oversight Group to perform the functions described in Paragraph I.N. of



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this Order and permitted under any applicable confidentiality agreement between Respondents and the Third Party Prime Contractor;

- ii. only after Northrop's chief legal officer, or designee (who shall sign appropriate non-disclosure or equivalent agreements providing written acknowledgement of their responsibilities regarding the restrictions on the use and dissemination of Non-Public Missile Information and Non-Public SRM Information) has reviewed any such Non-Public Information and verified that its disclosure to the Management Oversight Group is in compliance with this Order; and
  - iii. where any such communication to the Management Oversight Group containing a Third Party Prime Contractor's Non-Public Missile Information or Non-Public SRM Information shall be made available for review by the Compliance Officer;
- c. Shall under no circumstances have access to Non-Public Missile Information of the Third Party Prime Contractor's overall bid price or bid strategy or to Non-Public Missile Information unrelated to the SRMs and Related Services; and
  - d. To the extent a member of a Firewalled SRM Customer Team supporting a Third Party Prime Contractor in a Missile Competition is permitted to disclose and discloses Non-Public Missile Information to the Management Oversight Group, the Management Oversight Group shall not disclose such information to a different Firewalled SRM Customer Team and shall not use the information in any way,

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directly or indirectly, in support of Respondents' efforts to participate as a Prime Contractor in the Missile Competition; and

6. Northrop shall:
  - a. Not move members of a Firewalled SRM Customer Team from one Third Party Prime Contractor's team to any other Firewalled SRM Customer Team, for the same Missile Competition, so long as that Third Party Prime Contractor remains in the Missile Competition, without prior written consent of the affected Third Party Prime Contractor(s);
  - b. Maintain records of such transfers referenced in Paragraph III.A.6.a. during the term of this Order and make them available for inspection by the Commission and the Compliance Officer; and
  - c. Notify the Commission and the Compliance Officer of any such transfers within 15 days of the transfer;

*Provided, however,* that other than the limitations described in Paragraphs III.A.1-6. of this Order, the Order shall not limit the movement or reassignment of any Northrop Personnel to different roles or teams within the company.

- B. The Firewalled SRM Customer Teams shall protect all Non-Public Missile Information and Non-Public SRM Information, such that, absent a Third Party Prime Contractor's prior written consent or otherwise as provided below, the Firewalled SRM Customer Teams shall not:
  1. Disclose any of that Third Party Prime Contractor's Non-Public Missile Information or Non-Public SRM Information to Northrop

## Decision and Order

Personnel in a Firewalled SRM Customer Team supporting Northrop or another Third Party Prime Contractor, or

2. Use that Third Party Prime Contractor's Non-Public Missile Information or Non-Public SRM Information for any purpose other than developing or providing an Offer requested by or made to that Third Party Prime Contractor, or in supporting the proposal of that Third Party Prime Contractor in connection with the Offer.
- C. The Northrop Missile Business shall take all reasonable steps to protect any Non-Public SRM Information, and shall not provide, disclose, or otherwise make any Non-Public SRM Information available to the Northrop SRM Business. Northrop shall use Non-Public SRM Information only in Northrop's capacity as a Prime Contractor absent the prior written consent of the proprietor of the Non-Public SRM Information.
- D. Notwithstanding the provisions of Paragraphs III.A.-C. of this Order:
1. A Firewalled SRM Customer Team on a particular Missile Competition may disclose the Non-Public Missile Information or Non-Public SRM Information of a Third Party Prime Contractor to specified Northrop Personnel providing (i) support services to Firewalled SRM Customer Teams as members of a TAS Group, or (ii) management functions as part of the Management Oversight Group, in each case, only to the extent those persons have a need to know such Non-Public Information to fulfill their responsibilities and in support of the proposals as described herein;
  2. Members of a TAS Group or Management Oversight Group who receive Non-Public Missile

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Information or Non-Public SRM Information from more than one Prime Contractor shall:

- a. not be members of any Firewalled SRM Customer Team;
  - b. use such Non-Public Information only as needed to perform their functions and not for any purpose other than related to developing or providing an Offer requested by or made to that Third Party Prime Contractor, or in supporting the proposal of that Third Party Prime Contractor in connection with the Offer;
  - c. protect the confidentiality of such Non-Public Information; and
  - d. not share such Non-Public Information of one Third Party Prime Contractor with any other competing Prime Contractor's Firewalled SRM Customer Team;
3. The Northrop Missile Business on a particular Missile Competition may disclose the Non-Public Missile Information or Non-Public SRM Information of a Third Party supplier of SRMs to specified Northrop Personnel providing (i) support services to the Northrop Missile Business as members of a TAS Group, or (ii) management functions as part of the Management Oversight Group, in each case, to the extent those persons have a need to know the Non-Public Information to fulfill their responsibilities and in support of the proposals as described herein;
  4. Members of a TAS Group or Management Oversight Group who receive Non-Public Missile Information or Non-Public SRM Information from any Third Party supplier of SRMs shall:

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- a. not be members of any Firewalled SRM Customer Team;
  - b. use such Non-Public Information only as needed to perform their functions and not for any purpose other than related to Northrop's potential purchase, directly or indirectly, of that Third Party's SRMs and Related Services for a Missile Competition;
  - c. protect the confidentiality of such Non-Public Information; and
  - d. not share such Non-Public Information of any Third Party supplier of SRMs with the Northrop SRM Business;
5. Members of a TAS Group or Management Oversight Group who receive Non-Public Missile Information or Non-Public SRM Information from a Third Party Prime Contractor or a Third Party supplier of SRMs shall receive training and shall sign appropriate non-disclosure or equivalent agreements providing written acknowledgment of their responsibilities regarding the restrictions on the use and dissemination of such Third Party Non-Public Information, pursuant to the Compliance Program developed and provided to the Commission and the Compliance Officer.
- E. No later than 15 days after the Acquisition Date, Northrop shall submit a detailed plan for complying with the provisions of Paragraph III. of this Order with respect to all current Missile Competition(s) to the Commission and the Compliance Officer.
- F. The purpose of the provisions of Paragraph III. of this Order is to assure that the Northrop SRM Business maintains the confidentiality of all Non-Public Missile Information and the Northrop Missile Business maintains the confidentiality of all Non-Public SRM

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Information in a Missile Competition where Northrop is competing as a Prime Contractor, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

**IV.**

**IT IS FURTHER ORDERED THAT** within 10 days of the earliest date on which Northrop takes steps to compete or potentially compete as a Prime Contractor for a specific Missile Competition, including, but not limited to, setting up a capture or similar team to pursue the Missile Competition, committing funds to compete, responding to a Government Customer's Request for Information, Request for Proposal, or similar request for the Missile Competition, or other action by Northrop corporate management evidencing a decision to compete, Northrop shall notify the Commission and the Compliance Officer of this decision. The notice shall include the identity of the specific Missile Competition and a list of the members of the Management Oversight Group related to such Missile Competition.

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

- A. The Under Secretary of Defense for Acquisition and Sustainment shall appoint a Compliance Officer, who shall be an employee of the United States government not otherwise involved in Missile Competitions or in setting the requirements for or the procurement of SRMs, Missiles or Missile Systems. The Compliance Officer shall have the power and authority to oversee compliance by the Respondents with the terms of this Order.
- B. To the extent reasonably necessary to perform his or her duties and responsibilities pursuant to this Order, and subject to any legally recognized privilege or other forms of protection of information, the Compliance

## Decision and Order

Officer shall be authorized to and may, in the presence of counsel for Northrop:

1. during normal business hours, interview any of Respondents' personnel, upon three days' notice to that Respondent and without restraint or interference by Respondents, relating to any matters contained in this Order;
  2. during normal business hours, inspect and copy any document in the possession, custody, or control of Respondents relating to any matters contained in this Order;
  3. during normal business hours, obtain access to and inspect any systems or equipment, relating to any matters contained in this Order, to which Respondents' personnel have access;
  4. during normal business hours, obtain access to and inspect any physical facility, building, or other premises, relating to any matters contained in this Order, to which Respondents' personnel have access; and
  5. require Respondents to provide access to documents, data, and other information, relating to any matters contained in this Order, to the Compliance Officer in such form as the Compliance Officer may reasonably direct and within such time periods as the Compliance Officer may reasonably require.
- C. Respondents shall timely comply with the Compliance Officer's reasonable requests relating to Respondents' compliance with their obligations pursuant to this Order, and the Compliance Officer shall not unreasonably withhold approval of any request for additional time.

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- D. The Compliance Officer may:
1. investigate any complaint or representation made to the Compliance Officer, or made available to him or her with respect to any matter arising in relation to or connected with compliance by Respondents with this Order;
  2. solicit and accept comments from Third Parties regarding Respondents' compliance with this Order as the Compliance Officer deems necessary and appropriate;
  3. use other DoD employees as appropriate;
  4. retain, at the reasonable cost and expense of Northrop, such consultants, accountants, and other advisors (collectively, "Third Party Advisors") as are reasonably necessary to carry out the duties and responsibilities under this Paragraph V. of the Order, who shall be solely accountable to the Compliance Officer, and shall have the same access as the Compliance Officer pursuant to Paragraph V.B. of this Order; *provided, however,* that such Third Party Advisors shall maintain the confidentiality of all Non-Public Information and documents of (i) Respondents, subject to terms agreed with Northrop, or (ii) any other Person; and
  5. require Northrop, at its reasonable cost and expense and upon reasonable terms and conditions, to contract with such Third Party Advisors identified by the Compliance Officer for the provisions of such services of the Third Party Advisors to the Compliance Officer pursuant to this Order. In such contract, the DoD shall be named as a third party beneficiary under the terms of the contract, with the right of the Compliance Officer to direct the Third Party Advisors in performing the Compliance Officer's duties under this Paragraph V. of the Order; and the Third Party



## Decision and Order

Advisors shall have the same access as the Compliance Officer pursuant to Paragraph V.B. of this Order; *provided, however*, Northrop may require the Third Party Advisors to sign a customary confidentiality agreement; *provided further, however*, that such agreement shall not restrict the Third Party Advisors from providing any information provided by Northrop under the contract to the Compliance Officer or the Commission.

The Compliance Officer (and any persons working with the Compliance Officer) shall not use or disclose any information obtained in the course of performing his or her duties under this Order other than for the purpose of overseeing compliance with this Order. The Compliance Officer (and any persons working with the Compliance Officer) shall fully protect any proprietary, source-selection sensitive or other Non-Public Information.

- E. The Compliance Officer shall consult with the Office of the General Counsel of the DoD to ensure that in performing the duties set forth in this Paragraph, the Compliance Officer does not interfere with the integrity of any DoD procurement.
- F. Respondents shall use their reasonable best efforts to assist the Compliance Officer in satisfaction of his or her responsibilities pursuant to this Order.
- G. Subject to Paragraphs V.B. and V.C. of this Order, Respondents shall cooperate with the Compliance Officer and shall take no action to interfere with or to impede the performance of the Compliance Officer in satisfaction of his or her responsibilities.
- H. Nothing in this Order shall alter or limit the rights or responsibilities of the parties under any contracts between DoD and one or more of the Respondents.

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

- A. Respondents shall develop and implement written procedures and protocols and maintain a system of access and data controls, with the advice and assistance of the Compliance Officer, to comply with the requirements of this Order, which shall include, but not be limited to, procedures for:
1. Monitoring compliance;
  2. Requiring and enforcing compliance with appropriate remedial action in the event of non-compliance;
  3. Notifying the Compliance Officer and any Third Party Advisor of any non-compliance of the requirements of Paragraph III. of the Order.
- B. Respondents shall design, maintain, and operate a Compliance Program to assure compliance with the requirements and prohibitions of this Order, which shall include, but not be limited to:
1. Designating an officer or other individual to supervise personally the design, maintenance, and operation of the Compliance Program, and to be available on an ongoing basis to respond to any questions by employees of Respondents;
  2. Distributing a copy of the Order to all members of (i) a Firewalled SRM Customer Team; (ii) the TAS Group; (iii) the Management Oversight Group; or (iv) the Northrop Personnel who are developing a proposal or otherwise preparing for Northrop to compete as Prime Contractor in a Missile Competition:

## Decision and Order

- a. Within thirty (30) days of the date this Order becomes final; and
  - b. Annually within thirty (30) days of the anniversary of the date this Order becomes final until the Order terminates;
3. Training on the requirements of this Order for all members of (i) a Firewalled SRM Customer Team; (ii) the TAS Group; (iii) the Management Oversight Group; or (iv) the Northrop Personnel who are developing a proposal or otherwise preparing for Northrop to compete as a Prime Contractor in a Missile Competition;
  4. The retention of documents and records sufficient to record Respondents' compliance with its obligations under this Paragraph VI. of this Order.
- C. Respondents shall bear all of their costs of monitoring, complying with, and enforcing this Order, excluding the salaries and benefits of United States government employees.
- D. Respondents shall not charge to the DoD, either directly or indirectly, any of Respondents' costs, referred to in Paragraph VI.C. of this Order, including any Remedial Costs; *provided, however*, that costs referred to in Paragraph VI.C. of this Order, incurred by Respondents, other than Remedial Costs, associated with normal business activities that could reasonably have been undertaken by Respondents in the absence of this Order are not subject to the restrictions of Paragraphs VI.C. and VI.D. of this Order, whether or not such activities are affected by this Order.

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**VII.****IT IS FURTHER ORDERED THAT:**

- A. Respondent Northrop shall notify the Commission and its staff, the DoD, and the Compliance Officer of the Acquisition Date no later than five days after the Acquisition Date. Respondent Northrop shall notify the Commission via email to the Secretary of the Commission with electronic copies to the Secretary at [ElectronicFilings@ftc.gov](mailto:ElectronicFilings@ftc.gov), and shall provide notice to staff of the Compliance Division via email to [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov).
- B. Respondents shall submit verified written reports (“compliance reports”) in accordance with the following:
  1. Respondents shall submit:
    - a. interim compliance reports 30 days after the Order is issued, and every 90 days thereafter until, for each Missile Competition existing at the time the Order is issued, (i) the award of the applicable contract or, if a determination is made by the Government Customer not to award the applicable contract, the date such a determination is made; (ii) Respondent Northrop has been eliminated from consideration of being the Prime Contractor; (iii) Respondent Northrop has provided notice that it has withdrawn from consideration of being the Prime Contractor; (iv) Respondent Northrop’s SRM Business has been eliminated from consideration of being the SRM supplier to all Third Party Prime Contractors; or (v) Respondent Northrop is the sole remaining Prime Contractor, whichever occurs first;
    - b. interim compliance reports 30 days after the event which gives rise to an obligation to notify

## Decision and Order

pursuant to Paragraph IV. of this Order, and every 90 days thereafter until (i) the award of the applicable contract or, if a determination is made by the Government Customer not to award the applicable contract, the date such a determination is made; (ii) Respondent Northrop has been eliminated from consideration of being the Prime Contractor; (iii) Respondent Northrop has provided notice that it has withdrawn from consideration of being the Prime Contractor; (iv) Respondent Northrop's SRM Business has been eliminated from consideration of being the SRM supplier to all Third Party Prime Contractors; or (v) Respondent Northrop is the sole remaining Prime Contractor, whichever occurs first, *provided, however*, that if Respondents are filing reports under Paragraph VII.B.1.a. of this Order, then the reports under this provision may be included in such reports;

- c. annual compliance reports one year after the date this Order is issued, and annually for the term of the Order on the anniversary of that date; and
  - d. additional compliance reports as the Commission or its staff may request;
2. Each compliance report shall set forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with this Order, including, as applicable:
- a. the name and status of all Missile Competitions where Northrop is a competitor (or, for potential future Missile Competitions, when Northrop has the capability to compete and has taken steps in anticipation of potentially competing pursuant to Paragraph IV.) to be the Prime Contractor;

## Decision and Order

- b. the identity of all Third Party Prime Contractors seeking SRMs from Northrop for any such Missile Competition and the status of such request for each Third Party Prime Contractor; and
  - c. such other information as the Compliance Officer may request.
- C. Respondents shall verify each compliance report with a notarized signature or sworn statement of the Chief Executive Officer or other officer or employee specifically authorized to perform this function, or self-verified in the manner set forth in 28 U.S.C. § 1746. Respondents shall submit an original and 2 copies of each compliance report to the Commission as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at [ElectronicFilings@ftc.gov](mailto:ElectronicFilings@ftc.gov) and to the Compliance Division at [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov). In addition, Respondents shall provide a copy of each compliance report to the DoD and the Compliance Officer.
- D. The Compliance Officer and DoD shall keep all reports and other information received in connection with this Order confidential.

**VIII.**

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

- A. Any proposed dissolution of Northrop Grumman Corporation or Orbital ATK, Inc.;
- B. Any proposed acquisition, merger, or consolidation of Northrop Grumman Corporation or Orbital ATK, Inc. (other than the Acquisition); or

## Decision and Order

- C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

**IX.**

**IT IS FURTHER ORDERED THAT**, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege or other form of protection of information, upon written request and at least five days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified 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 business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

**X.**

**IT IS FURTHER ORDERED THAT** this Order shall terminate on June 5, 2038.

By the Commission.

Concurring Statement

**NON-PUBLIC APPENDIX A – MANAGEMENT  
OVERSIGHT GROUP****[Redacted From the Public Record Version, But Incorporated  
By Reference]****Statement of Bureau of Competition Deputy Director  
Ian Conner**

Today, the Commission voted to accept a consent agreement imposing remedies in the matter of Northrop Grumman Corporation's (Northrop) acquisition of Orbital ATK, Inc. (Orbital ATK). Without this remedy, the merger would have given Northrop the incentive and ability to discriminate against competitors for United States Department of Defense (DOD) missile systems and potentially dampened Northrop's incentive to provide DOD with the most sophisticated systems at a competitive price. At the same time, DOD expects substantial benefits from the merger, including increased competition for future programs and lower costs. To understand such potential competitive effects and any potential benefits, Commission staff worked closely with the DOD in this matter.<sup>1</sup> Such cooperation between the DOD and the Commission and the Antitrust Division of the Department of Justice (the antitrust agencies) is the hallmark of the agencies' defense industry reviews.<sup>2</sup>

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<sup>1</sup> See, e.g., Statement of Commissioner Kovacic, In the Matter of Lockheed Martin Corporation, The Boeing Company, and United Launch Alliance, L.L.C., FTC File No. 051 0165, Docket No. C-4188 (May 8, 2007) (citing William E. Kovacic, *Toward the Development of a Unified Trans-Atlantic Defense Procurement Market*, 2006 Fordham Comp. L. Inst. 179, 191–92 (B. Hawk ed. 2007)), available at <https://www.ftc.gov/sites/default/files/documents/cases/2007/05/0510165kovacicmajorasrosch.pdf> (hereinafter "Kovacic Statement").

<sup>2</sup> See Joint Statement of U.S. Dep't of Justice & Federal Trade Comm'n on Preserving Competition in the Defense Industry (April 12, 2016), available at [https://www.ftc.gov/system/files/documents/public\\_statements/944493/160412](https://www.ftc.gov/system/files/documents/public_statements/944493/160412)



## Concurring Statement

The remedy approved by the Commission is a carefully tailored behavioral remedy that seeks to preserve the benefits of the transaction for DOD, while counteracting the incentive of Northrop/Orbital to engage in a vertical foreclosure strategy that would undermine its competitors and harm competition for present and future missile system programs. Significantly, DOD will appoint a Compliance Officer to ensure that the parties implement the required programs to prevent potential harms.

The Bureau of Competition typically disfavors behavioral remedies and will accept them only in rare cases based on special characteristics of an industry or particular transaction.<sup>3</sup> This settlement does not depart from that policy. The special characteristics of the defense industry play an important role in considering appropriate remedies in many transactions. For instance, the defense industry is characterized by a single buyer—DOD—whose procurement processes are often distinct from other industries. That is the case here. In addition, the DOD depends on sophisticated products, such as the solid rocket motors at issue in this case, that are part of complex systems subject to winner-take-all competition for programs that can last decades.

Transactions in the defense industry can also implicate national security concerns. As Commission Chairman Robert Pitofsky testified nearly twenty years ago, “The Commission is sensitive to considerations of national security and in particular that a merger will enable the Defense Department to achieve its national security objectives in a more effective manner. The

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[doj-ftc-defense-statement.pdf](#) (“The Agencies rely on DoD’s expertise, often as the only purchaser, to evaluate the potential competitive impact of mergers, teaming agreements, and other joint business arrangements between firms in the defense industry.”).

<sup>3</sup> See D. Bruce Hoffman, “Vertical Merger Enforcement at the FTC,” Credit Suisse 2018 Washington Perspectives Conference (January 10, 2018), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1304213/hoffman\\_vertical\\_merger\\_speech\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf) (“First and foremost, it’s important to remember that the FTC prefers structural remedies to structural problems, even with vertical mergers.”); see also FTC Press Release, “FTC Seeks to Block Cytac Corp.’s Acquisition of Digene Corp.” (June 24, 2002), available at <https://www.ftc.gov/news-events/press-releases/2002/06/ftc-seeks-block-cytac-corps-acquisition-digene-corp>.

## Concurring Statement

Commission strongly believes, however, that competition produces the best goods at the lowest prices and is also most conducive to innovation.”<sup>4</sup>

For these reasons, there is ample precedent for accepting appropriate behavioral remedies in the defense industry when they suffice to eliminate potential anticompetitive effects.<sup>5</sup> The Commission’s order adapts the language and approach successfully used in the Commission’s most recent vertical defense merger consent<sup>6</sup> and is consistent with prior consent decrees imposed by both of the antitrust agencies in defense mergers.<sup>7</sup>

As in other industries, the lengths of consent decrees vary to account for the characteristics of the market in which the consent is occurring and the characteristics of the consent decree itself.<sup>8</sup> The Commission’s order will remain in place for a twenty-year term, an appropriate duration to protect competition in light of the long duration of the particular defense programs and the bidding processes at issue, the potential effects for future unidentified missile programs, and the high barriers to entry in this industry.

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<sup>4</sup> Mergers and Acquisitions in the Defense Industry: Hearing before the Subcommittee on Acquisition and Technology of the United States Senate Armed Services Committee (April 15, 1997) (statement of Robert Pitofsky, former Chairman, Federal Trade Comm’n), available at <https://www.ftc.gov/es/public-statements/1997/04/mergers-and-acquisitions-defense-industry>.

<sup>5</sup> *See id.*; *In re Lockheed Martin Corp.*, Dkt. C-4188 (complaint filed Oct. 6, 2006); *United States v. Northrop Grumman*, No. 1:02CV02432 (D.D.C. Dec. 23, 2002).

<sup>6</sup> *In re Lockheed Martin Corp.*, Dkt. C-4188 (complaint filed Oct. 6, 2006).

<sup>7</sup> *In re Lockheed Martin Corp.*, Dkt. C-4188 (complaint filed Oct. 6, 2006); *see also United States v. Northrop Grumman*, No. 1:02CV02432 (D.D.C. Dec. 23, 2002); Kovacic Statement.

<sup>8</sup> *See, e.g., In re Enbridge, Inc.*, Dkt. C-4604 (complaint filed Mar. 24, 2017); *In re PepsiCo, Inc.*, Dkt. C-4301 (complaint filed Feb. 26, 2010); *In re The Coca-Cola Co.*, Dkt. C-4305 (complaint filed Sept. 27, 2010); *In re Boeing/Rockwell*, Dkt. C-3723 (complaint filed Mar. 7, 1997).

## Concurring Statement

As the Commission recognized two years ago: “Our mission, when reviewing defense industry mergers is to ensure that our military continues to receive the effective and innovative products at competitive prices over both the short- and long-term, thereby protecting both our troops and our nation’s taxpayers.”<sup>9</sup> The remedy in this case does that by protecting competition and preserving procompetitive benefits for our nation’s critical missile systems for at least the next twenty years. Finally, the Commission retains jurisdiction in the event of a violation of its order and may modify the order to address such violations.

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<sup>9</sup> Joint Statement of the U.S. Dep’t of Justice & Federal Trade Comm’n on Preserving Competition in the Defense Industry (April 12, 2016), available at [https://www.ftc.gov/system/files/documents/public\\_statements/944493/160412\\_doj-ftc-defense-statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/944493/160412_doj-ftc-defense-statement.pdf).

Analysis to Aid Public Comment

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

The Federal Trade Commission (“Commission”) has accepted an Agreement Containing Consent Order (“Consent Agreement”) designed to remedy the anticompetitive effects resulting from Northrop Grumman Corporation’s (“Northrop”) proposed acquisition of Orbital ATK, Inc. (“Orbital ATK”). Under the terms of the Consent Agreement, Northrop would be required to (1) continue to act as a non-discriminatory merchant supplier of Orbital ATK’s solid rocket motors (“SRMs”) rather than favor its now-vertically integrated missile system business, and (2) protect SRM and missile system competitors’ competitively sensitive information from improper use or disclosure.

The Consent Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Given that the acquisition could impact a current ongoing missile system competition, the Commission issued the accompanying Decision and Order (“Order”) as final prior to seeking public comment, as provided in Section 2.34(c) of the Commission’s Rules. This will allow the Commission to enforce the Order if there are any violations of its provisions during the public comment period. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement or modify the accompanying Order.

Pursuant to an Agreement and Plan of Merger dated September 17, 2017, Northrop agreed to acquire 100 percent of the issued and outstanding voting securities of Orbital ATK for approximately \$7.8 billion (the “Acquisition”). The Commission’s Complaint alleges that the Acquisition is in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by

## Analysis to Aid Public Comment

lessening the competition in the United States market for missile systems. The Acquisition would provide Northrop with the ability and incentive to withhold its SRMs from competing missile system prime contractors, or only offer its SRMs at disadvantageous terms, thereby raising rivals' costs or otherwise undermining their ability to compete on future missile system bids. The Consent Agreement will remedy the alleged violations by prohibiting Northrop from discriminating against competing missile prime customers in supplying SRMs.

## **II. The Parties**

Northrop is a Delaware corporation with its principal place of business in Falls Church, Virginia. Northrop is a global aerospace and defense company that acts as a prime contractor or preferred supplier on many high-priority programs for the United States Department of Defense ("DOD") and other United States Government agencies. Northrop is one of only a few companies capable of acting as a prime contractor for tactical, missile defense, and strategic missile systems for DOD [the United States Government]. From 1997 to 2013, Northrop was the prime contractor responsible for maintaining, sustaining, and modernizing the Minuteman III strategic missile system. Northrop is currently competing to develop the nation's next intercontinental ballistic missile system, the Ground Based Strategic Deterrent. Northrop has also successfully competed for United States Government research and development contracts for tactical missiles and missile defense interceptors.

Orbital ATK is a Delaware corporation with its principal place of business in Dulles, Virginia. The company is a prime contractor and merchant supplier of space, defense, and aviation-related systems to customers around the world. Orbital ATK is the nation's leading producer of SRMs for both defense and commercial applications. For defense programs, Orbital ATK produces strategic-grade SRMs for the Trident II D-5 and Minuteman III and the Missile Defense Agency's Ground-based Midcourse Defense interceptor. In addition, Orbital ATK is a leading producer of SRMs for air-, sea- and land-based tactical missiles and missile defense interceptors. Orbital ATK supplies these SRMs to prime contractors for use in their missile systems.

## Analysis to Aid Public Comment

**III. The Products and Structure of the Markets**

Northrop is one of only four companies capable of supplying missile systems to the United States Government. Missile systems provide essential national defense capabilities for the United States Government. The United States Armed Forces employ multiple types of missile systems, including short-range tactical missiles, longer-range strategic missiles, and missile defense interceptors designed to defeat ballistic missile threats. Each type of missile system purchased by DOD has unique capabilities and is designed specifically to perform its given mission(s).

Orbital ATK is one of only two viable suppliers of SRMs for U.S. Government missile systems and the dominant supplier of large SRMs used for long-range strategic missiles. SRMs are used to propel tactical, missile defense, and strategic missiles to their intended targets. SRMs are used for virtually all missile systems purchased by the United States Government because they offer numerous advantages over all other existing propulsion technologies.

The relevant geographic market in which to analyze the effects of the proposed transaction is the United States. The missile systems that are the subject of the Complaint are solely purchased by the United States Government, which also typically funds their development. National security considerations and other factors limit DOD's ability to procure its missile systems from foreign suppliers. Federal law, national security, and other considerations similarly drive missile system prime contractors to procure SRMs from domestic suppliers.

**IV. Entry**

Entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. There are significant barriers to entry into the development, manufacture, and sale of both SRMs and missile systems in the United States. The relevant products are high technology, defense-specific products that require specialized expertise and facilities to develop, test, and manufacture. It would be extremely

#### Analysis to Aid Public Comment

difficult and costly for a new entrant to establish the technological expertise and specialized facilities necessary to compete successfully in either of these markets.

### **V. Effects of the Acquisition**

Following the Acquisition, Northrop, will be one of only two viable suppliers of SRMs for U.S. Government missile systems. The choice of SRM can have a significant impact on the final determination of a missile system prime competition because the propulsion system is a critical element of the overall missile design. SRMs comprise a large portion of the cost of the integrated missile and their performance affects the range, accuracy, and payload capacity of the missile. Absent the protections of the Consent Agreement, Northrop would have the ability to disadvantage competitors for future missile prime contracts by denying or limiting their access to Northrop's SRM products and technologies, which would lessen the ability of Northrop's missile system competitors to compete successfully for a given missile system prime contract. The Acquisition would also give Northrop access, through the former Orbital ATK SRM business, to the proprietary information that rival missile prime contractors must share with its SRM vendor. Similarly, the Acquisition creates a risk that the proprietary, competitively sensitive information of a rival SRM supplier supporting Northrop's missile system business could be transferred to Northrop's vertically integrated SRM business.

### **VI. The Consent Agreement**

The Consent Agreement remedies the acquisition's likely anticompetitive effects by requiring, whenever Northrop competes for a missile system prime contract, that Northrop must make its SRM products and related services available on a non-discriminatory basis to all other third-party competing prime contractors that wish to purchase them. The non-discrimination prohibitions of the Consent Agreement are comprehensive and apply to any potential discriminatory conduct affecting price, schedule, quality, data, personnel, investment, technology, innovation, design, or risk.

## Analysis to Aid Public Comment

The Consent Agreement requires Northrop to establish firewalls to ensure that Northrop does not transfer or use any proprietary information that it receives from competing missile prime contractors or SRM suppliers in a manner that harms competition. These firewall provisions require that Northrop maintain separate firewalled teams to support offers of SRMs to different third-party missile prime contractors and to maintain these firewalled teams separate from the team supporting Northrop's missile prime contractor activities. The firewall provisions also prohibit Northrop's missile business from sharing proprietary information it may receive from third-party SRM suppliers with Northrop's SRM business.

The Consent Agreement also provides that the DOD's Under Secretary of Defense for Acquisition and Sustainment shall appoint a compliance officer to oversee Northrop's compliance with the Order. The compliance officer will have all the necessary investigative powers to perform his or her duties, including the right to interview respondent's personnel, inspect respondent's facilities, and require respondents to provide documents, data, and other information. The compliance officer has the authority to retain third-party advisors, at the expense of Northrop, as appropriate to perform his or her duties. Access to these extensive resources will ensure that the compliance officer is fully capable of overseeing the implementation of, and compliance with, the Order.

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



## Complaint

## IN THE MATTER OF

**AMNEAL HOLDINGS, LLC,  
AMNEAL PHARMACEUTICALS LLC,  
IMPAX LABORATORIES, INC.,  
AND  
IMPAX LABORATORIES, LLC**

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

*Docket No. C-4650; File No. 181 0017  
Complaint, April 27, 2018 – Decision, June 29, 2018*

This consent order addresses the \$1.45 billion acquisition by Amneal Holdings, LLC and Amneal Pharmaceuticals LLC of certain assets of Impax Laboratories, Inc. and Impax Laboratories, LLC. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening current competition in the markets for: (1) generic desipramine hydrochloride tablets; (2) generic ezetimibe and simvastatin IR tablets; and (3) generic felbamate tablets in the United States. The complaint also alleges that the acquisition would violate the aforementioned statutes by lessening future competition in the markets for: (1) generic aspirin and dipyridamole ER capsules; (2) generic azelastine nasal spray; (3) generic diclofenac sodium and misoprostol DR tablets; (4) generic erythromycin tablets; (5) generic fluocinonide-E cream; (6) generic methylphenidate hydrochloride ER tablets; and (7) generic olopatadine hydrochloride nasal spray in the United States. The consent order requires the parties to divest all of Impax's rights and assets related to 1) generic desipramine hydrochloride tablets; 2) generic felbamate tablets; 3) generic aspirin and dipyridamole extended release ("ER") capsules; 4) generic diclofenac sodium and misoprostol delayed release ("DR") tablets; 5) generic ezetimibe and simvastatin immediate release ("IR") tablets; 6) generic erythromycin tablets; and 7) generic methylphenidate hydrochloride ER tablets to ANI Pharmaceuticals, Inc. Under the consent order, the parties also are required to divest all of Impax's rights and assets related to generic azelastine nasal spray and generic olopatadine hydrochloride nasal spray to Perrigo Company plc, and to divest all of Impax's rights and assets related to generic fluocinonide-E cream to G&W Laboratories.

*Participants*

For the *Commission*: *Kenneth A. Libby, Vanessa Schlueter,  
David von Nirschl and Kari A. Wallace.*

## Complaint

For the *Respondents: Patrick C. English and Amanda P. Reeves, Latham & Watkins LLP; William Diaz, McDermott Will & Emery 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 Amneal Holdings, LLC, and Respondent Amneal Pharmaceuticals LLC (collectively, “Amneal”), corporations subject to the jurisdiction of the Commission, have agreed to acquire the equity interests of Respondent Impax Laboratories, Inc., and Respondent Impax Laboratories, LLC (collectively, “Impax”), 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 Amneal Holdings, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 400 Crossing Boulevard, 3rd Floor, Bridgewater, New Jersey 08807. Respondent Amneal Pharmaceuticals LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 400 Crossing Boulevard, 3rd Floor, Bridgewater, New Jersey 08807.

2. Respondent Impax Laboratories, Inc. 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 30831 Huntwood Avenue, Hayward, California 94544. Respondent Impax Laboratories,

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LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 30831 Huntwood Avenue, Hayward, California 94544.

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 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**

4. Pursuant to a business combination agreement dated October 17, 2017, Respondent Amneal proposes to acquire the equity interests of Respondent Impax in a series of transactions valued at approximately \$1.45 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, license, manufacture, marketing, distribution, and sale of the following generic pharmaceutical products:

- a. desipramine hydrochloride tablets;
- b. ezetimibe and simvastatin immediate release (“IR”) tablets;
- c. felbamate tablets;
- d. aspirin and dipyridamole extended release (“ER”) capsules;
- e. azelastine nasal spray;
- f. diclofenac sodium and misoprostol delayed release (“DR”) tablets;

## Complaint

- g. erythromycin tablets;
- h. fluocinonide-E cream;
- i. methylphenidate hydrochloride ER tablets; and
- j. olopatadine hydrochloride nasal spray.

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. Desipramine hydrochloride is a tricyclic antidepressant. Only five companies currently sell generic desipramine hydrochloride tablets in the United States: Amneal, Impax, Heritage Pharmaceuticals, Inc. (“Heritage”), Sandoz, and Teva Pharmaceutical Industries Ltd. (“Teva”). Sales by Teva, Sandoz, and Amneal account for more than 95 percent of the market. Heritage accounts for the remaining 5 percent while Impax only launched its product in late 2017. The Acquisition would reduce the number of suppliers of generic desipramine hydrochloride tablets from five to four and eliminate the most recent entrant into the market.

8. Ezetimibe and simvastatin is used to improve cholesterol and lower triglycerides. Only four companies currently sell generic ezetimibe and simvastatin IR tablets in the United States: Amneal, Impax, Dr. Reddy’s Laboratories (“Dr. Reddy’s”), and Teva. Sales by Impax account for more than half the market, while Dr. Reddy’s and Teva share the remainder. Amneal entered the generic ezetimibe and simvastatin IR tablets market at the end of 2017. The Acquisition would reduce the number of suppliers from four to three and eliminate the most recent entrant.

9. Felbamate is an anticonvulsant used in the treatment of epilepsy. Only four companies currently sell generic felbamate tablets in the United States: Amneal, Impax, Alvogen, and Wallace Pharmaceuticals, Inc. (“Wallace”). The Acquisition

## Complaint

would reduce the number of suppliers of generic felbamate from four to three.

10. Aspirin and dipyridamole is an antiplatelet therapy used to reduce the risk of stroke. Only Amneal currently sells generic aspirin and dipyridamole ER capsules in the United States. Impax is one of only a limited number of suppliers capable of entering the market for generic aspirin and dipyridamole ER capsules in the near future.

11. Azelastine nasal spray is used to treat seasonal allergies. Three companies currently sell generic azelastine nasal spray: Impax, partnered with Perrigo Company plc (“Perrigo”); Wallace; and Apotex Inc. (“Apotex”). Amneal is one of a limited number of suppliers capable of entering the market in the near future.

12. Diclofenac sodium and misoprostol is used to provide pain relief while minimizing gastrointestinal side effects. Four companies—Amneal, Teva, Sandoz, and Exela Pharma Sciences LLC (“Exela”)—have approved ANDAs to sell generic diclofenac sodium and misoprostol DR tablets in the United States. In addition, Greenstone LLC, a Pfizer subsidiary, sells an authorized generic version. Sandoz does not sell its product directly to customers and supplies only to a private labeler. The Exela product, marketed by both Eagle Pharmaceuticals, Inc. and Dash Pharmaceuticals LLC, has limited sales. Impax, partnered with Micro Labs Limited, is one of only a few suppliers capable of entering the market for generic diclofenac sodium and misoprostol DR tablets in the near future.

13. Erythromycin is an antibiotic which until recently had only one supplier, Arbor Pharmaceuticals, LLC, in the United States. Amneal’s ANDA to sell generic erythromycin tablets was approved in March of 2018, and it has launched the product. Impax is one of a limited number of suppliers capable of entering the market for generic erythromycin in the near future.

14. Fluocinonide-E cream is a corticosteroid used on the skin to reduce swelling, redness, itching, and allergic reactions. Only four companies currently sell generic fluocinonide-E cream in the United States: Impax, Alvogen, Sun Pharmaceutical Industries

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Ltd. (“Sun”), and Teva. Sun and Teva are the market leaders, while Impax and Alvogen are recent entrants into the market. Amneal is one of only a few suppliers capable of entering the market for generic fluocinonide-E cream in the near future.

15. Methylphenidate hydrochloride is a central nervous system stimulant used to treat attention-deficit disorder and attention-deficit/hyperactivity disorder. Only four companies currently sell generic methylphenidate hydrochloride ER tablets in the United States: Teva is the leading supplier with more than 80 percent share, while Mylan N.V. and Trigen each have less than 10 percent share. Amneal’s ANDA was approved in February of 2018, and it has since launched the product. Impax is one of a limited number of suppliers capable of entering the market for generic methylphenidate hydrochloride ER tablets in the near future.

16. Olopatadine hydrochloride nasal spray is used to treat seasonal allergies. Three companies currently sell generic olopatadine hydrochloride nasal spray in the United States: Impax, partnered with Perrigo; Sandoz; and Apotex. Amneal is one of only a few suppliers capable of entering the market for generic olopatadine hydrochloride nasal spray in the near future.

**ENTRY CONDITIONS**

17. Entry into the relevant markets described in Paragraphs 7-16 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**

18. 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

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FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by eliminating actual, direct, and substantial competition between Amneal and Impax and reducing the number of independent significant competitors in the markets for (1) generic desipramine hydrochloride tablets; (2) generic ezetimibe and simvastatin IR tablets; and (3) generic felbamate tablets, thereby increasing the likelihood that: (a) Amneal would be able to unilaterally exercise market power in these markets; (b) the remaining competitors would engage in coordinated interaction between or among each other; and (c) customers would be forced to pay higher prices; and
- b. by eliminating future competition between Amneal and Impax in the markets for (1) generic aspirin and dipyridamole ER capsules; (2) generic azelastine nasal spray; (3) generic diclofenac sodium and misoprostol DR tablets; (4) generic erythromycin tablets; (5) generic fluocinonide-E cream; (6) generic methylphenidate hydrochloride ER tablets; and (7) generic olopatadine hydrochloride nasal spray, thereby (a) increasing the likelihood that the combined entity would forego or delay the launch of each product, and (b) increasing the likelihood that the combined entity would delay, eliminate, or otherwise reduce the substantial additional price competition that would have resulted from an additional supplier of each product.

**VIOLATIONS CHARGED**

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

20. The Acquisition described in Paragraph 4, if consummated, would constitute a violation of Section 7 of the

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Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-seventh day of April, 2018, issues its Complaint against said Respondents.

By the Commission.

**ORDER TO MAINTAIN ASSETS**

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent Amneal Holdings, LLC and Respondent Amneal Pharmaceuticals LLC (collectively “Amneal”) of the equity interests of Respondent Impax Laboratories, Inc. and Respondent Impax Laboratories, LLC (collectively “Impax”). The resulting combined entity is to be named Amneal Pharmaceuticals, Inc. Amneal, Impax, and Amneal Pharmaceuticals, Inc. are hereinafter collectively referred to as “Respondents.” The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Orders” or “Consent Agreement”), containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other



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provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and this Order to Maintain Assets; 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 Amneal Holdings, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 400 Crossing Boulevard, 3<sup>rd</sup> Floor, Bridgewater, New Jersey 08807. Respondent Amneal Pharmaceuticals LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 400 Crossing Boulevard, 3<sup>rd</sup> Floor, Bridgewater, New Jersey 08807.
2. Respondent Amneal Pharmaceuticals, Inc. 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 400 Crossing Boulevard, 3<sup>rd</sup> Floor, Bridgewater, New Jersey 08807.
3. Respondent Impax Laboratories, Inc. 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 30831 Huntwood Avenue, Hayward, California 94544. Respondent Impax Laboratories, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of

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the State of Delaware with its executive offices and principal place of business located at 30831 Huntwood Avenue, Hayward, California 94544.

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. “Amneal” means: Amneal Holdings, LLC; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Amneal Holdings, LLC (including, without limitation, Amneal Pharmaceuticals LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Amneal also means: Amneal Pharmaceuticals, Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Amneal Pharmaceuticals, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Amneal will include Impax.
- B. “Impax” means: Impax Laboratories, Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Impax Laboratories, Inc. (including, without limitation, Impax Laboratories, LLC), and the

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

- C. “Commission” means the Federal Trade Commission.
- D. “Respondent(s)” means Amneal and Impax, 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 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 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

## Order to Maintain Assets

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

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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;

## Order to Maintain Assets

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. Respondents shall:
1. for a period of twelve (12) months from the Closing Date, provide that Acquirer or its

## Order to Maintain Assets

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

## Order to Maintain Assets

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



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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 by the Respondents before the Closing Date for that Divestiture Product, Respondents, in

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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

## Order to Maintain Assets

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

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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 ten (10) 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

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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 through their full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for the Divestiture Product Businesses; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Product Assets except for ordinary wear and tear.

## Order to Maintain Assets

**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 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

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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 consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or 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 or an Aspirin/Dipyridamole 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 Respondents;
  - 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;

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*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 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. 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



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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 each Respondent of its 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.

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- 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.

- A. Respondents shall include in their 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 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 a detailed description of the timing for the completion of such obligations.

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- B. Respondents shall verify each compliance report with a notarized signature or sworn statement of the Chief Executive Officer or other officer or employee specifically authorized to perform this function, or self-verified in the manner set forth in 28 U.S.C. § 1746. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at [ElectronicFilings@ftc.gov](mailto:ElectronicFilings@ftc.gov) and to the Compliance Division at [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

*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 Amneal Holdings, LLC, Amneal Pharmaceuticals LLC, Amneal Pharmaceuticals, Inc., Impax Laboratories, Inc., or Impax Laboratories, LLC;
- B. any proposed acquisition, merger, or consolidation of Amneal Holdings, LLC, Amneal Pharmaceuticals LLC, Amneal Pharmaceuticals, Inc., Impax Laboratories, Inc., or Impax Laboratories, LLC; or
- C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution

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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 place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters address, the notified 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 business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), 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; or

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- B. the day after the divestiture of all of the Divestiture Product Assets, as required by and described in the Decision and Order, has been completed;
- C. the day after the Product Manufacturing Technology related to each Divestiture Product has been provided to the Acquirer in a manner consistent with the Technology Transfer Standards and the 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**

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent Amneal Holdings, LLC and Respondent Amneal Pharmaceuticals LLC (“collectively Amneal”) of the equity interests of Respondent Impax Laboratories, Inc. and Respondent Impax Laboratories, LLC (collectively “Impax”). The resulting combined entity is to be named Amneal Pharmaceuticals, Inc. Amneal, Impax, and Amneal Pharmaceuticals, Inc. hereinafter are collectively referred to as “Respondents.” The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the

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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.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Orders” or “Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission’s Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. 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 Amneal Holdings, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 400 Crossing Boulevard, 3<sup>rd</sup> Floor, Bridgewater, New Jersey 08807. Respondent Amneal Pharmaceuticals LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 400 Crossing Boulevard, 3<sup>rd</sup> Floor, Bridgewater, New Jersey 08807.

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2. Respondent Amneal Pharmaceuticals, Inc. 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 400 Crossing Boulevard, 3<sup>rd</sup> Floor, Bridgewater, New Jersey 08807.
3. Respondent Impax Laboratories, Inc. 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 30831 Huntwood Avenue, Hayward, California 94544. Respondent Impax Laboratories, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 30831 Huntwood Avenue, Hayward, California 94544.
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. "Amneal" means: Amneal Holdings, LLC; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Amneal Holdings, LLC (including, without limitation, Amneal Pharmaceuticals LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Amneal also means: Amneal Pharmaceuticals, Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures,

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subsidiaries, divisions, groups, and affiliates, in each case controlled by Amneal Pharmaceuticals, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Amneal will include Impax.

- B. “Impax” means: Impax Laboratories, Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Impax Laboratories, Inc. (including, without limitation, Impax Laboratories, LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Respondent(s)” means Amneal and Impax, individually and collectively.
- E. “Acquirer(s)” means the following:
  - 1. a Person specified by name in this Order to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final and effective; or
  - 2. a Person approved by the Commission to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- F. “Acquisition” means Respondent Amneal’s acquisition of Impax pursuant to the Acquisition Agreement.



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- G. “Acquisition Agreement” means the *Business Combination Agreement* by and among Impax Laboratories, Inc., Atlas Holdings, Inc., a wholly owned subsidiary of Impax Laboratories, Inc., K2 Merger Sub Corporation, a wholly owned subsidiary of Impax Laboratories, Inc., and Amneal Pharmaceuticals LLC, that was submitted by the Respondents to the Commission in this matter. The Acquisition Agreement is contained in Non-Public Appendix I.
- H. “Acquisition Date” means the earlier of the following dates: (i) the date on which Respondent Amneal acquires fifty percent (50%) or more of the voting securities of Impax; or (ii) the date on which Respondent Amneal acquires any ownership interest in the assets of Impax pursuant to the Acquisition Agreement.
- 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. “Amneal Aspirin/Dipyridamole ER Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Amneal pursuant to the following Application: ANDA No. 206392, and any supplements, amendments, or revisions to this ANDA. These Products are orally administered extended release capsules containing, as the active pharmaceutical ingredients, aspirin and dipyridamole, at the following strength: 25mg aspirin/200mg dipyridamole.
- K. “ANI Pharmaceuticals” means ANI Pharmaceuticals, Inc., a corporation organized, existing, and doing

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business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 210 Main Street West, Baudette, Minnesota 56623. ANI includes any subsidiaries of ANI Pharmaceuticals, Inc.

- L. “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.
- M. “Aspirin/Dipyridamole ER Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax pursuant to the following Application: ANDA No. 206964, and any supplements, amendments, or revisions to this ANDA. These Products are orally administered extended release capsules containing, as the active pharmaceutical ingredients, aspirin and dipyridamole, at the following strength: 25mg aspirin/200mg dipyridamole.
- N. “Aspirin/Dipyridamole ER Product Assets” means all rights, title, and interest in and to all assets related to the Business of Impax related to each of the Aspirin/Dipyridamole ER Products, to the extent legally transferable, including, without limitation, the

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Categorized Assets related to the Aspirin/Dipyridamole ER Products.

- O. “Azela**stine** Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax or its co-development partner, Perrigo, pursuant to the following Application: ANDA No. 202743, and any supplements, amendments, or revisions to this ANDA. These Products are nasally administered metered sprays containing, as the active pharmaceutical ingredient, azelastine, at the following strength: eq 0.1876mg/spray.
- P. “Azela**stine** Product Assets” means all rights, title, and interest in and to all assets related to the Business related to the Azelastine Products to the extent that such rights are owned, controlled, or held by Impax under and by virtue of the *Development, Manufacturing, and Commercialization Agreement* between Impax Laboratories, Inc., and Perrigo Israel Pharmaceuticals Ltd., dated July 27, 2010, as amended November 4, 2013, and June 19, 2014. This agreement was submitted to the Commission by Respondents and is contained in Non-Public Appendix II.B.
- Q. “Azela**stine**/Olopatadine Product Divestiture Agreements” means the following:
1. *Transfer Agreement* by and between Impax Laboratories, Inc. and Perrigo Pharma International Designated Activity Company, dated March 23, 2018; and
  2. all amendments, exhibits, attachments, agreements, and schedules attached to and submitted to the Commission with the foregoing listed agreement(s).

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The Azelastine/Olopatadine Product Divestiture Agreements are contained in Non-Public Appendix II.B. The Azelastine/Olopatadine 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.

- R. "Business" means (i) the research, Development, and manufacture of a Product wherever located throughout the world, and (ii) the commercialization, distribution, marketing, importation, advertisement, and sale of a Product in the United States.
- S. "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 Shared 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 Shared Intellectual Property;

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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

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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

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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

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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 Divestiture 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;



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17. 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; 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

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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 Shared 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).

- T. “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.

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- U. “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.
- V. “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.
- W. “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

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privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

- X. “Contract Manufacture” means the following:
1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer (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.
- Y. “Contract Manufacture Product(s)” means, individually and collectively:
1. Ezetimibe/Simvastatin Products;
  2. Erythromycin Products; and
  3. any ingredient, material, or component used in the manufacture of the foregoing Products including the active pharmaceutical ingredient(s), excipient(s), or packaging materials;

*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.

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- Z. “Desipramine Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax pursuant to the following Application: ANDA No. 205153, and any supplements, amendments, or revisions to this ANDA. These Products are orally administered tablets containing, as the active pharmaceutical ingredient, desipramine, at the following strengths: 10mg; 25mg; 50mg; 75mg; 100mg; and 150mg.
- AA. “Desipramine Product Assets” means all rights, title, and interest in and to all assets related to the Business of Impax related to each of the Desipramine Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Desipramine Products.
- BB. “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.
- CC. “Diclofenac/Misoprostol Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax or its co-development partner, Micro Labs, pursuant to the following Application: ANDA No. 204355, and any supplements, amendments, or revisions to this ANDA. These Products are orally

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administered delayed-release tablets containing, as active pharmaceutical ingredients, diclofenac and misoprostol, at the following strengths: 50mg diclofenac/0.2mg misoprostol; and 75mg diclofenac/0.2mg misoprostol.

- DD. “Diclofenac/Misoprostol Product Assets” means all rights, title, and interest in and to all assets related to the Business related to the Diclofenac/Misoprostol Products to the extent that such rights are owned, controlled, or held by Impax under and by virtue of the *License, Supply and Distribution Agreement*, by and between Micro Labs Limited and Corepharma LLC, dated June 22, 2012. This agreement was submitted to the Commission by Respondents and is contained in Non-Public Appendix II.A.
- EE. “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.
- FF. “Divestiture Product(s)” means the following, individually and collectively:
1. Aspirin/Dipyridamole ER Products;
  2. Azelastine Products;
  3. Desipramine Products;

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4. Diclofenac/Misoprostol Products;
5. Erythromycin Products;
6. Ezetimibe/Simvastatin Products;
7. Felbamate Products;
8. Fluocinonide Products;
9. Methylphenidate Products; and
10. Olopatadine Products.

GG. “Divestiture Product Assets” means the following, individually and collectively:

1. Aspirin/Dipyridamole ER Product Assets;
2. Azelastine Product Assets;
3. Desipramine Product Assets;
4. Diclofenac/Misoprostol Product Assets;
5. Erythromycin Product Assets;
6. Ezetimibe/Simvastatin Product Assets;
7. Felbamate Product Assets;
8. Fluocinonide Product Assets;
9. Methylphenidate Product Assets; and
10. Olopatadine Product Assets.

HH. “Divestiture Product Core Employee(s)” means the Product Research and Development Employees and the Product Manufacturing Employees related to each Divestiture Product.

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II. “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 Shared 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;
2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the specified Divestiture Product(s) within the United States;
3. to import or export the specified Divestiture Product(s) to or from the United States to the extent related to the marketing, distribution, or sale of the specified Divestiture Products in the United States; 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;

*provided, however,* that for any Product Shared 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.

JJ. “Divestiture Product Releasee(s)” means the following Persons:

1. the Acquirer for the assets related to a particular Divestiture Product;



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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.
- KK. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.
- LL. “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.
- MM. “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.
- NN. “Erythromycin Product(s)” means the Products manufactured or in Development owned or controlled by Impax (ANDA not filed as of the date of the Consent Agreement) that are being developed as oral tablets that contain, as the active pharmaceutical ingredient, erythromycin at the following strengths: 250mg and 500mg.
- OO. “Erythromycin Product Assets” means all rights, title, and interest in and to all assets related to the Business of Impax related to each of the Erythromycin Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Erythromycin Products.

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- PP. “Ezetimibe/Simvastatin Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax pursuant to the following Application: ANDA No. 201890, and any supplements, amendments, or revisions to this ANDA. These Products are orally administered tablets containing, as the active pharmaceutical ingredients, ezetimibe and simvastatin, at the following strengths: 10mg ezetimibe/10mg simvastatin; 10mg ezetimibe/20mg simvastatin; 10mg ezetimibe/40mg simvastatin; and 10mg ezetimibe/80mg simvastatin.
- QQ. “Ezetimibe/Simvastatin Product Assets” means all rights, title, and interest in and to all assets related to the Business of Impax related to each of the Ezetimibe/Simvastatin Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Ezetimibe/Simvastatin Products.
- RR. “Felbamate Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax pursuant to the following Application: ANDA No. 202284, and any supplements, amendments, or revisions to this ANDA. These Products are orally administered tablets containing, as the active pharmaceutical ingredient, felbamate, at the following strengths: 400mg; and 600mg.
- SS. “Felbamate Product Assets” means all rights, title, and interest in and to all assets related to the Business of Impax related to each of the Felbamate Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Felbamate Products.
- TT. “Fluocinonide Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax pursuant to the

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following Application: ANDA No. 074204, and any supplements, amendments, or revisions to this ANDA. These Products are topically administered emulsified creams containing, as the active pharmaceutical ingredient, fluocinonide, at the following strength: 0.05%.

- UU. “Fluocinonide Product Assets” means all rights, title, and interest in and to all assets related to the Business related to the Fluocinonide Products to the extent that such rights are owned, controlled, or held by Impax under and by virtue of the *Assignment and Assumption Agreement* between Actavis Pharma, Inc., Actavis Mid Atlantic LLC, and Impax Laboratories, Inc. dated August 3, 2016. This agreement was submitted to the Commission by Respondents and is contained in Non-Public Appendix II.B.
- VV. “Fluocinonide Product Divestiture Agreement(s)” means the following:
1. *Termination Agreement* by and between Impax Laboratories, Inc. and G&W Laboratories, Inc., dated [insert], 2018; and
  2. all amendments, exhibits, attachments, agreements, and schedules attached to and submitted to the Commission with the foregoing listed agreement(s), including without limitation, Appendix I, *Seller NDC Number Transition Services*.

The Fluocinonide Product Divestiture Agreements are contained in Non-Public Appendix II.C. The Fluocinonide 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.

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- WW. “G&W” means G&W Laboratories, 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 111 Coolidge Street, South Plainfield, New Jersey 07080-3895. G&W includes any subsidiaries of G&W Laboratories.
- XX. “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.
- YY. “Group A Product(s)” means the following Divestiture Products, individually and collectively:
1. Aspirin/Dipyridamole ER Products;
  2. Desipramine Products;
  3. Diclofenac/Misoprostol Products;
  4. Erythromycin Products;
  5. Ezetimibe/Simvastatin Products;
  6. Felbamate Products; and
  7. Methylphenidate Products.
- ZZ. “Group A Product Assets” means the following Divestiture Product Assets, individually and collectively:
1. Aspirin/Dipyridamole ER Product Assets;
  2. Desipramine Product Assets;
  3. Diclofenac/Misoprostol Product Assets;
  4. Erythromycin Product Assets;

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5. Ezetimibe/Simvastatin Product Assets;
6. Felbamate Product Assets; and
7. Methylphenidate Product Assets.

AAA. “Group A Product Divestiture Agreement(s)” means the following:

1. the *Asset Purchase Agreement* by and between ANI Pharmaceuticals, Inc. and Impax Laboratories, Inc. dated as of April 23, 2018;
2. the letter agreement from Amneal Pharmaceuticals LLC to ANI Pharmaceuticals, Inc. to provide consulting services through certain named employees of Respondents to ANI Pharmaceuticals, Inc. with respect to the Aspirin/Dipyridamole Products, to be executed on or before the Closing Date for the Group A Product Assets;
3. the *Supply Agreement* by and between ANI Pharmaceuticals, Inc. and Impax Laboratories, Inc. to be executed on or before the Closing Date for the Group A Product Assets (for the supply of the Contract Manufacture Products);
4. the letter agreement from Impax Laboratories, Inc. to ANI Pharmaceuticals, Inc. to be executed on or before the Closing Date for the Group A Product Assets (regarding the labeling of certain products);
5. the *Agreement for the Exchange of Drug Safety Information* between Amneal Pharmaceuticals LLC & ANI Pharmaceuticals, Inc. to be executed on or before the Closing Date for the Group A Product Assets;
6. the *Supply Agreement* by and between ANI Pharmaceuticals, Inc. and Amneal Pharmaceuticals

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LLC to be executed on or before the Closing Date for the Group A Product Assets (for supply of Amneal Aspirin/Dipyridamole ER Products);

7. the *Quality Agreement* by and between Amneal Pharmaceuticals LLC & ANI Pharmaceuticals, Inc. to be executed on or before the Closing Date for the Group A Product Assets; and
8. all amendments, exhibits, attachments, agreements, and schedules attached to and submitted to the Commission with the foregoing listed agreements.

The Group A Product Divestiture Agreements are contained in Non-Public Appendix II.A. The Group A 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.

- BBB. "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 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.

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- CCC. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- DDD. “Manufacturing Designee” means any Person other than a Respondent that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer.
- EEE. “Methylphenidate Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax pursuant to the following Application: ANDA No. 208607, and any supplements, amendments, or revisions to this ANDA. These Products are orally administered extended release tablets containing, as active pharmaceutical ingredients, methylphenidate, at the following strengths: 18mg; 27mg; 36mg; and 54mg.
- FFF. “Methylphenidate Product Assets” means all rights, title, and interest in and to all assets related to the Business of Impax related to each of the Methylphenidate Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Methylphenidate Products.
- GGG. “Micro Labs” means Micro Labs Limited a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of India with its executive offices and principal place of business located at 27, Race Course Road, Bangalore-560001, India. Micro Labs includes any subsidiaries of Micro Labs Limited.
- HHH. “Monitor” means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.
- III. “NDC Number(s)” means the National Drug Code number, including both the labeler code assigned by

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the FDA and the additional numbers assigned by the labeler as a product code for a specific Product.

- JJJ. “Olopatadine Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax or its co-development partner, Perrigo, pursuant to the following Application: ANDA No. 202853, and any supplements, amendments, or revisions to this ANDA. These Products are nasally administered metered sprays containing, as the active pharmaceutical ingredient, olopatadine, at the following strength: 0.665mg/spray.
- KKK. “Olopatadine Product Assets” means all rights, title, and interest in and to all assets related to the Business related to the Olopatadine Products to the extent that such rights are owned, controlled, or held by Impax under and by virtue of the *Development, Manufacturing, and Commercialization Agreement* between Impax Laboratories, Inc., and Perrigo Israel Pharmaceuticals Ltd., dated July 27, 2010, as amended November 4, 2013, and June 19, 2014. This agreement was submitted to the Commission by Respondents and is contained in Non-Public Appendix II.B.
- LLL. “Orders” means this Decision and Order and the related Order to Maintain Assets.
- MMM. “Order Date” means the date on which the final Decision and Order in this matter is issued by the Commission.
- NNN. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.
- OOO. “Patent(s)” means all patents and patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications



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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.

- PPP. “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.
- QQQ. “Perrigo” means Perrigo Company plc, a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of Ireland with its executive offices and principal place of business located at Treasury Building, Lower Grand Canal Street, Dublin 2, Ireland. Perrigo includes Perrigo Israel Pharmaceuticals Ltd., a company incorporated under the laws of Israel, and any subsidiaries of Perrigo Company plc.
- RRR. “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.
- SSS. “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, and includes, without limitation, all approvals, registrations, licenses, or

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authorizations granted in connection with any Application related to that Product.

TTT. “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;

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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

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may retain similar rights for the purposes of the Retained Product(s).

UUU. “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, 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

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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.

VVV. "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;

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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;

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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.

WWW. “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;

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- 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.
- XXX. "Product Intellectual Property" means all of the following intellectual property related to a Divestiture Product (other than Product Shared 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;



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*provided, however,* that “Product Intellectual Property” does not include the corporate names or corporate trade dress of “Amneal”, “Impax”, 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 Amneal or Impax can be identified or defined.

YYY. “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, (v) assuring that during routine manufacturing the process remains in a state of control, (vi) collecting and evaluating data for the purposes of providing scientific evidence that the manufacturing process is capable of consistently delivering quality Products, (vii) managing the operation of the manufacturing process, or (viii) 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.

ZZZ. “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

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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.

AAAA. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of the specified Divestiture Product in the United States 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,

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artwork for the production of packaging components, television masters, and other similar materials related to the specified Divestiture Product.

BBBB. “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.

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

DDDD. “Product Shared 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 to limit the use or disclosure thereof, that are related to a

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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.

EEEE. “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.

FFFF. “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.

GGGG. “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.

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HHHH. “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

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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.

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.

KKKK. “SKU” means stock keeping unit.

LLLL. “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

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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 and any allocation or absorption of costs for excess or idle capacity; *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.

MMMM. "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*:

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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:



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- 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.

NNNN. “Therapeutic Equivalent” means a drug product that is classified by the FDA as being therapeutically equivalent to another drug product.

OOOO. “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.

PPPP. “United States” means the United States of America, and its territories, districts, commonwealths and possessions.

QQQQ. “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.

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

- A. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the Group A Product Assets and grant the Divestiture Product License related to the Group A Products, absolutely and in good faith, to ANI Pharmaceuticals pursuant to, and in accordance with, the Group A 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 ANI Pharmaceuticals or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Group A Product Assets is incorporated by reference into this Order and made a part hereof;

*provided, however,* that if Respondents have divested the Group A Product Assets to ANI Pharmaceuticals 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 ANI Pharmaceuticals is not an acceptable purchaser of any of the Group A Product Assets, then Respondents shall immediately rescind the transaction with ANI Pharmaceuticals, in whole or in part, as directed by the Commission, and shall divest the Group A 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 Group A Product Assets to ANI Pharmaceuticals 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

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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 Group A Product Assets to ANI Pharmaceuticals (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 ten (10) days after the Acquisition Date, Respondents shall divest the Azelastine Product Assets and the Olopatadine Product Assets (to the extent that such assets are not already owned, controlled or in the possession of Perrigo), absolutely and in good faith, to Perrigo pursuant to, and in accordance with, the Azelastine /Olopatadine 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 Perrigo or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Azelastine Product Assets or the Olopatadine Product Assets is incorporated by reference into this Order and made a part hereof;

*provided however*, that if Respondents have divested the Azelastine Product Assets or the Olopatadine Product Assets to Perrigo 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 Azelastine Product Assets or the Olopatadine Product Assets (whichever is relevant) to Perrigo (including, but not limited to, entering into additional agreements or arrangements) as the

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Commission may determine are necessary to satisfy the requirements of this Order.

- C. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the Fluocinonide Product Assets (to the extent that such assets are not already owned, controlled or in the possession of G&W), absolutely and in good faith, to G&W pursuant to, and in accordance with, the Fluocinonide 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 G&W or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the G&W Product Assets is incorporated by reference into this Order and made a part hereof;

*provided however*, that if Respondents have divested the Fluocinonide Product Assets to G&W 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 Fluocinonide Product Assets to G&W (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- D. Prior to the Closing Date for each respective Divestiture Product, Respondent 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.

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- E. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the 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.
- F. 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

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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

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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.

- G. 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

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the execution of each such release, Respondents shall provide a copy of the release to that Acquirer.

- H. Respondents 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 Respondents 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.
- I. Respondents shall:
1. upon reasonable written notice and request from the Acquirer to Respondents, Contract Manufacture and deliver, or cause to be manufactured and delivered, to the requesting Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products at Supply Cost, for a period of time sufficient to allow the Acquirer (or the Manufacturing Designee of the Acquirer) to obtain all of the relevant Product Approvals necessary to manufacture in commercial quantities, and in a manner consistent with cGMP, the finished dosage form drug product independently of Respondents, and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and necessary components listed in Application(s) of a Respondent from Persons other than Respondents;
  2. make representations and warranties to the Acquirer that the Contract Manufacture Product(s) supplied by Respondents pursuant to a Remedial Agreement meet the relevant Agency-approved specifications;



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3. for the Contract Manufacture Product(s) to be marketed or sold in the United States, 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 Respondents 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 Respondents' 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) Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by

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Respondents, and (ii) Respondents are 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 Manufacturer Product for which Respondents purchase the active pharmaceutical ingredient(s), components(s), or excipient(s) from a Third Party, provide that Acquirer with the actual price paid by Respondents 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 Respondents are 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 Respondents' 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 Respondents become (i) unable to supply or produce a Contract Manufacture Product

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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 Respondents use or have used to source their 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 ninety (90) 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 Respondents and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling that Acquirer (or the Manufacturing Designee of that Acquirer) to obtain all Product Approvals to manufacture the

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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 Respondents and sufficient to satisfy management of the Acquirer that its personnel (or the Manufacturing Designee's personnel) are adequately trained in the manufacture of the Contract Manufacture Products.

The foregoing 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 Respondents; (ii) the date the Acquirer notifies the Commission and Respondents of their intention to abandon their 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.

- 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 the Acquirer's business.
- K. Respondents shall require, as a condition of continued employment post-divestiture of the Divestiture Product

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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).

- L. Not later than ten (10) 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.

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## M. 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;

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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

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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.



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- N. If the Acquirer of the Aspirin/Dipyridamole ER Product Assets has not obtained all of the relevant Product Approvals necessary to manufacture (in a manner consistent with cGMP), market, and sell the Aspirin/Dipyridamole ER Products in commercial quantities by July 1, 2019, then, at the request of that Acquirer, Respondents shall:
1. grant an immediate license to that Acquirer to enable that Acquirer to market and sell the Amneal Aspirin/Dipyridamole ER Products;
  2. supply the Amneal Aspirin/Dipyridamole ER Products to that Acquirer in commercial quantities in time to enable the Acquirer to commence the delivery of the Amneal Aspirin/Dipyridamole ER Products to customers by October 1, 2019;
  3. make representations and warranties to the Acquirer that the Amneal/Dipyridamole ER Products supplied by Respondents pursuant to a Remedial Agreement meet the relevant Agency-approved specifications;
  4. agree to hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure of the Amneal Aspirin/Dipyridamole ER Products to be delivered in a timely manner *unless* (i) Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents, and (ii) Respondents are able to cure the supply failure not later than thirty (30) days after the receipt of notice from the Acquirer of a supply failure;
  5. give the firm purchase orders of the Acquirer for the Amneal Aspirin/Dipyridamole ER Products equal footing with the manufacture and supply of the Amneal Aspirin/Dipyridamole ER Products for Respondents' own use or sale; and

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6. not be entitled to terminate any agreement to supply the Amneal Aspirin/Dipyridamole ER Products to the Acquirer due to that Acquirer's 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;

The above-described requirements for the Respondents to license and supply the Amneal Aspirin/Dipyridamole ER Products shall continue until the earliest of the following dates: (i) the date that Acquirer terminates the license and supply; (ii) the date one (1) month after that Acquirer receives all relevant Product Approvals necessary to manufacture (in a manner consistent with cGMP), market, and sell the Aspirin/Dipyridamole ER Products in commercial quantities; or (iii) March 1, 2021.

- O. 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;

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- 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.
- P. Respondents shall not, in the United States:
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.

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- Q. 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 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. 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

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offer for sale within the United States 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. 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.

- R. 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 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.
- S. 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

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marketing, sale, or offer for sale within the United States 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, 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.
- T. 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;
  2. to create a viable and effective competitor that is independent of Respondents in the Business of each Divestiture Product within the United States; and
  3. to remedy the lessening of competition resulting from the Acquisition as alleged in the

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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:

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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 consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or 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 or an Aspirin/Dipyridamole ER 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 Respondents;
  - b. the date the Acquirer of that Divestiture Product notifies the Commission and Respondents of its intention to abandon its efforts to manufacture that Divestiture Product; or



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- 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 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. 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

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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 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 Respondents have filed their 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.
- 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

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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

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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.

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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

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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

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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.

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- 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;



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*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,

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as applicable, and to have any such manufacture to be independent of Respondents, all as soon as reasonably practicable.

- E. No Respondent shall seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Divestiture Products, a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.
- F. No Respondent shall modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

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

- A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition Date occurred, including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at [ElectronicFilings@ftc.gov](mailto:ElectronicFilings@ftc.gov) and to the Compliance Division at [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov).
- B. Within five (5) days of each Closing Date, Respondents shall submit to Commission staff a letter certifying the date on which that particular divestiture occurred, including a paper original submitted to the Secretary of the Commission and electronic copies to

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the Secretary at [ElectronicFilings@ftc.gov](mailto:ElectronicFilings@ftc.gov) and to the Compliance Division at [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov).

- C. Within thirty (30) days after the Order Date, and every ninety (90) days thereafter until Respondents have (i) completed their 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 the Acquirer, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondents intend to comply, are complying, and have complied with these requirements of this Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with 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 and/or consulting services being provided by Respondents to the Acquirer, and (iii) the agreement(s) to Contract Manufacture; and
  2. a detailed description of the timing for the completion of such obligations.
- D. 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. In addition to the foregoing, Respondents 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

## Decision and Order

of each of these Retained Products by Respondents for either the one-year period immediately preceding the report or the full calendar or fiscal year that immediately precedes the report.

- E. Respondents shall verify each compliance report with a notarized signature or sworn statement of the Chief Executive Officer or other officer or employee specifically authorized to perform this function, or self-verified in the manner set forth in 28 U.S.C. § 1746. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at [ElectronicFilings@ftc.gov](mailto:ElectronicFilings@ftc.gov) and to the Compliance Division at [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

**VIII.**

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

- A. any proposed dissolution of Amneal Holdings, LLC, Amneal Pharmaceuticals LLC, Amneal Pharmaceuticals, Inc., Impax Laboratories, Inc., or Impax Laboratories LLC;
- B. any proposed acquisition, merger, or consolidation of Amneal Holdings, LLC, Amneal Pharmaceuticals LLC, Amneal Pharmaceuticals, Inc., Impax Laboratories, Inc., or Impax Laboratories LLC; 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.

## Decision and 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 place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters address, the notified 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 business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), 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 June 29, 2028.

By the Commission.

Decision and Order

**NON-PUBLIC APPENDIX I  
ACQUISITION AGREEMENT****[Cover Page]****[Redacted From the Public Record Version, But Incorporated  
By Reference]****NON-PUBLIC APPENDIX II.A  
AGREEMENTS RELATED TO THE  
GROUP A PRODUCTS REMEDY****[Cover Page]****[Redacted From the Public Record Version, But Incorporated  
By Reference]****NON-PUBLIC APPENDIX II.B.  
AGREEMENTS RELATED TO THE  
AZELASTINE PRODUCT AND OLOPATADINE  
PRODUCT REMEDY****[Cover Page]****[Redacted From the Public Record Version, But Incorporated  
By Reference]**

Analysis to Aid Public Comment

**NON-PUBLIC APPENDIX II.C.  
AGREEMENTS RELATED TO THE  
FLUOCINONIDE PRODUCT REMEDY**

**[Cover Page]**

**[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 Amneal Holdings, LLC, Amneal Pharmaceuticals LLC (collectively, “Amneal”), Impax Laboratories, Inc., and Impax Laboratories, LLC (collectively, “Impax”) that is designed to remedy the anticompetitive effects resulting from Amneal’s acquisition of equity interests of Impax. Under the terms of the proposed Consent Agreement, the parties are required to divest all of Impax’s rights and assets related to the following seven products to ANI Pharmaceuticals, Inc. (“ANI”): generic desipramine hydrochloride tablets; generic felbamate tablets; generic aspirin and dipyridamole extended release (“ER”) capsules; generic diclofenac sodium and misoprostol delayed release (“DR”) tablets; generic ezetimibe and simvastatin immediate release (“IR”) tablets; generic erythromycin tablets; and generic methylphenidate hydrochloride ER tablets. Pursuant to the Consent Agreement, the parties also are required to divest all of Impax’s rights and assets related to generic azelastine nasal spray and generic olopatadine hydrochloride nasal spray to Perrigo Company plc (“Perrigo”), and to divest all of Impax’s rights and assets related to generic fluocinonide-E cream to G&W Laboratories (“G&W”).

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments from

## Analysis to Aid Public Comment

interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again evaluate the proposed Consent Agreement, along with the comments received, to make a final decision as to whether it should withdraw from the proposed Consent Agreement, modify it, or make final the Decision and Order (“Order”).

Pursuant to agreements dated October 17, 2017, Amneal proposes to acquire the equity interests of Impax in a series of transactions valued at approximately \$1.45 billion (the “Proposed Acquisition”). The Commission alleges in its Complaint that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening current competition in the following three U.S. markets: (1) generic desipramine hydrochloride tablets; (2) generic ezetimibe and simvastatin IR tablets; and (3) generic felbamate tablets. The Commission also alleges that the Proposed Acquisition would violate the aforementioned statutes by lessening future competition in the following seven U.S. markets: (1) generic aspirin and dipyridamole ER capsules; (2) generic azelastine nasal spray; (3) generic diclofenac sodium and misoprostol DR tablets; (4) generic erythromycin tablets; (5) generic fluocinonide-E cream; (6) generic methylphenidate hydrochloride ER tablets; and (7) generic olopatadine hydrochloride nasal spray. 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**

In human pharmaceutical markets, price generally decreases as the number of generic competitors increases. Prices continue to decrease incrementally with the entry of the second, third, fourth, and even fifth generic oral pharmaceutical competitor. Accordingly, the reduction in the number of suppliers within each relevant market has a direct and substantial effect on pricing.

The Proposed Acquisition would reduce current competition in the markets for three products: (1) generic desipramine



## Analysis to Aid Public Comment

hydrochloride tablets; (2) generic ezetimibe and simvastatin IR tablets; and (3) generic felbamate tablets.

Desipramine hydrochloride, a tricyclic antidepressant, is sold by only three companies, other than Amneal and Impax, in the United States: Heritage Pharmaceuticals, Inc., Sandoz (a subsidiary of Novartis AG), and Teva Pharmaceutical Industries Ltd. (“Teva”).

Ezetimibe and simvastatin is used to improve cholesterol and lower triglycerides. Only four companies currently sell generic ezetimibe and simvastatin IR tablets in the United States: Amneal, Impax, Dr. Reddy’s Laboratories, and Teva.

Felbamate is an anticonvulsant used in the treatment of epilepsy. For generic felbamate tablets, Alvogen, and Wallace Pharmaceuticals, Inc. (“Wallace”) are the only two companies in addition to Amneal and Impax that sell the product in the United States.

The Proposed Acquisition also would reduce future competition in seven markets in which Amneal or Impax is a current competitor and the other is likely to enter the market: (1) generic aspirin and dipyridamole ER capsules; (2) generic azelastine nasal spray; (3) generic diclofenac sodium and misoprostol DR tablets; (4) generic erythromycin tablets; (5) generic fluocinonide-E cream; (6) generic methylphenidate hydrochloride ER tablets; and (7) generic olopatadine hydrochloride nasal spray.

Aspirin and dipyridamole is an antiplatelet therapy used to reduce the risk of stroke. Amneal is the only company currently selling generic aspirin and dipyridamole ER capsules in the United States, and Impax is one of only a limited number of suppliers capable of entering the market in the near future.

Azelastine nasal spray is used to treat seasonal allergies. Impax partners with Perrigo to sell generic azelastine nasal spray. In addition, Wallace and Apotex Inc. also sell the product. Amneal, one of a limited number of suppliers capable of entering the market for generic azelastine nasal spray in the near future,

## Analysis to Aid Public Comment

already has tentative approval from the United States Food and Drug Administration (“FDA”).

Diclofenac sodium and misoprostol is used to provide pain relief while minimizing gastrointestinal side effects. Four companies—Amneal, Teva, Sandoz, and Exela Pharma Sciences LLC (“Exela”)—have approved ANDAs to sell generic diclofenac sodium and misoprostol DR tablets in the United States. In addition, Greenstone LLC, a Pfizer subsidiary, sells an authorized generic version. Sandoz does not sell its product directly to customers and supplies only to a private labeler. The Exela product, marketed by both Eagle Pharmaceuticals, Inc. and Dash Pharmaceuticals LLC, has limited sales. Impax, partnered with Micro Labs Limited, is one of only a few suppliers capable of entering the market for generic diclofenac sodium and misoprostol DR tablets in the near future.

Erythromycin is an antibiotic that had only one supplier, Arbor Pharmaceuticals, LLC, before the FDA approved Amneal’s ANDA for generic erythromycin tablets in March of 2018. Amneal is the only supplier of generic erythromycin tablets in the United States. Impax is one of only a few suppliers capable of entering the market for generic erythromycin in the near future.

Fluocinonide-E cream, a topical corticosteroid used to reduce swelling, redness, itching, and allergic reactions, is sold in generic form by Impax, Alvogen, Sun Pharmaceutical Industries Ltd., and Teva in the United States. Amneal is one of very few suppliers capable of entering the market for generic fluocinonide-E cream in the near future.

Methylphenidate hydrochloride is a central nervous system stimulant used to treat attention-deficit disorder and attention-deficit/hyperactivity disorder. Only four companies currently sell generic methylphenidate hydrochloride ER tablets in the United States: Amneal, Mylan N.V., Teva, and Trigen Labs. Impax is one of only a limited number of suppliers capable of entering the market for generic methylphenidate hydrochloride ER tablets in the near future.

## Analysis to Aid Public Comment

Olopatadine hydrochloride nasal spray is used to treat seasonal allergies. Generic olopatadine hydrochloride nasal spray is sold in the United States by Sandoz, Apotex, and Impax partnered with Perrigo. Amneal is one of very few suppliers capable of entering the market in the near future.

**II. Entry**

Entry into the ten 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 FDA, is costly and lengthy.

**III. Competitive Effects**

The Proposed Acquisition likely would cause significant anticompetitive harm to consumers by eliminating current competition between Amneal and Impax in the markets for generic desipramine hydrochloride tablets, generic ezetimibe and simvastatin IR tablets, and generic felbamate tablets. Generic desipramine hydrochloride tablets, generic ezetimibe and simvastatin IR tablets, and generic felbamate tablets are commodity products, 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. Customers also raise concerns about their ability to source product at a competitive price if one supplier experiences manufacturing difficulties when there are fewer competitors in the market. The Proposed Acquisition would combine two of the only five companies selling generic desipramine hydrochloride tablets, and would combine two of the only four companies selling generic ezetimibe and simvastatin IR tablets and generic felbamate tablets, likely resulting in higher prices.

But for the proposed Consent Agreement, the Proposed Acquisition also is likely to delay the introduction of beneficial competition, and subsequent price decreases, by eliminating

## Analysis to Aid Public Comment

future competition in seven markets in which either Amneal or Impax is a current competitor and the other is likely to enter. Multiple customers expressed concerns about the effect of the proposed merger on the market for generic aspirin and dipyridamole ER capsules, in which Amneal is the only current generic competitor and Impax is approved to enter. Impax is one of only three competitors providing generic azelastine nasal spray, and the imminent entry of Amneal likely would allow customers to negotiate more competitive prices and secure adequate supply. Impax is one of very few well-positioned entrants in the market for generic diclofenac sodium and misoprostol DR tablets, in which Amneal is one of four current competitors, and customers note that they would benefit from additional entry to negotiate pricing. Amneal is the only generic erythromycin tablet competitor, and Impax is one of a limited number of companies with products in development that upon entry would allow customers to negotiate lower prices. Amneal is the only foreseeable entrant in the market for generic fluocinonide-E cream, in which Impax is one of only three competitors. In the market for generic methylphenidate hydrochloride ER tablets, Amneal is one of four current competitors and Impax is one of few potential entrants. Finally, Amneal is one of only a few entrants poised to enter the market for generic olopatadine hydrochloride nasal spray, in which Impax is one of only three current competitors. Absent a remedy, the Proposed Acquisition likely would cause U.S. consumers to pay higher prices for the aforementioned generic products.

**IV. The Consent Agreement**

As the Commission explained in its remedy review, *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics* (hereafter "*The FTC Merger Remedies Study*")<sup>1</sup>, products made at third-party manufacturing sites are easier to divest and involve less risk than the technology transfer from in-house manufacturing to a new facility, and thus

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<sup>1</sup> See *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics* (Jan. 2017) at 36-37, [https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-com-petition-economics/p143100\\_ftc\\_merger\\_remedies\\_2006-2012.pdf](https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-com-petition-economics/p143100_ftc_merger_remedies_2006-2012.pdf).

## Analysis to Aid Public Comment

help ensure the success of divestitures. As a result, in most cases, if one of the products is developed or manufactured by a third party, the Commission will require divestiture of that product.

Additionally, in mergers involving complex pharmaceutical products that are difficult to manufacture, the Commission generally will require the divestiture of an on-market product over a pipeline product to place the greater risk on the merging parties rather than the public, with exceptions for compelling and fact-specific reasons. When such compelling, fact-specific reasons exist, “The goal of a divestiture is to put the product development effort (including any pending regulatory filings) in the hands of a new firm with the same ability and incentive to bring the pipeline product to market.”<sup>2</sup>

The proposed Consent Agreement conforms to this approach and remedies the competitive concerns raised by the Proposed Acquisition in the generic azelastine nasal spray and generic olopatadine hydrochloride nasal spray markets by requiring Impax to return any rights and assets it has to its partner and ANDA-owner for these products, Perrigo. The proposed Consent Agreement remedies the competitive concerns raised by the Proposed Acquisition in the generic fluocinonide-E cream market by requiring Impax to return any rights and assets it has to its partner and ANDA-owner for this product, G&W. The parties must accomplish these divestitures no later than ten days after they consummate the Proposed Acquisition.

The proposed Consent Agreement remedies the competitive concerns raised by the Proposed Acquisition in seven of the markets at issue by requiring Impax to divest all of its rights and assets related to those products to ANI. ANI is a pharmaceutical corporation that develops, manufactures, sells, and distributes solid oral, liquid, and topical pharmaceutical products in the United States. ANI’s track record in developing and bringing to market pipeline products suggests that the divested products will be placed in the hands of a firm with the same ability and incentive to bring the products to market. As explained below, the Consent Agreement helps make that outcome more likely.

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<sup>2</sup> See *The FTC’s Merger Remedies Study* at 31.

## Analysis to Aid Public Comment

For two of the products that both Amneal and Impax currently market, generic desipramine hydrochloride tablets and felbamate tablets, Impax will assign its contract manufacturing agreements to ANI. For the third currently-marketed product, Amneal will supply ANI with generic ezetimibe and simvastatin IR tablets for two years with the option to extend for two additional years.

In four overlap markets in which Amneal has an on-market product and Impax has a product in development, Impax will divest its rights and assets to ANI rather than requiring Amneal to divest its on-market, in-house manufactured products. Each of these product markets has specific facts that warrant the divestiture of the Impax rights and assets rather than the Amneal product. Of note, three products—generic aspirin and dipyridamole ER capsules, generic methylphenidate hydrochloride ER tablets, and generic diclofenac sodium and misoprostol DR tablets—are more complicated to manufacture because they have extended or delayed release characteristics.

For generic aspirin and dipyridamole ER capsules, Amneal is the only manufacturer with a product on the market. Amneal manufactures this product in-house. Impax received FDA approval for its ANDA in 2017 and had expected to use a third-party manufacturer to launch its product. That manufacturer experienced some manufacturing difficulties and Impax had begun the process of developing the means to produce the product at its own facilities. With the divestiture, ANI will finalize the manufacturing process and expects to have the Impax drug on the market soon. Nevertheless, should ANI be unable to market its own version of this product by October 1, 2019, ANI has the option to source generic aspirin and dipyridamole ER capsules from Amneal until ANI obtains the necessary regulatory approvals or through March 1, 2021, whichever date is earlier. This ensures that ANI will be able to market a competing product near the time Impax likely would have had the product on market, and provides the incentive for ANI to manufacture and market its own product. An alternative divestiture of the Amneal product would involve more risk and could jeopardize the only generic product on the market.

## Analysis to Aid Public Comment

The FDA approved Amneal's ANDA for generic methylphenidate hydrochloride ER tablets in February 2018. Impax also has an approved ANDA. Impax's product is contract manufactured, but the contract manufacturer needs to resolve manufacturing issues before it can resume manufacturing the product. It will be less risky for Impax to assign its manufacturing contract to ANI than to affect a technology transfer from Amneal for this complex product, and it will put the product in ANI's hands, which has the same ability and incentive as Impax to bring methylphenidate hydrochloride ER tablets to market. Thus, the proposed Order requires the divestiture of Impax's rights and assets to ANI.

For generic diclofenac sodium and misoprostol DR tablets, Amneal has an on-market in-house manufactured product, and Impax is partnered with Micro Labs to commercialize a competing product. Impax holds only marketing rights to the product; Micro Labs is responsible for development and manufacturing. Impax will transfer its marketing agreement with Micro Labs to ANI, and Micro Labs will manufacture the product for ANI for the current contract term.

For erythromycin tablets, Amneal launched its product in March 2018, and only one other competitor, Arbor Pharmaceuticals, is currently selling erythromycin tablets. Amneal manufactures the erythromycin tablets in-house. Impax is one of a few companies developing the product, and once approved, it plans to outsource the manufacturing. Here, the easier-to-divest product is the Impax drug in development. Thus, Commission staff considers it prudent to leave the in-house Amneal-manufactured product with the merged firm, an ongoing and viable competitor to Arbor. Further, Impax will transfer all of its assets related to its development of erythromycin tablets to ANI, which has the same ability and incentive to bring a competing third erythromycin tablet to market.

The proposed Order also requires Amneal to provide transitional services to ANI, Perrigo, and G&W to assist them in establishing their manufacturing capabilities and securing all of the necessary FDA approvals. These transitional services include technical assistance to manufacture the ten products at issue in

## Analysis to Aid Public Comment

substantially the same manner and quality employed or achieved by Impax. 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 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 ANI, Perrigo, and/or G&W are not acceptable acquirers, or that the manner of the divestitures is not acceptable, the proposed Order requires the parties to unwind the sale of rights to ANI, Perrigo, and/or G&W and then divest the affected 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 purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Order or to modify its terms in any way.



INTERLOCUTORY, MODIFYING,  
VACATING, AND MISCELLANEOUS  
ORDERS

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IN THE MATTER OF

**LOUISIANA REAL ESTATE APPRAISERS  
BOARD**

*Docket No. 9374. Order, January 10, 2018*

Order scheduling oral argument on Respondent's Motion to Dismiss Complaint and Complaint Counsel's Motion for Partial Summary Decision.

ORDER SCHEDULING CONSOLIDATED ORAL ARGUMENT AND  
EXTENDING DEADLINES FOR COMMISSION RULINGS

On November 27, 2017, Respondent Louisiana Real Estate Appraisers Board filed a Motion to Dismiss Complaint in this proceeding. On that same date, Complaint Counsel submitted a Motion for Partial Summary Decision. Both motions raise issues regarding application of the state action doctrine. Respondent's Motion argues that re-promulgation of a regulation, establishment of new procedures, and various steps to address ongoing or prospective effects of prior regulation – all of which have occurred after issuance of the Commission's Complaint – bring Respondent's activities within the scope of the state action doctrine and render this proceeding moot. Complaint Counsel's Motion seeks summary determination that two of Respondent's defenses – asserting that “[t]he Complaint fails adequately to allege that the Board has a controlling number of active participants in the relevant **residential** appraisal market” (emphasis in original) and that “LREAB is immune from antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943)” – should be dismissed. Each party has since opposed the other's motion and has filed a timely Reply in support of its own motion.

Respondent has requested oral argument regarding its Motion to Dismiss, and we believe that entertaining oral argument on both motions would be beneficial. Although both parties should be prepared to address all issues raised by both motions, we

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instruct the parties to focus their attention during the oral argument on the following question:

Since the issuance of the Complaint, has the State of Louisiana taken sufficient steps to establish active supervision over the conduct of the Respondent at issue in this matter?

The Commission has determined to conduct the oral argument on Thursday, February 22, 2018, at 2:00 p.m. in Hearing Room 532 of the Headquarters Building of the Federal Trade Commission, located at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Each side will be allotted 30 minutes to present its argument. Respondent will have the opportunity to open the argument and will be permitted to reserve time for rebuttal. The Commission's deadlines for ruling upon the motions, currently 45 days after the respective Reply filings, will be adjusted to a date 45 days after the oral argument. Accordingly,

**IT IS HEREBY ORDERED** that the Commission will conduct oral argument regarding Respondent's Motion to Dismiss Complaint and Complaint Counsel's Motion for Partial Summary Decision on February 22, 2018, as specified above; and

**IT IS FURTHER ORDERED** that the Commission's deadlines for ruling on Respondent's Motion to Dismiss Complaint and Complaint Counsel's Motion for Partial Summary Decision are extended to April 9, 2018.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**LOUISIANA REAL ESTATE APPRAISERS  
BOARD**

*Docket No. 9374. Order, January 12, 2018*

Order denying Respondent's motion to stay proceeding.

**ORDER DENYING RESPONDENT'S EXPEDITED MOTION TO STAY  
PART 3 ADMINISTRATIVE PROCEEDING AND MOVE THE  
EVIDENTIARY HEARING DATE**

On January 10, 2018, the Commission issued an order scheduling oral argument on two pending motions in this proceeding – a Motion to Dismiss Complaint, filed by Respondent Louisiana Real Estate Appraisers Board, and a Motion for Partial Summary Decision, filed by Complaint Counsel (“the pending motions”). The Commission's order scheduled oral argument on February 22, 2018, and moved the deadlines for the Commission's rulings on the pending motions to April 9, 2018.

One day later, Respondent moved (1) to stay the administrative proceeding until the Commission renders its decisions on the pending motions and (2) to delay the start of the evidentiary hearing from May 30, 2018, to August 27, 2018. Respondent argues that granting its motion would avoid expenses of pretrial activity, including discovery and the preparation of expert reports, that might prove unnecessary, depending on how the Commission resolves the pending motions. Respondent further asserts that the delay it seeks would not prejudice the public interest. In opposing Respondent's motion, Complaint Counsel argues that Commission rules contemplate proceeding with discovery and other pretrial activities without delay and that Respondent has identified no unusual circumstances that would warrant a stay.

Commission Rule of Practice 3.22(b), 16 C.F.R. § 3.22(b) states in relevant part: “A motion under consideration by the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission so orders . . . .” When the

## Interlocutory Orders, Etc.

Commission first adopted this Rule, it explained that the provision's "purpose . . . was to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motions . . . ." 16 C.F.R. Parts 3 and 4: Rules of Practice, 74 Fed. Reg. 1804, 1810 (Jan. 13, 2009).<sup>1</sup> The Commission, nonetheless, left itself discretion to order a stay in appropriate cases.

The Commission has determined that a stay of the proceedings pending before Chief Administrative Law Judge D. Michael Chappell is not warranted. Respondent premises its motion on a desire to avoid the cost of discovery and other pretrial activities that might prove unnecessary depending on how the Commission resolves the pending motions. The expenses at issue, however, are normal consequences of litigation, routinely borne by litigants while dispositive motions are pending.

Generally, routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters.<sup>2</sup> In this instance, our concern for expedition is heightened by the fact that, as previously requested by Respondent, the presiding Administrative Law Judge and the Commission have already stayed this proceeding and delayed

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<sup>1</sup> See also 16 CFR Parts 3 and 4: Rules of Practice: Proposed Rule Amendments and Request for Public Comment, 73 Fed. Reg. 58832, 58834 (Oct. 7, 2008) ("Rules 3.22 and 3.24 [if amended as proposed] would provide authority to the Commission to decide in the first instance all dispositive prehearing motions, including motions for summary decision, unless it refers the motion to the ALJ, while at the same time ensuring that the underlying proceedings are not stayed pending resolution of the dispositive motion absent a Commission order"); *id.* at 58836 ("The Commission anticipates that new paragraphs [3.22](b) and (e) would expedite cases by providing that proceedings before the ALJ will not be stayed while the Commission considers a motion, unless the Commission orders otherwise . . .").

<sup>2</sup> See 16 CFR Parts 3 and 4: Rules of Practice, 74 Fed. Reg. 1804, 1805 (Jan. 13, 2009) (explaining that in amending its rules for adjudicative proceedings, the Commission "intended . . . to balance three important interests: the public interest in a high quality decisionmaking process, the interests of justice in an expeditious resolution of litigated matters, and the interest of the parties in litigating matters without unnecessary expense").

## Interlocutory Orders, Etc.

commencement of the evidentiary hearing by four months.<sup>3</sup> Further stay and additional delay would not be appropriate. *Cf. North Carolina Bd. of Dental Exam'rs*, 150 F.T.C. 851 (2010) (denying a motion to stay proceedings in order to avoid pretrial expenses, pending the Commission's ruling on a motion to dismiss and a motion for partial summary decision).

Accordingly,

**IT IS ORDERED** that the Expedited Motion of Respondent Louisiana Real Estate Appraisers Board to Stay Part 3 Administrative Proceedings and Move the Evidentiary Hearing Date is hereby **DENIED**.

By the Commission.

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<sup>3</sup> The evidentiary hearing was originally scheduled to begin on January 30, 2018. On July 18, 2017, Respondent moved to stay the proceeding and to extend the commencement of trial to May 30, 2018. Complaint Counsel objected. On July 28, 2017, the presiding Administrative Law Judge stayed the proceeding for 90 days. Subsequently, the Commission granted a joint motion by Respondent and Complaint Counsel to stay the proceeding nearly an additional month and to move the commencement of trial to May 30, 2018. Order Continuing Stay and Postponing the Evidentiary Hearing (Oct. 26, 2017).

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**1-800 CONTACTS, INC.**

*Docket No. 9372. Order, January 19, 2018*

Order staying proceedings and extending deadlines in the event of a lapse in appropriations.

**ORDER REGARDING SCHEDULING**

In the event that a lapse in appropriations results in a shutdown of most Commission operations, the Commission hereby directs that this proceeding be fully stayed during the duration of the shutdown and for an additional five business days thereafter. The oral argument date will be delayed -- and any pre-oral argument deadlines will be extended -- by the number of calendar days of this stay.

**IT IS SO ORDERED.**

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**IMPAX LABORATORIES, INC.**

*Docket No. 9373. Order, January 19, 2018*

Order staying proceedings and extending deadlines in the event of a lapse in appropriations.

**ORDER REGARDING SCHEDULING**

In the event that a lapse in appropriations results in a shutdown of most Commission operations, the Commission hereby directs that this proceeding be fully stayed for the duration of the shutdown and for an additional five business days thereafter. Any post-hearing deadlines will be extended by the number of calendar days of the stay. Accordingly,

**IT IS SO ORDERED.**

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**LOUISIANA REAL ESTATE APPRAISERS  
BOARD**

*Docket No. 9374. Order, January 19, 2018*

Order staying proceedings and extending deadlines in the event of a lapse in appropriations.

**ORDER REGARDING SCHEDULING**

In the event that a lapse in appropriations results in a shutdown of most Commission operations, the Commission hereby directs that the proceedings before the Administrative Law Judge shall be fully stayed for the duration of the shutdown and for an additional five business days thereafter. The evidentiary hearing date and any pre-hearing deadlines shall be extended by the number of calendar days of this stay. The Administrative Law Judge retains discretion to adjust any such pre-hearing deadlines to the extent compatible with the hearing date as extended by this Order or to make a recommendation to the Commission regarding an alternative hearing date. Absent further direction, the oral argument before the Commission regarding Respondent's Motion to Dismiss Complaint and Complaint Counsel's Motion for Partial Summary Decision remains scheduled for February 22, 2018. Accordingly,

**IT IS SO ORDERED.**

By the Commission.



Interlocutory Orders, Etc.

**IN THE MATTER OF**

**TRONOX LIMITED,  
NATIONAL INDUSTRIALIZATION COMPANY  
(TASNEE),  
NATIONAL TITANIUM DIOXIDE COMPANY  
LIMITED (CRISTAL),  
AND  
CRISTAL USA INC.**

*Docket No. 9377. Order, January 19, 2018*

Order staying proceedings and extending deadlines in the event of a lapse in appropriations.

**ORDER REGARDING SCHEDULING**

In the event that a lapse in appropriations results in a shutdown of most Commission operations, the Commission hereby directs that this proceeding be fully stayed for the duration of the shutdown and for an additional five business days thereafter. The evidentiary hearing date and all pre-hearing deadlines will be extended by the number of calendar days of this stay. The Administrative Law Judge retains discretion to adjust any such pre-hearing deadlines to the extent compatible with the hearing date as extended by this Order or to make a recommendation to the Commission regarding an alternative hearing date. Accordingly,

**IT IS SO ORDERED.**

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**OTTO BOCK HEALTHCARE NORTH AMERICA,  
INC.**

*Docket No. 9378. Order, January 19, 2018*

Order staying proceedings and extending deadlines in the event of a lapse in appropriations.

**ORDER REGARDING SCHEDULING**

In the event that a lapse in appropriations results in a shutdown of most Commission operations, the Commission hereby directs that this proceeding be fully stayed for the duration of the shutdown and for an additional five business days thereafter. The evidentiary hearing date and all pre-hearing deadlines shall be extended by the number of calendar days of this stay. The Administrative Law Judge retains discretion to adjust any such pre-hearing deadlines to the extent compatible with the hearing date as extended by this Order or to make a recommendation to the Commission regarding an alternative hearing date. Accordingly,

**IT IS SO ORDERED.**

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**ZIMMER HOLDINGS, INC.,  
LVB ACQUISITION, INC.,  
AND  
BIOMET, INC.**

*Docket No. C-4534. Order, February 7, 2018*

Letter Order granting the Application of Zimmer Biomet Holdings, Inc. to modify the agreements with DJO Global, Inc.

**LETTER ORDER APPROVING MODIFICATIONS**

Mr. George L. Paul, Esq.  
White & Case LLP

Re: *In the Matter of Zimmer Holdings, Inc. and Biomet, Inc.*,  
Docket No. C-4534

Dear Mr. Paul,

Pursuant to Rule 2.41(f) of the Commission's Rules of Practice, the Commission has determined to approve the Application of Zimmer Biomet Holdings, Inc. ("Zimmer") (December 6, 2017) to modify the agreements with DJO Global, Inc. which are incorporated into the Commission's Order in the above matter. In according its approval to Zimmer's Application, the Commission has relied upon the information submitted by Zimmer, and the Commission has assumed that information to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**LOUISIANA REAL ESTATE APPRAISERS  
BOARD**

*Docket No. 9374. Order, February 16, 2018*

Order denying respondent's motion to reconsider the Commission's January 12 order.

**ORDER DENYING RESPONDENT'S RENEWED EXPEDITED MOTION  
TO STAY PART 3 ADMINISTRATIVE PROCEEDINGS AND MOVE THE  
EVIDENTIARY HEARING DATE**

On January 10, 2018, the Commission issued an order scheduling oral argument on two pending motions in this proceeding - a Motion to Dismiss Complaint, filed by Respondent Louisiana Real Estate Appraisers Board, and a Motion for Partial Summary Decision, submitted by Complaint Counsel ("the pending motions"). The Commission's order scheduled oral argument on February 22, 2018, and moved the deadlines for the Commission's rulings on the pending motions to April 9, 2018.

One day later, Respondent moved (1) to stay the administrative proceeding until the Commission renders its decisions on the pending motions and (2) to delay the start of the evidentiary hearing from May 30, 2018 to August 27, 2018. Respondent argued that granting its motion would avoid expenses of pretrial activity that might prove unnecessary, depending on how the Commission resolves the pending motions. On January 12, 2018, the Commission denied Respondent's motion. The Commission found that routine discovery costs of the type that Respondent sought to avoid generally do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters. The Commission also noted that, as previously requested by Respondent, the Commission had already stayed the proceeding and delayed commencement of the evidentiary hearing by four months.

On January 31, 2018, Respondent requested that the Commission reconsider its January 12 order; stay the administrative proceeding until after the Commission renders its

## Interlocutory Orders, Etc.

decision on the pending motions; and move the starting date for the evidentiary hearing to September 10, 2018. Again, Respondent cites the cost of litigation. It elaborates regarding the burdens and distractions that litigation imposes and urges that a stay could permit the resolution of important issues presented in this case regarding the state action doctrine in a manner least disruptive to its operations and budgetary concerns. Complaint Counsel have opposed Respondent's renewed motion.

Respondent has identified no changes in fact or law or other new considerations or circumstances that would warrant reconsideration. *Cf* Commission Rule of Practice 3.55 (limiting petitions for reconsideration to "new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission"). Viewed as a self-standing request, the renewed motion is largely a repetition and elaboration of arguments that Respondent has already made. For the same reasons stated in our January 12 order, Respondent's renewed motion is denied.

Accordingly,

**IT IS ORDERED** that the Renewed Expedited Motion of Respondent Louisiana Real Estate Appraisers Board to Stay Part 3 Administrative Proceedings and Move the Evidentiary Hearing Date is hereby **DENIED**.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**PEPSICO, INC.**

*Docket No. C-4301. Order, February 26, 2018*

Letter Order extending the term of the Monitor's agreement for an additional three years.

LETTER ORDER APPROVING AMENDMENT TO THE MONITOR'S  
AGREEMENT

Megan H. Hurley  
Senior Vice President, General Counsel  
PepsiCo North America Beverages  
Quaker Foods North America

Eric A. Croson

Re: *In the Matter of PepsiCo, Inc., Docket No. C-4301*

Dear Ms. Hurley and Mr. Croson:

This letter serves to approve the Second Amendment to the Monitor's agreement originally approved by the Commission by letter dated September 27, 2010 (and amended by the First Amendment, which was approved by the Commission by letter dated March 27, 2015), and entered into as of February 1, 2018. The Second Amendment extends the term of the Monitor's agreement for an additional three years.

By direction of the Commission.

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**IN THE MATTER OF**

**1-800 CONTACTS, INC.**

*Docket No. 9372. Order, February 26, 2018*

Order scheduling oral arguments on appeal.

**ORDER SCHEDULING ORAL ARGUMENT**

The Respondent has filed its Appeal Brief perfecting its appeal from the Initial Decision in this matter; Counsel for the Complaint have filed their Answering Brief; and the Respondent has filed its Reply Brief. Commission Rule 3.52(b)(2) provides that the Commission ordinarily will schedule an Oral Argument within fifteen days after the date on which the Reply Brief is filed. Commission Rule 3.51(a) provides that the Commission may extend for good cause any of the time periods relating to an appeal of an Initial Decision. The Commission recognizes that a number of new Commissioners likely will be confirmed in the near future. Thus, the Commission has determined to conduct the Oral Argument in this matter on May 1, 2018, at 2 p.m. in Hearing Room 532 of the Headquarters Building of the Federal Trade Commission, located at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Each side will be allotted forty-five minutes to present its argument. Respondents will have the opportunity to open the argument and will be permitted to reserve time for rebuttal. If either side wishes to provide the Commission with a short written or electronic compilation of material to facilitate its presentation during the Oral Argument, any such compilation may contain only public information that is already in the record of the proceeding, and copies must be filed with the Secretary of the Commission and provided to opposing counsel no later than April 24, 2018 at 2 p.m.

By the Commission.

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**IN THE MATTER OF**

**SEARS HOLDINGS MANAGEMENT  
CORPORATION**

*Docket No. C-4264. Order, February 27, 2018*

Order granting respondent's petition to reopen and modify the Order by changing the definition of "Tracking Application" to exclude software applications that only engage in consumer-expected types of tracking.

**ORDER REOPENING AND MODIFYING ORDER**

On October 31, 2017, Sears Holdings Management Corporation ("Sears") filed a petition pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. § 2.51, asking the Commission to reopen and modify the Order in Docket No. C-4264 ("Order"), issued by the Commission on August 31, 2009.

The Order requires Sears, among other things, to provide clear and prominent notice of the types of information it collects through any tracking software it distributes—defined as a "Tracking Application"—and get consumers' express consent before they download or install the software. In its petition, Sears requests that the Commission modify the definition of Tracking Application as it relates to Sears's mobile applications.

Sears bases its petition on changed conditions of fact that it claims are sufficient to warrant reopening and modifying the Order. Sears asserts that neither it nor the Commission staff who negotiated the Order could have anticipated the tremendous growth of mobile applications, the consolidation in that market to very few platforms, or the importance to retailers such as Sears of being able to interact with customers through mobile applications. Sears argues that these changes have made the Order obsolete because of the significant control the platforms exercise over privacy and disclosures for mobile applications. Sears also argues that modifying the Order would be in the public interest because the current Order puts Sears at a competitive disadvantage in the mobile application market. Sears further contends that the



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Order's disclosure requirements are not in consumers' interest where the data collection by a mobile application is expected and benefits the application's function.

Sears requests that the Commission modify the definition of "Tracking Application" to exclude software applications that only engage in consumer-expected types of tracking. For the reasons stated below, the Commission has determined to grant the petition.

**Background**

On August 31, 2009, the Commission approved a final Complaint and Decision and Order against Sears. The Complaint states that, as part of a "MySHC Community" market research program, Sears offered \$10 to consumers to install a software application on their desktop personal computers. The Complaint alleges that Sears deceptively failed to disclose the full extent of the software's data collection. According to the Complaint, although Sears stated only that the software would track consumers' "online browsing," it in fact tracked nearly all internet activity on consumers' computers; monitored their activity in online secure sessions with other websites; and collected sensitive personal information from those sessions.

Part I of the Order requires Sears to provide clear and prominent notice to consumers of the full collection practices of any "Tracking Application" it offers, and obtain consumers' express consent to that data collection before they download or install the software. "Tracking Application" includes any software "capable of installation on consumers' computers" that is used to "monitor, record, or transmit information about activities occurring on computers on which it is installed, or about data that is stored on, created on, transmitted from, or transmitted to the computers on which it is installed." The definition of "computers" encompasses mobile devices.

Parts II and III of the Order provide remediation to the consumers that downloaded Sears's software before the Complaint. Part II requires Sears to notify consumers who downloaded any Tracking Application (including the MySHC

## Interlocutory Orders, Etc.

Community software) of the full extent of its tracking and collection, and provide them with instructions on how to uninstall it. Part III requires Sears to cease collecting any information through any Tracking Applications installed by consumers prior to service of the Order, and to delete any information Sears had previously collected through such software. The remaining Parts contain standard recordkeeping and reporting provisions.

**Standard to Reopen and Modify**

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent “makes a satisfactory showing that changed conditions of law or fact” so require.<sup>1</sup> A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in law or fact and shows that the changes either eliminate the need for the order or make continued application of it inequitable or harmful to competition.<sup>2</sup> Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,<sup>3</sup> and the burden remains on the requester in all cases to demonstrate why the order

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<sup>1</sup> See *Supplementary Information, Amendment to 16 CFR § 2.51(b)*, announced August 15, 2000 (“Amendment”), 65 Fed. Reg. 50636 (Aug. 21, 2000).

<sup>2</sup> S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Order Reopening and Modifying Order 3, *Toys “R” Us Inc.*, Docket No. 9278 (FTC Apr. 11, 2014), [https://www.ftc.gov/system/files/documents/cases/140415\\_toysrusorder.pdf](https://www.ftc.gov/system/files/documents/cases/140415_toysrusorder.pdf). See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (holding that, even after reopening, FTC is not required to make requested modification unless changed circumstances compel it).

<sup>3</sup> *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

## Interlocutory Orders, Etc.

should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.<sup>4</sup> All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.<sup>5</sup>

**Changed Conditions of Fact Justify Reopening the Order**

The Commission has determined that changed conditions of fact require that the Order be reopened.<sup>6</sup> The Commission finds that, although the Order's terms and definitions apply to mobile applications, neither the Commission nor Sears anticipated the changes to the mobile application marketplace that would occur in the years since the Order was issued. At the time the Order was issued in 2009, the Android and Apple iOS app stores had both launched a year before. And the mobile application market was just beginning a transition from being dominated by primarily simple or novelty mobile applications to an ecosystem that businesses across the board would leverage. The Commission finds that, at the time, companies like Sears were focused on creating mobile-optimized versions of their websites.

The Commission further finds that the changes in the mobile marketplace since the Order have made it critical for retailers like Sears to be able to distribute interactive mobile applications. Today's mobile applications typically require the collection and transmission of many different types of data to support the services and features for which consumers have downloaded them, as Sears argues, and the Commission agrees that consumers expect this type of data collection.

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<sup>4</sup> See *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (strong public interest considerations support repose and finality).

<sup>5</sup> 16 C.F.R. § 2.51(b).

<sup>6</sup> Sears has asserted both changed conditions of fact and public interest grounds in support of its petition. Because the Commission has determined that Sears has demonstrated that changed conditions of fact support reopening, the Commission need not consider whether the public interest also justifies reopening the Order.

## Interlocutory Orders, Etc.

Sears has demonstrated that these changed conditions make application of the current Order unnecessary as it relates to Sears's suite of mobile applications. The Order's mandated disclosures are intended to place notice and consent obligations on Tracking Applications such as the MySHC Community software, which engaged in broad and unexpected monitoring of consumers' activity across the internet, or similar software. Significantly, the Order does not require heightened notice and consent for first-party tracking on Sears's websites through technologies such as cookies, which were common and expected at the time the Order was entered. However, there is no comparable exception in the Order for the same type of data collection when carried out by a mobile application. Thus, the heightened notice and consent requirements apply even to the most mundane mobile application engaged in first-party tracking only. For example, the Order requires prominent disclosures and express consent for an application that remembers the items a user places in the shopping cart when shopping within the application, or an application that collects the consumer's address when a consumer enters it in order to have a purchase shipped.

In the context of mobile applications that engage in the types of information collection that consumers expect, the Commission believes that the notice and consent requirements contemplated by the Order are burdensome and counterproductive, for both consumers and Sears.

From the consumer point of view, for the limited types of data collection that Sears proposes to exclude from the Order, the disclosure and consent requirements are counterproductive because they are unnecessary. Since issuing the Order, the Commission has recognized that some data collection is likely intrinsic to many internet-related business practices, and has advocated that companies provide consumers with choices about data collection and usage only when those practices are not consistent with the consumer's relationship with the company.<sup>7</sup>

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<sup>7</sup> See FTC Report, *Protecting Consumer Privacy in an Era of Rapid Change* 36-44 (Mar. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf> ("2012 Privacy Report")

## Interlocutory Orders, Etc.

Likewise, the Commission has pushed for affirmative express consent—like that which the Order requires for software that collects any data—only for the collection and use of sensitive information.<sup>8</sup>

Under that framework, a mobile application that collects only data consistent with the context of consumers' interactions—for which the Commission has said no disclosure or choice are required—is not benefiting consumers by providing the Order-mandated disclosure and affirmative, express consent.<sup>9</sup> And it may be confusing to some consumers. Some consumers may view Sears's very prominent disclosure and consent requirement as a positive indication of Sears's transparency. But others may take the request for express consent, in particular, as a signal that the types of data collected by Sears apps are unusual, or are used or shared in unusual ways or for unusual purposes that the consumer may not want or expect.<sup>10</sup>

As to Sears, the Commission credits that having to provide heightened disclosures and seek consumers' affirmative express consent for any and all information collection through a mobile application—when competitors need not do so—is disruptive to the initial application install flow, without providing a corresponding benefit to consumers.<sup>11</sup> The Commission concludes that these changed conditions of fact justify reopening the Order.

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(indicating that data collection and use consistent with consumers' interaction with a first party may not require notice and choice).

<sup>8</sup> *See id.* at 47-48, 58-60. The Commission also recognized the need for affirmative express consent when companies make material retroactive changes to privacy representations. *Id.* at 57- 58.

<sup>9</sup> *See id.* at 38-39 (noting that the benefits of providing choice are reduced for data collection consistent with the context of a company's interaction with consumers).

<sup>10</sup> *See* Petition at 11.

<sup>11</sup> *See* Petition at 15-18.

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**Comments on Reopening**

In making this determination, the Commission has considered the fact that many of the twelve public comments filed in this proceeding oppose reopening the Order. The comments raise two areas of concern related to reopening. First, two comments argue that Sears has not made a satisfactory showing that changed circumstances warrant reopening. The World Privacy Forum argues that Sears failed to provide sufficient evidence that the Order-mandated disclosures caused it to lose customers. However, the Commission does not agree that such evidence is necessarily required to find that changed circumstances justify reopening: As noted above, we credit Sears's argument that the heightened disclosure and consent requirement is unnecessary for the particular types of collection Sears proposes to be excluded from the Order, and in some cases even disruptive to consumers onboarding its mobile applications.<sup>12</sup> Indeed, on the policy front, the Commission has moved since the Order toward less disclosure for expected information collection, not heightened requirements.<sup>13</sup>

Similarly, commenter Chris Hoofnagle argues that Sears has not met the standard because mobile applications behave fundamentally the same as they did at the time the Order was issued. But Sears's argument, and the Commission's finding, is not based on changes to the capabilities of mobile applications. It is based on changes in the mobile marketplace that have made it much more important for retailers to be able to provide mobile applications to interact with their customers, including applications that collect information in order to provide consumers with features.

Second, several commenters raise general concerns about data collection by Sears or businesses in general. Some of these comments also stress the importance of transparency and clarity in companies' disclosures. The Commission understands the commenters' concerns about maintaining the Order's strong

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<sup>12</sup> See *id.*; Affidavit ¶¶ 9-12.

<sup>13</sup> See 2012 Privacy Report at 36-44.

## Interlocutory Orders, Etc.

protections for consumer privacy. It agrees that the Order should continue to require heightened disclosure and consent requirements for broad, unexpected information collection, whether through personal computer software or mobile applications. Indeed, if Sears distributes software that monitors consumers' activities across mobile applications, the modified Order would still require Sears to provide a clear and prominent notice and obtain consumers' express consent. However, the limited modifications to the Order described in the following section will continue to fulfill the goal of maintaining strong protections for privacy, without unduly burdening consumers or Sears.

**The Order Should Be Modified**

After considering and balancing all of the reasons for and against modification, the Commission has determined that the Order should be modified to alter the definition of "Tracking Application." Sears proposes the Commission add an exception to the definition. The modified definition would exclude from the heightened notice and consent requirements any software that tracks only "(a) the configuration of the software program or application itself; (b) information regarding whether the software program or application is functioning as represented; or (c) information regarding consumers' use of the program or application itself." The Commission finds that Sears's proposed modification is an effective means of addressing the changed conditions of fact discussed above.

Sears's proposed exception to the "Tracking Application" definition would make it very similar to comparable definitions in subsequent, similar FTC orders against *Compete, Inc.* and *Upromise, Inc.*<sup>14</sup> These matters also involved software that allegedly deceptively collected information about consumers'

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<sup>14</sup> See Decision and Order 3, *Compete, Inc.*, FTC Docket No. C-4384 (Feb. 20, 2013) (definition of "Data Collection Agent"), <https://www.ftc.gov/sites/default/files/documents/cases/2013/02/130222competedo.pdf>; Decision and Order 3-4, *Upromise, Inc.*, FTC Docket No. C-4351 (Mar. 27, 2012) (definition of "Targeting Tool"), <https://www.ftc.gov/sites/default/files/documents/cases/2012/04/120403upromisedo.pdf>.

## Interlocutory Orders, Etc.

online activity. Similar to the complaint against Sears, the Commission alleged that Compete and Upromise each represented that their browser toolbars would collect basic information about consumers' internet browsing, but failed to disclose that their toolbars would in fact comprehensively track users' online behavior.<sup>15</sup> The exceptions in those orders, like the one that Sears proposes, exclude software that conducts types of data collection that consumers would expect.<sup>16</sup>

### Comments on Proposed Modification

Two of the comments received by the Commission provide input on the proposed modification. Although these commenters do not broadly oppose the first two exceptions from the notice and consent requirements, which would allow Sears to use tracking software for configuration and testing purposes,<sup>17</sup> they do oppose the third exception, which would allow Sears to track "information regarding consumers' use of the program or application itself." Generally, the objections fall into three categories.

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<sup>15</sup> The *Compete, Inc.* complaint alleges that the company represented that its Toolbar would collect "aspects of [consumers'] browsing behavior" and "the addresses of the web pages you visit online." Complaint at 2-3, *Compete, Inc.*, FTC Docket No. C-4384 (Feb. 20, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/02/130222competecmpt.pdf>. Similarly, the *Upromise, Inc.* complaint alleges that the company represented that its Toolbar collected "information about the web sites you visit." Complaint 2-3, *Upromise, Inc.*, FTC Docket No. C-4351 (Mar. 27, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2012/04/120403upromi secmpt.pdf>. But in both cases, the companies allegedly collected extensive information from the websites consumers visited, including information from secure sessions on third-party websites.

<sup>16</sup> See Note 14, *supra*.

<sup>17</sup> The World Privacy Forum expresses concern in its comment that the first two exceptions could enable technologies such as browser fingerprinting, or presumably, in the context of mobile applications, device fingerprinting. Comment of World Privacy Forum at 4. The Commission does not agree that identifying a consumer's device through fingerprinting relates to the application's configuration or functionality, and thus does not agree that fingerprinting is excepted under one of the first two exceptions.



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First, Consumers Union, Consumer Federation of America, and the Center for Digital Democracy argue in their joint comment that the proposed exception would allow for a greater degree of information collection than prior FTC orders.<sup>18</sup> For example, they argue that the recent FTC order against *Vizio, Inc.* does not contain any exceptions to the notice and consent requirements. But the *Vizio* order applies only to the narrow category of “Viewing Data.”<sup>19</sup> The *Sears* Order, by contrast, applies to a broad scope of information: “information about activities occurring on computers on which [a tracking application] is installed, or about data that is stored on, created on, transmitted from, or transmitted to the computers on which [the tracking application] is installed.” Because the *Vizio* order applies only to a narrow category of information, unlike *Sears*, an exception was not necessary.

Likewise, Consumers Union *et al.* assert that an analogous exception in the *Upromise, Inc.* order is narrower than the one proposed by Sears.<sup>20</sup> Accordingly, the commenter recommends that the Commission add a further limitation to the third exception modeled on *Upromise*, restricting the third exception to instances when “the data collection is reasonably expected and necessary

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<sup>18</sup> Comment of Consumers Union, Consumer Federation of America, and the Center for Digital Democracy at 7-11.

<sup>19</sup> See Stipulated Order for Perm. Inj. and Monetary J. 3-4, *FTC v. Vizio, Inc.*, No. 2:17-cv-00758 (D.N.J. Feb. 6, 2017), [https://www.ftc.gov/system/files/documents/cases/170206\\_vizio\\_stipulated\\_proposed\\_order.pdf](https://www.ftc.gov/system/files/documents/cases/170206_vizio_stipulated_proposed_order.pdf).

<sup>20</sup> Comment of Consumers Union *et al.* at 10. The Commission disagrees that the exception proposed by Sears is broader than the analogous *Upromise* exception. Both limit the collection of data to that which stems from the purpose for which the consumer uses the application. In *Upromise*, the exception encompassed data collection across multiple sources of potential consumer data—“respondent’s websites, services, applications, and/or forms”—provided the collection stem from provision of “reward service benefits.” Decision and Order 3-4, *Upromise, Inc.*, FTC Docket No. C-4351 (Mar. 27, 2012) (definition of “Targeting Tool”), <https://www.ftc.gov/sites/default/files/documents/cases/2012/04/120403upromisedo.pdf>. Whereas Sears’s proposed exception is limited to data collection regarding only one source: the consumer’s use of the data-collecting application itself. In both cases, the exceptions are tailored to ensure that only expected types of data collection are excluded from the order.

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for the software to perform the function or service that the consumer requests, and that information is only collected, retained, or used as is necessary for those purposes.”<sup>21</sup> The Commission believes that, here, such a limitation would restrict Sears from providing valuable product offerings without a commensurate benefit to consumers. If Sears could only satisfy the exception when collecting data for functions a consumer requests, Sears would be unable to provide some anticipatory services to consumers—like making product recommendations based on a consumer’s past shopping within the application—without providing notice and obtaining express consent. The Commission believes that Sears’s proposed exception better aligns with consumers’ expectations by requiring the data collection to stem from a consumer’s “use” of the application, rather than only functions a consumer requests.

Second, the World Privacy Forum and Consumers Union *et al.* argue in their comments that the exception may allow Sears to engage in unexpected methods of tracking or data collection in mobile applications, such as keystroke logging, third-party tracking, collection of information outside of an application, or collection of information through links contained in an application.<sup>22</sup> The Commission does not believe that the proposed exception would allow any of these activities. The exception is limited to the consumer’s “use” of the program or application itself, and would not allow for the type of passive tracking, cross-application tracking, or third-party tracking contemplated by the commenters. In order for the exception to apply, any information a Sears application accesses or collects must relate to some functionality the application is providing to the consumer in performing a service the consumer expects.

Third, Consumers Union *et al.* argues that the proposed exception might enable Sears to evade the mobile operating systems’ built-in notice and consent system (permissions) when accessing device data like geolocation.<sup>23</sup> The Commission does

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<sup>21</sup> Comment of Consumers Union *et al.* at 13.

<sup>22</sup> *See id.* at 7, 12; Comment of World Privacy Forum at 4.

<sup>23</sup> Comment of Consumers Union *et al.* at 12.

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not see how this could occur. The Order cannot provide a technical means for Sears to get around the mobile operating systems' controls, and it does not impose conditions on the operating system developers.

Finally, the World Privacy Forum advises that the Commission should not rely on the mobile application platforms to protect consumers, as Sears suggests they do. The Commission does not rely on this argument, however, and does not believe the proposed exception rests on the existence of those controls. Instead of excluding all mobile applications from the Order, the proposed modification draws a distinction between software that tracks information that consumers would expect and software that engages in unexpected tracking—like the MySHC Community software—and thus warrants increased transparency. The modified Order's disclosure and consent requirement would still apply to the latter, including mobile applications.<sup>24</sup>

Considering all the reasons for and against the modification, the Commission concludes that Sears's proposed modification is the best means to address the changed conditions of fact discussed above.

### Conclusion

For the reasons explained above, the Commission has determined to reopen and modify the Order. Accordingly,

**IT IS ORDERED** that this matter be, and it hereby is, reopened; and

**IT IS FURTHER ORDERED** that the definition of "Tracking Application" be, and it hereby is, revised to read:

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<sup>24</sup> Commenter Chris Hoofnagle appears to express concern about modifying the Order to exclude mobile applications completely. The Commission agrees with this concern, but believes the proposed modifications are a technology-neutral way to ensure that the Order's requirements apply similarly to websites and mobile applications. The modified Order would still apply to mobile applications that tracked consumers in unexpected ways.

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4. "Tracking Application" shall mean any software program or application disseminated by or on behalf of respondent, its subsidiaries or affiliated companies, that is capable of being installed on consumers' computers and used by or on behalf of respondent to monitor, record, or transmit information about activities occurring on computers on which it is installed, or about data that is stored on, created on, transmitted from, or transmitted to the computers on which it is installed, unless the information monitored, recorded, or transmitted is limited solely to the following: (a) the configuration of the software program or application itself; (b) information regarding whether the software program or application is functioning as represented; or (c) information regarding consumers' use of the program or application itself.

By the Commission.

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IN THE MATTER OF

**LOUISIANA REAL ESTATE APPRAISERS  
BOARD**

*Docket No. 9374. Order, April 10, 2018*

Opinion and Order denying Respondent's Motion to Dismiss Complaint and granting Complaint Counsel's Motion for Partial Summary Decision regarding Respondent's Third and Ninth Affirmative Defenses.

OPINION AND ORDER OF THE COMMISSION

**By Maureen K. Ohlhausen, Acting Chairman:**

Federal antitrust law plays a crucial role in our economy, serving as “a central safeguard for the Nation’s free market structures,”<sup>1</sup> by protecting U.S. consumers from anticompetitive conduct. In our federal system, individual states are sovereigns that retain substantial authority to regulate the commerce that occurs within their borders, including displacing competition. Because “[s]tate agencies are not simply by their government character sovereign actors,”<sup>2</sup> however, antitrust law has a legitimate role in challenging certain types of government-related activities that restrain competition.

The state action doctrine guides this analysis. When an action is truly that of the state sovereign, antitrust law gives way. But immunity for anticompetitive action by state agencies “requires more than a mere facade of state involvement . . . .”<sup>3</sup> States can ensure immunity is available to their agencies by adopting clear policies to displace competition, and, if those agencies are controlled by market participants, by providing active supervision.<sup>4</sup>

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<sup>1</sup> *North Carolina State Board of Dental Examiners v. FTC*, 135 S.Ct. 1101, 1109 (2015) (“*N.C. Dental*”).

<sup>2</sup> *Id.* at 1114.

<sup>3</sup> *Id.* at 1111.

<sup>4</sup> *See id.* at 1115-16.

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To be clear, neither antitrust enforcement nor the state action doctrine is a vehicle for the federal government to micromanage the affairs of the sovereign states.<sup>5</sup> Instead, the state action doctrine only arises in relation to anticompetitive conduct that, if not done by a sovereign actor, violates federal antitrust law. Thus, the critical inquiry is “whether the State’s review mechanisms provide ‘realistic assurance’ that a nonsovereign actor’s anticompetitive conduct ‘promotes state policy, rather than merely the party’s individual interests.’”<sup>6</sup>

This matter presents one of the most common scenarios in which state action issues arise: a state board with market participants exercising regulatory oversight of their own industry or profession. Although oversight by industry participants, with or without the involvement of the state, can have socially beneficial and even laudatory purposes, such arrangements can also present significant antitrust concerns. Indeed, “[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor.”<sup>7</sup>

One critical check on such influences is the requirement of “active supervision” by the state sovereign of active market participants exercising regulatory powers. The appropriate scope of the active supervision requirement in the state action defense is the central issue raised by the instant Motions we decide here.

Respondent, the Louisiana Real Estate Appraisers Board (“LREAB” or “the Board”), is a ten-member board that regulates

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<sup>5</sup> *Id.* at 1110 (“If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States’ power to regulate.”).

<sup>6</sup> *Id.* at 1115-16 (quoting *Patrick v. Burget*, 486 U.S. 94, 100-101 (1988)).

<sup>7</sup> *Id.* at 1111.

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the practice of real estate appraisals in Louisiana. *See* La. Rev. Stat. §§ 37:3394, 37:3395. By statute, at least eight of its members must be Board-licensed appraisers. On May 31, 2017, the Commission issued a Complaint alleging that the Board had unreasonably restrained price competition for appraisal services provided to appraisal management companies (“AMCs”) by adopting in 2013 and subsequently enforcing a regulation known as Rule 31101. In its Answer, the Board invoked the state action defense, asserting that the challenged conduct is exempt from antitrust scrutiny.

The legal landscape has not been static following issuance of the Complaint. Beginning with an executive order issued by the Louisiana Governor on July 11, 2017, the State of Louisiana and the Board have implemented a series of administrative changes (without any changes in the underlying statutory scheme) intended to increase the level of state supervision over the Board’s actions and shield it from antitrust review. The Board revoked the original Rule 31101, reissued it in identical form under the new procedures, and entered into a contract with a state administrative agency to review certain of its enforcement decisions. In light of these changes, the Board has moved to dismiss the Complaint as moot. Complaint Counsel argue that the changes do not moot the proceeding and have moved for partial summary decision on the Board’s state action defense.

We conclude that the evidence proffered by the Board is insufficient to demonstrate that the State of Louisiana actively supervised the reissuance of Rule 31101 in 2017, or that it will actively supervise enforcement proceedings under the Rule in the future. The contours of the active supervision requirement are flexible and context-dependent. However, they require, at minimum, a more substantive engagement by the State in a review mechanism that provides assurance that the actions of a board regulating its own profession promote state public policy, rather than the private interests of the profession. Accordingly, we deny the Board’s Motion to Dismiss the Complaint. We further conclude that there is no genuine dispute of fact either that the Board is subject to the active supervision requirement or that the Board’s conduct prior to 2017 was not actively supervised. We therefore grant Complaint Counsel’s Motion for Partial

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Summary Decision on Respondent's Third and Ninth Affirmative Defenses.

## BACKGROUND

### The Board

The Louisiana Legislature has given the LREAB broad authority to regulate real estate appraisals, including the power to issue licenses, set standards, issue rules and regulations, and conduct disciplinary proceedings, including proceedings to suspend or revoke licenses or to censure or fine licensees. La. Rev. Stat. § 37:3395. The Board also licenses and regulates AMCs, which act as agents for lenders in arranging for real estate appraisals, and thus effectively function as the purchasers of appraisal services. *Id.* §§ 37:3415.2(2), 37:3415.3.

Since August 1, 2014, the Board has consisted of ten members appointed by the Louisiana Governor, all drawn from real estate-related businesses. *Id.* § 37:3394(B). Two are selected from a list submitted by the Louisiana Bankers Association. *Id.* § 37:3394(B)(1)(a). Seven members must be certified real estate appraisers who have been licensed by the Board for at least five years, including at least four “general appraisers” and two “residential appraisers.” *Id.* §§ 37:3394(B)(1)(c), (B)(2). General appraisers are licensed “for appraisal of all types of real estate regardless of complexity or transaction value.” *Id.* § 37:3392(7). By contrast, residential appraisers are licensed “to appraise one to four residential units, without regard to transaction value or complexity, and perform appraisals of other types of real estate having a transaction value of two hundred fifty thousand dollars or less.” *Id.* § 37:3392(13). The last member must be an employee or representative of a Louisiana-licensed AMC, who must also be a Board-licensed appraiser. *Id.* § 37:3394(B)(1)(b).<sup>8</sup>

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<sup>8</sup> Prior to August 1, 2014, there was no AMC representative and the Board had only nine members, but its composition was otherwise the same. *See* La. Rev. Stat. § 37:3394(B) (2013).



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### **Initial Adoption of Rule 31101**

The Truth in Lending Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, provides that lenders and their agents must compensate appraisers “at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised.” 15 U.S.C. § 1639e(i)(1). These provisions of the statute appear within a section of the law focused on ensuring “appraisal independence” and detail various prohibited practices, such as bribery or other coercion aimed at improperly influencing valuations provided by appraisers. Louisiana adopted a similar “customary and reasonable” rate requirement in 2012. La. Rev. Stat. § 37:3415.15(A) (added by Act of May 31, 2012, No. 429, 2012 La. H.B. 1014).

In 2013, the Board first adopted the regulation at the heart of this dispute. Rule 31101 specifies how AMCs must comply with the customary and reasonable requirement. *See* La. Admin. Code tit. 46, pt. LXVII, § 31101 (2017).<sup>9</sup> It provides that AMCs can demonstrate compliance by using “objective third-party information such as government agency fee schedules, academic studies, and independent private sector surveys” or by using a schedule of fees established by the Board. *Id.* AMCs not using one of these methods must, at a minimum, review a set of six factors on each assignment made and then “make appropriate adjustments to recent rates paid in the relevant geographic market necessary to ensure that the amount of compensation is reasonable.” *Id.* § 31101(A).

Pursuant to Louisiana law, the Board sent Rule 31101 to the relevant oversight subcommittees in the Louisiana Legislature before it was formally issued. *See* La. Rev. Stat. § 3415.21(B) (2013) (repealed by Act of June 19, 2014, No. 764, 2014 La. S.B. 575); La. Rev. Stat. § 49:968; Unangst Aff. ¶ 33.<sup>10</sup> Neither the

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<sup>9</sup> For convenience, we cite to the current version of the rule, which (as discussed in the text) is identical to the version promulgated in 2013.

<sup>10</sup> We use the following abbreviations for purposes of this opinion:  
Compl.: Complaint

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House nor the Senate subcommittee held a hearing, thereby allowing the Rule to go into effect as proposed. *Id.* ¶ 34. The Louisiana Governor had authority to disapprove Rule 31101, but issued no disapproval order. *Id.* ¶ 36.

**Complaint and Answer**

The Complaint alleges that Rule 31101 amounts to an unlawful restraint of competition on its face because it prohibits AMCs from arriving at an appraisal fee through the operation of the free market. Compl. ¶¶ 30-31. It also alleges that the Board has unlawfully restrained price competition by its enforcement of the Rule, because it effectively requires AMCs to set rates at least as high as those set forth in a survey conducted by the Southeastern Louisiana University Business Research Center. *Id.* ¶¶ 32-43. It alleges that the Board was “controlled at all relevant times by active market participants.” *Id.* ¶ 6.

The Board’s Answer denies that the Rule unlawfully restrains competition either on its face or as applied and asserts several affirmative defenses. As relevant to these Motions, the Third Affirmative Defense states, “The Complaint fails adequately to allege that the Board has a controlling number of active participants in the relevant residential appraisal market” (emphasis omitted), and the Ninth Affirmative Defense states that the Board “is immune from federal antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943).”

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MTD: Memorandum of Points and Authorities in Support of Motion of Respondent Louisiana Real Estate Appraisers Board to Dismiss the Complaint  
CCOpp: Complaint Counsel’s Opposition to Respondent’s Motion to Dismiss the Complaint

RRB: Reply in Support of Respondent Louisiana Real Estate Appraisers Board Motion to Dismiss

RX: Respondent’s Exhibits (attached to MTD)

MPSD: Memorandum of Law in Support of Complaint Counsel’s Motion for Partial Summary Decision

ROpp: Memorandum of Respondent Louisiana Real Estate Appraisers Board in Opposition to Complaint Counsel’s Motion for Partial Summary Decision

Unangst Aff.: Affidavit of Bruce Unangst (attached to ROpp)

Tr. Oral Arg.: Transcript of Oral Argument on Respondent’s Motion to Dismiss and Complaint Counsel’s Motion for Partial Summary Decision (Feb. 22, 2018)

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### **Post-Complaint Events**

Following issuance of the Complaint, Louisiana officials and the Board took several steps intended to increase the level of state supervision over the Board's conduct and thereby insulate the Board from antitrust scrutiny. Those efforts began on July 11, 2017, when Louisiana's Governor issued an executive order directing changes both in the way the Board promulgates rules relating to the customary and reasonable fee requirement and in the way it enforces those rules. RX1.

#### **1. Promulgation of Rules**

The executive order directs the Board to submit any proposed rule, along with the rulemaking record, to the state Commissioner of Administration (or the Commissioner's designee) for approval, rejection, or modification. It directs the Commissioner (or his/her designee) to review the proposed rule to "ensure that [it] serves Louisiana's public policy of protecting the integrity of the residential mortgage appraisals by requiring that the fees paid by AMCs for an appraisal are to be customary and reasonable." RX1, at § 2.

In light of this directive, on July 31, 2017, the Board apparently voted to repeal Rule 31101 and adopt a "Replacement Rule" with precisely the same language. MTD at 9.<sup>11</sup> By letter dated August 14, 2017, the Commissioner of Administration advised that it was his opinion that the proposed Rule would further Louisiana public policy. RX3. The Board thereafter proceeded to solicit public comments and hold a hearing. It then submitted the proposed Rule, along with the comments and hearing transcript, to the relevant legislative oversight subcommittees and provided the comments and transcript to the Commissioner of Administration. Neither the House nor the Senate subcommittee held a hearing, and the reissued Rule 31101 became effective in November 2017 upon publication in the *Louisiana Register*. MTD at 14; RX 12-14.

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<sup>11</sup> The Board has not submitted records of the July 31 vote or a copy of what it allegedly sent to the Commissioner of Administration.

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## 2. Enforcement Proceedings

The executive order also called for the State of Louisiana's Division of Administrative Law ("DAL") to review certain Board enforcement actions. Specifically, it provided that before finalizing a settlement with or filing an administrative complaint against an AMC regarding compliance with the customary and reasonable fee requirement, the Board would submit the proposed action to the DAL for approval, rejection, or modification. The executive order stated that the purpose of the review is "to ensure fundamental fairness and that the proposed action serves Louisiana's policy of protecting the integrity of residential mortgage appraisals by requiring that fees paid by AMCs for such an appraisal are customary and reasonable." RX1, at § 1.

The executive order also directed the Board to enter into a contract with the DAL to establish the review procedures. In accordance with this directive, the Board and the DAL entered into a memorandum of understanding ("MOU") that specifies the procedures and standards for the DAL's review. RX9.

In addition, following issuance of the executive order, the Board closed all pending investigations under the original Rule 31101. RX10. The Board asserts that all enforcement actions based on the Rule prior to its reissuance in November 2017 either expired by their own terms or were vacated or terminated with no finding of violation, and that any prior payments or enforcement actions will not be admissible in future proceedings. *Id.* Any future enforcement actions will be based upon the reissued Rule 31101 (which, again, is identical to the original Rule 31101) and will be subject to the review procedures set forth in the executive order and the MOU.

### THE STATE ACTION DOCTRINE

In *Parker v. Brown*, the Supreme Court held that the Sherman Act does not reach anticompetitive conduct by states acting in their sovereign capacity. 317 U.S. at 350-51. The Court has applied the same rule in antitrust cases brought by the Commission under Section 5 of the FTC Act, 15 U.S.C. § 45. *See, e.g., N.C. Dental*, 135 S. Ct. at 1111-14; *FTC v. Phoebe*

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*Putney Health Sys.*, 568 U.S. 216, 219 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).

The Court has long held that two conditions must be satisfied for private parties to avail themselves of the state action doctrine to avoid antitrust liability: first, the challenged restraint must be clearly articulated and affirmatively expressed as state policy, and second, the policy must be actively supervised by the state itself. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980). In *N.C. Dental*, the Court held that the same test applies to “a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates.” 135 S. Ct. at 1114. As noted above, the Court explained: “State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity.” *Id.* at 1111. Rather, application of the doctrine “requires more than a mere facade of state involvement, for it is necessary in light of *Parker*’s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control.” *Id.* Thus, “*Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State’s own.” *Id.*

The primary issues presented by these Motions concern the active supervision requirement. Active supervision is a “flexible and context-dependent” inquiry. *N.C. Dental*, 135 S. Ct. at 1116. It “need not entail day-to-day involvement in an agency’s operations or micromanagement of its every decision. Rather, the question is whether the State’s review mechanisms provide realistic assurance that a nonsovereign actor’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.” *Id.* (internal quotation marks omitted).

The Court recognized, however, several “constant requirements” for active supervision. *Id.* First, “the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it.” *Id.* Second, “the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy.” *Id.* Third, “the ‘mere potential for state supervision is not an adequate substitute

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for a decision by the State.” *Id.* (quoting *Ticor Title*, 504 U.S. at 638). Finally, “the state supervisor may not itself be an active market participant.” *Id.* at 1117.

With these principles in mind, we now turn to the two Motions before us. In addressing the state action issues, we emphasize that the question before us “is not whether the challenged conduct is efficient, well-functioning, or wise. Rather, it is whether anticompetitive conduct engaged in by nonsovereign actors should be deemed state action and thus shielded from the antitrust laws.” *Id.* at 1111 (citations, internal quotation marks, and internal brackets omitted).

**THE BOARD’S MOTION TO DISMISS**

We first consider the Board’s Motion to Dismiss. The Board argues that the case is now moot in light of “[r]ecent sovereign actions by the State of Louisiana” taken since July 2017. MTD at 1. It argues first that the Louisiana Legislature has clearly articulated a policy to displace competition in the market for residential real estate appraisal fees and that Rule 31101 effectuates that policy. *Id.* at 15-18. It then argues that the State actively supervised the reissuance of Rule 31101 in 2017 and has put procedures in place to ensure that any future enforcement of the Rule will be actively supervised. *Id.* at 18-22.<sup>12</sup> With respect to the reissuance of the Rule, the Board points to the review by the state Commissioner of Administration and the actions of the state legislative committees and various other state officials. With respect to enforcement, the Board primarily relies on the executive order and the review procedure established in the MOU, as well as the availability of judicial review. It argues that as a result it is “[b]eyond cavil” that “the State of Louisiana has accepted political accountability for any anticompetitive effects of promulgation or enforcement of Replacement Rule 31101.” RRB at 8. Finally, the Board argues that it has eradicated any ongoing effects of the pre-2017 enforcement of Rule 31101. MTD at 22-24. Because (in the Board’s view) the state action doctrine will shield its conduct going forward and there are no continuing

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<sup>12</sup> For purposes of the Motion to Dismiss, the Board does not dispute that active supervision is necessary. *See id.* at 15 n.9.

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effects from the prior Rule, it argues that there is no reasonable expectation that the alleged violations can recur and no meaningful relief that the Commission can issue. *Id.* at 24-28.

Complaint Counsel oppose Respondent's Motion on several grounds. They contend that the regime that Louisiana has established to supervise Respondent's activities is "unproven, incomplete, and facially deficient." CCOpp at 1; *see also id.* at 22-32.<sup>13</sup> According to Complaint Counsel, "The procedure for review of Respondent's regulation by the Commissioner of Administration is largely unknown. The procedure for review of Respondent's enforcement activities by an administrative law judge is defective on its face." *Id.* at 1. Moreover, say Complaint Counsel, even were the new supervision regime facially sufficient, "a supervision regime that looks fine on paper may fail in execution." *Id.* at 2. In the event we conclude "that there is both an antitrust violation and a facially adequate state action regime," Complaint Counsel argue, the case still would not be moot; in those circumstances Complaint Counsel urge that we issue an order that proscribes future anticompetitive conduct, but which might include a "State Action Proviso" that expressly allows future conduct that falls within the protections of the state action doctrine. *Id.* at 22; *see also id.* at 2.

We conclude that the Board has not shown that the reissuance and enforcement of Rule 31101 have been and will be actively supervised, and, thus, the Board has not met its burden to demonstrate mootness. We therefore do not address Complaint Counsel's argument that post-complaint changes to the supervision regime – even if facially sufficient to constitute active supervision – cannot moot the case.

### **Legal Standard**

The Board correctly states that we review motions to dismiss under the standards of Rule 12 of the Federal Rules of Civil

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<sup>13</sup> Although Complaint Counsel do not concede that the clear articulation requirement has been satisfied, their briefing focuses on active supervision. CCOpp at 10 n.4. Because we find that active supervision has not been demonstrated, we do not address the clear articulation issue.

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Procedure, MTD at 3, but does not expressly address which provision of that rule applies here. In *South Carolina State Board of Dentistry*, 138 F.T.C. 229 (2004), cited by the Board, we considered a motion to dismiss on state action grounds under the standards of Rule 12(b)(6), which governs motions to dismiss for failure to state a claim. But in that case, the respondent challenged the sufficiency of the complaint's allegations based on the state action doctrine (although it also raised a claim of mootness based in part on post-complaint events). In this case, by contrast, the Board's Motion to Dismiss is not directed to the sufficiency of the Complaint. Rather, the Board contends that the case is moot in light of actions taken by Louisiana officials and the Board *after* the Complaint was issued.

Mootness is a justiciability issue and a motion to dismiss on this ground is properly evaluated under the standards of Rule 12(b)(1). *See, e.g., Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents*, 633 F.3d 1297, 1308 (11th Cir. 2011). The difference is significant because on a Rule 12(b)(1) motion, unlike a Rule 12(b)(6) motion, a court is not bound by the allegations of the complaint at least as to the jurisdictional facts. As to those facts, the court is "free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case." *Montez v. Dep't of the Navy*, 392 F.3d 147, 149 (5th Cir. 2004).

In this case, however, the basic facts relating to the Board's mootness argument do not appear to be in dispute. The Board has submitted 14 exhibits in support of its Motion and suggests that we take official notice of these materials. MTD at 3. Complaint Counsel challenge only two of these exhibits (RX12 and RX13), arguing that they are not official government records and that they recite facts that are a subject of dispute and hence not eligible for official notice. CCOpp at 26 & n.8. But as noted above, on a Rule 12(b)(1) motion, courts are not limited to matters that are judicially noticeable; they may consider any evidence going to the jurisdictional facts. *See Montez*, 392 F.3d at 149; *Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002). Complaint Counsel have not challenged the authenticity of any of the Board's exhibits. Accordingly, we will consider all of the Board's exhibits to the extent they are relevant and assume for



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purposes of the Board's Motion that they are what they purport to be.

The standard for determining whether a case is moot is well settled. Ordinarily, the moving party must show that the challenged conduct has ceased and that there is no possibility that it could recur. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Of course, in this case, there has been no change in the language of Rule 31101, and the Board does not allege that the remaining challenged conduct – enforcement of the Rule in a manner that may restrain competition – has changed substantively. Rather, the Board contends that the effects of its past alleged violations have been eradicated, and that the state action doctrine shields its future conduct from antitrust scrutiny, such that the Commission can no longer grant any effective relief.

Thus, the critical question before us is whether the Board has shown that its conduct is protected by the state action doctrine going forward. After identifying certain key characteristics that typically contribute to active supervision, we separately address (i) whether the Board has shown that the state actively supervised the reissuance of Rule 31101, and (ii) whether the Board has shown that the state will actively supervise future enforcement of the Rule.

### **The Active Supervision Inquiry**

We begin by discussing the showing that a board with a controlling number of active market participants must make to demonstrate that its conduct is actively supervised by the state. Citing *N.C. Dental*, the Board contends that “[a]ctive supervision exists where the supervisor: (1) reviews the substance of the anticompetitive decision, not merely the procedures followed to produce it; (2) has the power to veto or modify particular decisions to ensure they accord with state policy; and (3) is not itself an active market participant.” MTD at 19. Although the Supreme Court described these – along with the important consideration (entirely omitted from the Board's list) that the “mere potential for state supervision is not an adequate substitute for a decision by the State” – as “constant requirements,” *N.C. Dental*, 135 S. Ct. at 1116, it did not suggest that active

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supervision exists if and only if these requirements are satisfied. To the contrary, it eschewed a rigid formula, making clear that “the inquiry regarding active supervision is flexible and context-dependent” and that “the adequacy of supervision will depend on all the circumstances of a case.” *Id.* at 1116-17.

Our prior cases offer further guidance. In *Kentucky Household Goods Carriers Association, Inc.*, 139 F.T.C. 404 (2005), we explained that the Supreme Court decisions make clear that “a state official or agency must have ascertained the relevant facts, examined the substantive merits of the private action, and assessed whether the private action comports with the underlying statutory criteria established by the state legislature in a way sufficient to establish the challenged conduct as a product of deliberate state intervention rather than private choice.” *Id.* at 416-17. After surveying case law from the circuit courts and prior Commission decisions, we identified three elements that should be considered as part of the active supervision analysis: (1) the development of an adequate factual record, including notice and an opportunity to be heard; (2) a written decision on the merits; and (3) a specific assessment – both quantitative and qualitative – of how the private action comports with the substantive standard established by the legislature. *Id.* at 420. We addressed the same three elements in *North Carolina Bd. of Dental Exam’rs*, 151 F.T.C. 607, 629 (2011). Although we cautioned in both cases that “no single one of these elements is necessarily a prerequisite for active supervision,” we noted that the absence of all of the factors would support a conclusion that the state had not adequately supervised the private actors’ activity. *Id.*; *Kentucky Household Goods*, 139 F.T.C. at 421.

These factors accord with the Supreme Court’s recent teachings in *N.C. Dental*. We emphasize again that these factors are merely guidelines; there is no one-size-fits-all set of immutable characteristics that a state supervising entity must satisfy in every context. The ultimate question is always simply “whether the State’s review mechanisms provide ‘realistic assurance’ that a nonsovereign actor’s anticompetitive conduct ‘promotes state policy, rather than merely the party’s individual interests.’” *N.C. Dental*, 135 S. Ct. at 1116 (quoting *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988)). In general, when these three

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elements are all satisfied, a finding of active supervision is normally appropriate. However, when one or more of these factors are missing, it becomes increasingly likely that the scope of state supervision is inadequate.

**Reissuance of Rule 31101**

The Board contends that the State actively supervised the reissuance of Rule 31101 in two principal ways.<sup>14</sup> First, the Louisiana Commissioner of Administration reviewed the Rule, in accordance with the Governor's executive order of July 11, 2017. Second, the Board submitted the Rule to the appropriate oversight subcommittees in the Louisiana Legislature. According to the Board, the subcommittee members "required no information, found no hearing necessary, and allowed promulgation to proceed." RRB at 6. The Board has not demonstrated that either of these procedures was sufficient to constitute active supervision.

The defects in the review by the Commissioner of Administration are readily apparent.<sup>15</sup> As a preliminary matter, the Board has not submitted with its Motion what, if anything, it submitted to the Commissioner on July 31, 2017.<sup>16</sup> But in any event, it is clear that the Board did not submit the Rule "along with its rulemaking record," as required by the executive order (RX1, § 2), because the rulemaking record was far from complete

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<sup>14</sup> The Board also notes that the staff director of the Louisiana Legislative Fiscal Office approved the Fiscal and Economic Impact Statement for the proposed Rule and that the *Louisiana Register* accepted the Rule for publication. These ministerial actions do not reflect any active supervision by state officials to ensure that the Rule furthers a state policy to displace the antitrust laws.

<sup>15</sup> We express no view as to whether a review required by a governor's executive order, as opposed to one that the legislature has mandated by statute, is sufficient to satisfy the active supervision requirement.

<sup>16</sup> At oral argument, counsel for Respondent stated that what the Commissioner of Administration looked at prior to his August 14, 2017 approval letter was "the promulgation record for the prior rule, prior Rule 31101." Tr. Oral Arg. at 14. While this material might have been relevant, the Commissioner could not reasonably have made the necessary determinations regarding the 2017 reissuance without reviewing the 2017 rulemaking record.

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at that time; the Board had yet to solicit public comment or conduct a hearing. Thus the first element we identified in *N.C. Dental* and *Kentucky Household Goods*, an adequate factual record with notice and opportunity to be heard, is not present here.<sup>17</sup>

Moreover, the record fails to show that the Commissioner “exercised sufficient judgment and control” to show that the reissuance of Rule 31101 was “a product of deliberate state intervention, not simply [an] agreement among private parties.” *Ticor Title*, 504 U.S. at 634-35. The Commissioner’s letter of August 14, 2017 approving the proposed Rule (RX3) consists of three sentences. The operative sentence reads: “After careful consideration of LREAB’s regulatory role, the circumstances leading to these proposed rules, and the goals sought by their promulgation, I am of the opinion that these rules will further the public policy of the State of Louisiana of protecting the integrity of the residential mortgage appraisals by requiring that the fees paid by AMCs for an appraisal are to be customary and reasonable.” We do not think that this qualifies as a “written decision on the merits” in any meaningful sense, and it certainly does not reflect any “specific assessment . . . of how the [Board’s] action comports with the substantive standard established by the legislature.” *N.C. Dental*, 151 F.T.C. at 629. The letter merely recites the standard set forth in section 2 of the executive order, with no analysis, discussion, or explanation of the Commissioner’s reasoning. Under the circumstances – including the fact that the Board was proposing to reissue, word-for-word, the same rule it had issued in 2013 – the letter strongly suggests that the Commissioner simply rubber-stamped the Board’s decision.

The Board has also submitted a two-page letter from the General Counsel of the Division of Administration dated November 9, 2017. RX11. It states that the General Counsel reviewed materials submitted by the Board, including “a

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<sup>17</sup> We express no view as to whether review by the Commissioner of the factual record developed by the Board, as opposed to his own development of a factual record, would satisfy the first element of the framework we applied in *N.C. Dental* and *Kentucky Household Goods*.

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substantive history of Rule 31101, background information on Dodd-Frank and its requirements, the pertinent state and federal laws, the rulemaking record from the past promulgation of Rule 31101, as well as all documents and public comments related to the 2017 promulgation of the rule.” Based on that review, the General Counsel concluded that “all sides seem to be in agreement that the payment of customary and reasonable fees is an important public policy goal” and stated that “I believe that Rule 31101 achieves that public policy goal” because it “reasonably codifies the more general requirements set forth in law without becoming an inflexible, ‘one size fits all’ decree.” *Id.* at 2.

The General Counsel’s letter does not remedy the defects in the Commissioner’s earlier letter. Critically, on its face, the General Counsel’s letter disavows any authority to review the Rule: “[A]t this point of the rulemaking process, the legislative oversight committee and the Governor – not the DOA – have the formal authority to disapprove proposed rules.” *Id.* at 1. It states that under the executive order, “any action on the part of DOA to approve, reject, or modify the proposed rule was prior to its promulgation,” and that the Commissioner had already “approved the adoption of the rule via letter on August 14, 2017.” *Id.* By his own words, the General Counsel thus lacked “the power to veto or modify particular decisions” that the Supreme Court tells us “the supervisor must have.” *N.C. Dental*, 135 S. Ct. at 1116.

Moreover, although noting that the Real Estate Valuation Advocacy Association (representing a number of AMCs) had voiced concern that “Rule 31101 is unlawfully more restrictive than the federal requirements set forth in Dodd-Frank and its accompanying regulations,” the General Counsel brushed the issue aside, stating that it was “not the role of the [Division of Administration] to issue a legal opinion on the matter.” RX11, at 2. Although not quite as terse as the Commissioner’s earlier letter, the General Counsel’s letter still lacks any analysis or discussion of how the reissued Rule furthers Louisiana’s policy and whether the criticisms voiced in public comments identified flaws in the Rule or suggested viable improvements. It thus fails to satisfy the third criterion of *N.C. Dental* and *Kentucky Household Goods*, which looks at whether the state has provided

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“a specific assessment . . . of how the private action comports with the substantive standards established by the legislature.”

Nor has the Board shown that the Louisiana Legislature actively supervised the reissuance of the Rule. To the contrary, the materials submitted by the Board do not show that the Louisiana Legislature played an active role in supervising the Board’s reissuance of Rule 31101.

Louisiana law provides a procedure for legislative review of regulations proposed by an agency. *See* La. Rev. Stat. § 49:968.<sup>18</sup> Briefly, when notice of the proposed rule is submitted to the *Louisiana Register* for publication, the agency must also submit a report to the presiding officers of each legislative house and the appropriate standing legislative committees containing, *inter alia*, a copy and brief summary of the rule, a statement of the circumstances that require its adoption, amendment or repeal, and statements of the fiscal and economic impact of the proposed action. *Id.* §§ 49:968(B)-(C). The chair of each standing committee appoints an oversight subcommittee, which “may conduct hearings” on the proposed rule. *Id.* § 49:968(D)(1)(a). The agency thereafter submits a second report to the subcommittees, which must include summaries of any hearing held by the agency and comments received by the agency. *Id.* § 49:968(D)(1)(b). If the subcommittee holds a hearing, it will determine whether the rule “is acceptable or unacceptable.” *Id.* § 49:968(D)(3)(d). But “[f]ailure of a subcommittee to conduct a hearing or to make a determination regarding any [proposed] rule . . . shall not affect the validity” of the rule. *Id.* § 49:968(E)(2). If neither the House nor the Senate subcommittee finds the proposed rule unacceptable, the agency may adopt it as proposed. *Id.* § 49:968(H)(1).

The materials submitted by the Board appear to show that this procedure was followed for the reissuance of Rule 31101.

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<sup>18</sup> We note that an additional statute governing legislative review of Board regulations that was in force in 2013 when Rule 31101 was originally adopted had been repealed by 2017. *See* La. Rev. Stat. § 3415.21(B) (2013) (discussed below in connection with Complaint Counsel’s Motion for Partial Summary Decision).

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According to the Board, no subcommittee member requested a hearing or submitted any questions about the proposed Rule. MTD at 14; RX12; RX13. At most, this shows a “potential for state supervision,” which the Supreme Court has held “is not an adequate substitute for a decision by the State.” *Ticor Title*, 504 U.S. at 638. This procedure is substantively similar to the “negative option rule” addressed in *Ticor Title*, under which state agencies had an opportunity to review rates proposed by private entities and “[t]he rates became effective unless they were rejected within a set time.” *Id.* Similarly, here, the Board’s proposed rules, establishing compensation rules set by active market participants, automatically become effective if not rejected by the legislative subcommittees in a set time. Here, as in *Ticor Title*, the failure of the state to act does not “signif[y] substantive approval,” *id.*, and thus does not demonstrate active supervision.<sup>19</sup>

Finally, the Board has also submitted no evidence that Louisiana’s Governor actively supervised the reissuance of Rule 31101. Respondent cites La. Rev. Stat. §§ 49:968(D)-(F) and 49:970 in arguing that every rule promulgated by the Board must be reviewed by the Governor. MTD at 19-20. La. Rev. Stat. §§ 49:968(D)-(G) provide for review by the Governor when a legislative oversight subcommittee finds that a proposed rule change is unacceptable, an event that did not occur here. La. Rev. Stat. § 49:970 permits the Governor to suspend or veto any rule or regulation of a state board within 30 days of its adoption, a procedure much like that which the Supreme Court found a mere

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<sup>19</sup> At oral argument, the Board’s counsel cited *Motor Transport Association of Connecticut, Inc.*, 112 F.T.C. 309 (1989), for the proposition that we have previously approved negative option procedures. Tr. Oral Arg. at 16. In *Motor Transport*, however, the record showed that the state public utilities commission “regularly review[ed] proposed tariffs and consider[ed] the reasonableness of proposed rates.” *Id.* at 349. The record contained specific examples of active oversight, including situations where the agency had suspended rules, held a hearing, and issued a written decision, and the record showed that the “when the [agency] allows a proposed rate to become effective without invoking its hearing procedures, that action results from the decision of the agency that the proposed rate meets the requirements of the statutes and regulations.” *Id.* (internal quotation marks and brackets omitted). There is no comparable evidence of active legislative supervision here, and nothing in *Motor Transport* suggests that a state’s decision not to hold a hearing on a proposed rule can be deemed active supervision.

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“potential for state supervision” that did not qualify as a “decision by the State.” *Ticor Title*, 504 U.S. at 638. Here, there is nothing in the record to suggest that the Louisiana Governor even looked at reissued Rule 31101, much less conducted the type of analysis that would be necessary to qualify as active supervision. Accordingly, we find the State of Louisiana failed to actively supervise the reissuance of Rule 31101.

**Supervision of Enforcement Proceedings**

Whether the changes to the Board’s procedures for enforcing Rule 31101 are sufficient to show active supervision is a more difficult question, complicated by the fact that the new procedures have never been implemented. As a starting point, *Ticor Title* makes clear that a program for state supervision that appears adequate on paper is not, by itself, sufficient to establish active supervision; state officials must actually exercise their supervision authority in a meaningful way. *See Ticor Title*, 504 U.S. at 637-38. In this case, however, certain features of the review procedure adopted by the Board are problematic on their face.

As noted above, the review procedure is spelled out in an MOU between the Board and the DAL, which is authorized to provide administrative law judges on a contractual basis for state agencies. *See* La. Rev. Stat. § 49:999.1.<sup>20</sup> The MOU provides that before “finaliz[ing] a settlement agreement with” or “filing an administrative complaint against” an AMC, the Board will “transmit its proposed action and the record thereof to the DAL.” RX9, § 4. The DAL then has 30 days to “approve, reject, or modify” the Board’s proposed action, and may remand the proceeding to the Board “with instructions or to obtain additional evidence for the record on review.” *Id.* § 5.

When the Board seeks to initiate an administrative complaint, the DAL will review the request to determine “(i) whether the

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<sup>20</sup> We express no view as to whether an agreement on enforcement procedures between state agencies imposed pursuant to an executive order, as opposed to procedures that the legislature has mandated by statute, can be sufficient to satisfy the active supervision requirement. We note that the MOU procedures may be terminated by either party on 30 days’ notice. RX9, § 9.



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evidence presented is sufficient to show a likelihood that the AMC has not complied with the customary and reasonable requirements . . . and (ii) whether the proposed enforcement action serves Louisiana's policy of protecting the integrity of residential mortgage appraisals.” *Id.* § 5(a). When the Board seeks approval of a “proposed settlement agreement, dismissal, or informal resolution of any DAL-approved enforcement action,” the DAL will “determine whether the proposed enforcement action serves Louisiana's policy of protecting the integrity of residential mortgage appraisals by requiring that fees paid by AMCs for such appraisals are customary and reasonable in accordance with [Louisiana law].” *Id.* § 5(b).

The MOU also provides that the DAL “shall review the entirety of the hearing record and evidence of each enforcement proceeding conducted by the LREAB, the written proposed determination by the LREAB as to whether one or more violations by an AMC . . . have occurred, and any proposed remedy with respect to any such violation.” *Id.* § 5(c). The DAL will conduct this review according to the standards set forth in La. Rev. Stat. § 49:964(G), which governs judicial review of administrative adjudications.<sup>21</sup> The DAL will review “all questions of law and statutory and regulatory interpretations . . .

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<sup>21</sup> Section 49:964(G) provides: The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

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without deference to the LREAB determinations.” RX9, § 5(c)(i). It will review findings of fact “in accordance with Section 964(G)(6), giving deference to the LREAB’s determination of credibility issues.” *Id.* § 5(c)(iii). And it will review the proposed remedy “in accordance with Section 964(G)(5), in light of the underlying policies of the State of Louisiana and the determination by the DAL of the findings of fact.” *Id.* § 5(c)(ii).

Without passing on the sufficiency of the other aspects of this scheme, we find the provision for review of the Board’s proposed remedy to be problematic.<sup>22</sup> The remedy is likely to be a critical issue in Board enforcement proceedings, as the Board investigates, settles, and enters remedial orders resolving allegations that AMCs have failed to comply with the customary and reasonable fee requirements of La. Rev. Stat. § 37:3415.15(A) and has authority to suspend or revoke licenses and impose fines and civil penalties of up to \$50,000. *See* La. Rev. Stat. § 37:3415.19; RX1, at § 1; [REDACTED]. But under the MOU, the DAL would review the Board’s remedy only to determine if it is “[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” La. Rev. Stat. § 49:964(G)(5). This is a deferential standard that the Louisiana Supreme Court has described as “quite limited.” *Allen v. La. State Bd. of Dentistry*, 543 So. 2d 908, 915 (La. 1989). But “[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.” *Ticor Title*, 504 U.S. at 633. Application of such deferential review is insufficient to make the Board’s remedial determination “the State’s own,” or to ensure that the State has accepted “political accountability” for any anticompetitive conduct attributable to the Board. *See N.C. Dental*, 135 S. Ct. at 1111.

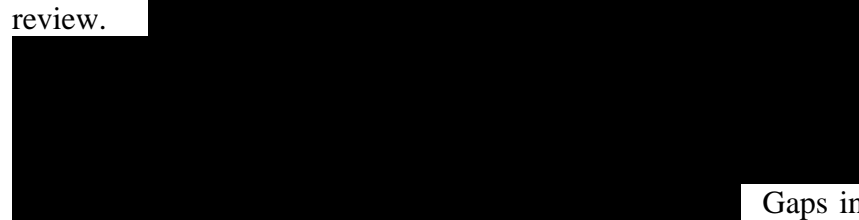
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<sup>22</sup> Complaint Counsel raise a number of other potential concerns, including that the ALJ reviews only the evidence before the Board; the review process is closed to consumers and many other potentially interested parties; the ALJ is required to defer to the Board’s determinations of credibility; and the MOU does not require the ALJ to issue a sufficiently detailed written decision.

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In *Patrick v. Burget*, the Supreme Court held that judicial review of the actions of private actors was not active supervision when the review was “of a very limited nature.” 486 U.S. at 104. Courts applying *Patrick* have consistently found that deferential forms of limited judicial review are not sufficient to qualify as active supervision. See *Pinhas v. Summit Health Ltd.*, 894 F.2d 1024, 1030 (9th Cir. 1989); *Shawahy v. Harrison*, 875 F.2d 1529, 1535-36 (11th Cir. 1989). We see no reason why the rule should be different when the State has provided for a deferential form of administrative review, rather than judicial review.<sup>23</sup>

In addition, we find significant coverage gaps in the DAL’s review of the Board’s enforcement actions. DAL review of proposed settlement agreements, dismissals, and informal resolutions is limited to those resulting from “DAL-approved enforcement actions.” RX9, § 5(b). The entire realm of Board activity that never gives rise to a DAL-approved administrative complaint under RX9, § 5(a), is to be resolved without any DAL review.



Gaps in the coverage of DAL review both draw the sufficiency of supervision of enforcement proceedings into question and highlight the fact that an absence of supervision of the reissuance of Rule 31101 means that significant aspects of the Board’s activities receive no supervision whatsoever.

### Conclusion

For the foregoing reasons, we conclude that the evidence proffered by the Board is insufficient to show either that the State of Louisiana actively supervised the reissuance of Rule 31101 in 2017 or that it will actively supervise enforcement proceedings under the Rule going forward. The Board’s contention that this

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<sup>23</sup> The same consideration contributes to our conclusion that the potential for judicial review of the Board’s actions under the deferential standard of La. Rev. Stat. § 964(G) cannot constitute active supervision. See *infra* Section IV.C.

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case is moot rests critically on its claim that the state action defense shelters its future activities from antitrust scrutiny, leaving no conduct for the Commission to prevent and no relief for the Commission to grant. As noted above, for purposes of its Motion to Dismiss, the Board does not dispute that active supervision is necessary. Consequently, our conclusions regarding active supervision establish that the Board has failed to demonstrate a state action defense and that its mootness claim must fail. We therefore deny the Board's Motion to Dismiss.

**COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION**

We turn now to Complaint Counsel's Motion for Partial Summary Decision. This Motion raises two main issues. First, is the Board subject to the active supervision requirement? This primarily turns on the resolution of a legal dispute regarding the proper interpretation of *N.C. Dental's* "active market participant" standard. Second, if the Board is subject to the active supervision requirement, did the State actively supervise the Board's conduct? We first set forth the governing legal standard, and then address these issues in turn.

**The Legal Standard**

We review Complaint Counsel's Motion under Rule 3.24 of our Rules of Practice, 16 C.F.R. § 3.24, which is "virtually identical" to Federal Rule of Civil Procedure 56, governing summary judgment in the federal courts. *N.C. Dental*, 151 F.T.C. at 607. "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.'" *Jerk, LLC*, 159 F.T.C. 885, 889 (2015) (quoting Fed. R. Civ. P. 56(a)). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Furthermore, once the moving party has adequately supported its motion, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*

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*Corp.*, 475 U.S. 574, 586 (1986). It must instead establish “specific facts showing that there is a genuine issue for trial.” *Id.* at 587 (internal quotation marks and emphasis omitted). “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Id.* (internal quotation marks omitted).

**Whether the Active Supervision Requirement Applies**

*N.C. Dental* held that the active supervision requirement of the state action doctrine applies when “a controlling number of decisionmakers are active market participants in the occupation the board regulates.” 135 S. Ct. at 1114. The parties disagree sharply about what this language means. Complaint Counsel argue for a bright-line rule that the standard is satisfied when a controlling number of board members must be licensed to practice the occupation the board regulates – in this case, real estate appraisal. MPSD at 1, 9-13. Under this approach, it would not be necessary to distinguish between general appraisers and residential appraisers; both need Board licenses. Nor would it be necessary to consider to what degree particular Board members actually conduct residential appraisals or stand to benefit from Rule 31101.

The Board argues that we must undertake a much more fact-intensive inquiry. It contends that we must first define the “relevant market,” *see generally Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962), and then determine which Board members actually perform services within that market. In the Board’s view, the relevant market is limited to residential real estate appraisals for “covered transactions,” *i.e.*, those where the mortgage is secured by a consumer’s principal dwelling. ROpp at 27.

The Board’s approach would require us to scrutinize the actual business activities of Board members to determine whether they have “any cognizable pecuniary interest in the regulations at issue.” *Id.* at 28. The Board argues that its general appraiser board members lack such an interest and that only residential appraisers – who make up a minority of the Board – should be deemed active market participants. *Id.* at 27. At the very least, it

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asserts that there are factual questions regarding market definition and the degree to which general appraiser Board members participate in the residential market. *Id.* at 30.

The Board concedes that general appraisers can appraise residential property. But it argues that general appraisers “rarely” perform residential appraisals, and that “they may lack geographic or other competence factors necessary” for such work. *Id.* at 25. It has submitted eight affidavits from past or present Board members who are licensed as general appraisers.<sup>24</sup> Three of the affiants state that they did at least occasionally conduct residential appraisals during the time they served on the Board, with one stating that most of his residential appraisal work was in connection with VA loans – *i.e.*, residential mortgage loans.<sup>25</sup> Three other affiants state that they work for banks, in which capacity they reviewed appraisals rather than conducting them; they all state that they “occasionally” reviewed residential appraisals.<sup>26</sup> Five of these six individuals state that they do not consider residential appraisals to be a “significant” part of their business. The other two affiants state that they did not actively perform residential appraisals during their time on the Board and do not consider residential appraisals to be part of their business.<sup>27</sup>

The Board further argues that we must determine whether its members “pursued proper policy or private interests,” and that this is also a fact-intensive inquiry that cannot be resolved on

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<sup>24</sup> The Board also submitted additional affidavits (from some of the same individuals and some new ones), as well as a chart purporting to summarize the Board’s membership from 2011 to 2017, in connection with its opposition to Complaint Counsel’s separate, subsequent Motion for Partial Summary Decision on Respondent’s Fourth Affirmative Defense. These additional materials are not part of the record of the instant summary decision motion, but in any case do not change our disposition.

<sup>25</sup> See Affidavit of Leonard E. Pauley ¶¶ 4-5; Affidavit of Michael E. Graham ¶¶ 4-5; Affidavit of Rebecca Rothschild ¶ 5 (all attached to ROpp).

<sup>26</sup> See Affidavit of Heidi C. Lee ¶¶ 4-5; Affidavit of Clayton Lipscomb ¶¶ 4-5; Affidavit of Kara Ann Platt ¶¶ 4-5 (all attached to ROpp).

<sup>27</sup> See Affidavit of Cheryl B. Bella ¶ 5; Affidavit of Gayle Boudousquie ¶ 4 (all attached to ROpp).

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summary decision. *Id.* at 30. It argues that the Board has “[e]ssential . . . structural features that protect against members pursuing private over public interests.” *Id.* at 32. In particular, it argues that the Board’s membership represents different industry categories – general appraisers, residential appraisers, an AMC member (who must also be a licensed appraiser), and banking representatives – with no single category constituting a majority. *Id.* It notes that the Board members are not elected by industry members, as in *N.C. Dental*, but are appointed by the Governor and confirmed by the Louisiana Senate, and that the Governor may remove them at any time for cause. *Id.* And it further notes that the executive director of the Board, who by statute is the executive director of the Louisiana Real Estate Commission, is not selected by the Board (and hence is not under its control) and is not an appraiser. *Id.*

We conclude that Complaint Counsel’s approach is more consistent with both the case law and the underlying purpose of the active supervision requirement. The Board’s argument is very similar to one that we explicitly rejected in *N.C. Dental*. That case involved a rule issued by the State Board of Dental Examiners that barred non-dentists from performing teeth whitening services; in opposing summary decision, the board argued that Complaint Counsel had “presented no evidence that the individual dentist members of the Board . . . derived substantial revenues in their private practice from teeth whitening services.” *N.C. Dental*, 151 F.T.C. at 627. We rejected this argument, holding that “the determinative factor in requiring supervision is not the extent to which individual members may benefit from the challenged restraint, but rather the fact that the Board is controlled by participants in the dental market.” *Id.* Thus, although we noted that many of the dental board members did perform teeth whitening services in their private practices, our holding was “not predicated on the Board members’ actual financial interests.” *Id.* In affirming our decision, the Supreme Court likewise did not focus on the degree to which dental board members actually provided teeth whitening services. Rather, its decision turned on the fact that the dental board members participated in “the occupation the board regulates” – *i.e.*, dentistry. *N.C. Dental*, 135 S. Ct. at 1114.

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Applying those principles to this case, we conclude that the “occupation the board regulates” here is real estate appraisal. There is no dispute that by statute, seven of the ten Board members must be Board-licensed real estate appraisers with at least five years’ experience (not counting the AMC representative, who must also be a licensed appraiser). *See* La. Rev. Stat. § 37:3394(B)(1). This is thus a classic instance where the state has delegated authority to a private industry group to regulate itself, with only limited participation from other industry groups. We see no basis for drawing a distinction between general appraisers and residential appraisers, since the general appraisers are licensed to appraise residential property (and the Board’s own evidence shows that some of them do). Just as it was not necessary in *N.C. Dental* to determine whether individual dental board members performed teeth whitening services, it is not necessary here to probe whether particular Board members derive revenue from residential appraisals. It is enough that the Board licenses them to conduct such appraisals.

The Board’s argument that we must first define a “relevant market” and then determine the extent to which individual members participate in that market improperly conflates two distinct issues. Definition of the relevant market generally is a step in determining whether a practice is anticompetitive, by identifying the groups of products or the geographic areas of competition that could be subject to an exercise of market power. *See, e.g.,* U.S. Dep’t of Justice & FTC, *Horizontal Merger Guidelines* §§ 4.1, 4.2 (2010). The “active market participant” test concerns a different issue: whether a board empowered by the state to regulate a given industry is, as a practical matter, controlled by that industry. If it is, a significant risk exists that the board will act to further the interests of the industry, rather than the public interest, and active supervision is required before the state action doctrine can be invoked.

Moreover, the Board’s proposed test would be difficult, if not impossible, to apply as a practical matter. Under the Board’s approach, it would be impossible to know whether a particular action required active supervision without first conducting an analysis of the relevant market affected by the action and the degree to which each Board member derived income from that



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market. Variations in the impact on individual members' revenues would require repeating this analysis every time the Board took a new action that potentially might give rise to an antitrust challenge. Such a regime would be extremely burdensome not only for the Board and its members, but also for agencies and courts tasked with reviewing such conduct.

The Board is correct that in *N.C. Dental*, we placed weight on the fact that the board members were elected by North Carolina dentists. 151 F.T.C. at 626-28. But the fact that Board members here are appointed by the Louisiana Governor, rather than elected, does not alter our analysis. The statute requires the Governor to appoint seven Board-certified appraisers with at least five years' experience, posing a significant risk that at least these seven Board members will represent the interests of their industry. Of course, there is nothing inherently wrong with such a structure, but a board that is controlled by representatives of the industry it regulates cannot shield itself from antitrust scrutiny unless the state actively supervises the board's activities.<sup>28</sup>

Complaint Counsel are correct that the dispositive question is whether a controlling number of Board members are licensed to practice the occupation the Board regulates. This can be answered affirmatively without defining relevant antitrust markets or delving into the details of individual board members' income streams. It follows that there is no genuine dispute of material fact that would preclude summary decision on this issue. We hold that the Board is controlled by active market participants and is therefore subject to the active supervision requirement. We therefore grant partial summary decision in favor of Complaint Counsel as to the Board's Third Affirmative Defense.

**Whether the Board's Prior Conduct Was Actively Supervised**

The Board argues that Louisiana actively supervised both the initial promulgation of Rule 31101 in 2013 and the enforcement

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<sup>28</sup> The Board's argument that its executive director is not an appraiser and is not selected by the Board need not detain us long, because the executive director is not a member of the Board and has no voting power.

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of that Rule prior to the adoption of new procedures in 2017. We reject these arguments for essentially the same reasons that we reject the Board's similar contentions in connection with its Motion to Dismiss Complaint.

The Board first contends that the Louisiana Legislature and the Governor actively supervised the promulgation of Rule 31101. ROpp at 19-21. The record shows just the opposite. In 2013, a Louisiana law (since repealed) provided that any rules issued by the Board required "affirmative approval" by the Louisiana House and Senate oversight committees. La. Rev. Stat. § 3415.21(B) (2013). But the statute also provided that "[i]f the board submits its proposed rules for affirmative approval and the legislature is not in session, the proposed rules shall be deemed affirmatively approved if forty-five days have elapsed from the date the proposed rules are received by the oversight committees and no hearing is held by either committee." *Id.* In other words, legislative *inaction* would be deemed affirmative approval.

In this case, the Board submitted its report on the proposed Rule to the Legislature on September 26, 2013. Unangst Aff. ¶ 33. The Legislature was not in session at that time. *Id.* ¶ 34. Neither the House nor the Senate subcommittee opted to hold a hearing, thus allowing the rule to take effect. *Id.* The Senate subcommittee originally scheduled a hearing, but then voted to remove it from the calendar after the Chairman explained that holding the hearing could trigger the affirmative approval requirement and prevent the proposed Rule from going into effect. *See id.* (citing a video recording of a hearing on the website of the Senate Commerce Committee at <http://senate.la.gov/video/videoarchive.asp?v=senate/2013/11/111313COM>).

The upshot is that there is no evidence that either committee engaged in substantive analysis of the reissued Rule. Although it is clear that the legislative oversight subcommittees could have conducted a substantive review, "[t]he mere 'potential for state supervision is not an adequate substitute for a decision by the State.'" *Ticor Title*, 504 U.S. at 638. Similarly, the fact that Louisiana's Governor allowed the Rule to proceed, *see* Unangst Aff. ¶ 36, does not show that he conducted the kind of substantive analysis necessary to satisfy the active supervision requirement.

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As discussed above with respect to the 2017 reissuance of the Rule, *see supra* Section III.C, *Ticor Title* makes clear that approval through this type of “negative option” procedure does not constitute active supervision.

The Board also contends that its enforcement decisions prior to 2017 were actively supervised because they were reviewable in state court under the Louisiana Administrative Procedure Act (“APA”). ROpp at 21-23; *see* La. Rev. Stat. § 49:964(G). In *Patrick*, the Supreme Court held that insofar as Oregon law provided for judicial review of the decisions at issue, the review was too limited to qualify as active supervision. 486 U.S. at 103-04. The Board correctly notes that *Patrick* did not absolutely preclude the use of judicial review as active supervision, but it cites no case holding judicial review to be adequate. And *Ticor Title* and *N.C. Dental* make clear that the “mere potential” for state supervision is inadequate. *N.C. Dental*, 135 S. Ct. at 1116 (quoting *Ticor Title*, 504 U.S. at 638). Here, although Louisiana law provides for judicial review of Board enforcement decisions, it does not require such review. In many cases, parties aggrieved by a Board enforcement decision might decide not to undertake the burden and expense of a court challenge; in such cases, the Board’s decision would never be reviewed. This amounts to at most potential supervision.

Furthermore, judicial review of the Board’s decisions takes place under a deferential standard. The Board’s governing statute provides for judicial review of “questions of law” involved in any final decision of the Board. La. Rev. Stat. § 37:3415.20(B)(1). Under the statute, “[i]f the court finds that the Louisiana Real Estate Appraisers Board has regularly pursued its authority and has not acted arbitrarily, it shall affirm the decision, order, or ruling of the board.” *Id.* § 37:3415.20(B)(2). This is clearly a limited and highly deferential form of review akin to that the Supreme Court found inadequate in *Patrick*. *See also Ticor Title*, 504 U.S. at 638 (where state did not actively supervise ratemaking, “as in *Patrick*, the availability of state judicial review could not fill the void”). The parties’ briefs do not address how the specific judicial review provision in the Board’s governing statute interacts with the more general judicial review procedures set forth in the Louisiana APA, *see* La. Rev. Stat. § 49:964(G).

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But as discussed above, the Louisiana Supreme Court has made it clear that review under the Louisiana APA is “quite limited.” *Allen v. La. State Bd. of Dentistry*, 543 So. 2d at 915.

In sum, the limited and contingent nature of judicial review here makes clear that it cannot qualify as active supervision. Furthermore, in cases that were resolved through settlement, there was not even a potential for judicial review. *See generally* Unangst Aff. ¶ 76 (acknowledging that the Board “has closed formal investigations into alleged violations of La. R.S. 37:3415.15 after the AMC provided a proposal to ensure compliance with federal and Louisiana [customary and reasonable] requirements”).

### Conclusion

We conclude that there is no genuine issue for trial as to whether the State actively supervised the Board’s initial promulgation of Rule 31101 and its enforcement of the Rule prior to adoption of the new procedures in 2017. On both issues, Complaint Counsel prevail as a matter of law. Coupled with our determination in Section IV.B that active supervision was a necessary component of the state action defense, our ruling that active supervision was absent is fatal to the Board’s state action claims. We therefore grant partial summary decision in favor of Complaint Counsel as to the Board’s Ninth Affirmative Defense.

Accordingly, **IT IS ORDERED THAT:**

1. Respondent’s Motion to Dismiss Complaint is **DENIED**;
2. Complaint Counsel’s Motion for Partial Summary Decision regarding Respondent’s Third and Ninth Affirmative Defenses is **GRANTED**; and
3. Respondent’s Third and Ninth Affirmative Defenses are hereby **DISMISSED**.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**1-800 CONTACTS, INC.**

*Docket No. 9372. Order, April 17, 2018*

Order rescheduling the oral argument in this Matter

**ORDER RESCHEDULING ORAL ARGUMENT**

The Respondent has filed its Appeal Brief perfecting its appeal from the Initial Decision in this matter; Counsel for the Complaint have filed their Answering Brief; and the Respondent has filed its Reply Brief. Commission Rule 3.52(b)(2) provides that the Commission ordinarily will schedule an Oral Argument within fifteen days after the date on which the Reply Brief is filed. Commission Rule 3.51(a) provides that the Commission may extend for good cause any of the time periods relating to an appeal of an Initial Decision. On February 26, 2018, the Commission scheduled the Oral Argument in this matter for May 1, 2018. To enable the new Commissioners who are likely to be confirmed in the near future to conduct the Oral Argument on a matter they likely will decide, the Commission has determined to reschedule the Oral Argument in this matter for June 26, 2018, at 2 p.m. in Hearing Room 532 of the Headquarters Building of the Federal Trade Commission, located at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Each side will be allotted forty-five minutes to present its argument. Respondents will have the opportunity to open the argument and will be permitted to reserve time for rebuttal. If either side wishes to provide the Commission with a short written or electronic compilation of material to facilitate its presentation during the Oral Argument, any such compilation may contain only public information that is already in the record of the proceeding, and copies must be filed with the Secretary of the Commission and provided to opposing counsel no later than June 19, 2018, at 5 p.m.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**LOUISIANA REAL ESTATE APPRAISERS  
BOARD**

*Docket No. 9374. Order, April 18, 2018*

Order extending the time period to issue the Opinion and Order of the Commission regarding Complaint Counsel's Motion for Partial Summary Decision.

**ORDER EXTENDING TIME FOR ISSUING OPINION AND ORDER  
ADDRESSING COMPLAINT COUNSEL'S MOTION FOR PARTIAL  
SUMMARY DECISION DISMISSING RESPONDENT'S FOURTH  
AFFIRMATIVE DEFENSE**

In order to ensure that it can give full consideration to the issues presented by Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense, the Commission has determined, pursuant to Commission Rules 3.22(a) and 4.3(b), 16 C.F.R. §§ 3.22(a) and 4.3(b), to extend the time period for issuing an opinion and order until April 26, 2018.

**IT IS SO ORDERED.**

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**OTTO BOCK HEALTHCARE NORTH AMERICA,  
INC.**

*Docket No. 9378. Order, April 18, 2018*

Opinion and Order denying Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense.

OPINION AND ORDER OF THE COMMISSION

**By OHLHAUSEN, Acting Chairman:**

On December 20, 2017, the Commission issued an administrative complaint alleging that the agreement for Otto Bock HealthCare North America, Inc. ("Otto Bock" or "Respondent") to purchase FIH Group Holdings, LLC ("Freedom") violated Section 5 of the FTC Act, and that consummation of that transaction on September 22, 2017, violated Section 7 of the Clayton Act. According to the Complaint, the agreement and consummated transaction had the effect of substantially reducing competition in the market for microprocessor-controlled prosthetic knees sold to prosthetic clinics in the United States.

In its Answer to the Complaint, *inter alia*, Respondent denied that the merger harmed consumers or competition, Am. Ans. ¶ 57,<sup>1</sup> and asserted affirmative defenses. Respondent's Seventh Affirmative Defense asserts [REDACTED]

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<sup>1</sup> We use the following abbreviations for purposes of this opinion:

Compl.: Complaint

CCM: Memorandum of Law in Support of Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense

Am. Ans.: Amended Answer and Affirmative Defenses of Respondent Otto Bock Healthcare North America, Inc.

ROpp: Respondent's Opposition to Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense

Shotzbarger Decl.: Declaration of William Shotzbarger (attached to ROpp)

## Interlocutory Orders, Etc.

[REDACTED] Am. Ans. at 30.

At this time, we consider Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense, which was filed pursuant to Commission Rule 3.22(a). *See* 16 C.F.R. § 3.22(a) (permitting motions to strike); *see also* Fed. R. Civ. P. 12(f) ("The court may strike from a pleading an insufficient defense . . ."). Complaint Counsel argue that a [REDACTED] does not affect the legality of the merger agreement between Otto Bock and Freedom or the consummated merger. CCM at 2. According to Complaint Counsel, Respondent's affirmative defense is improper because Respondent cannot prove any set of facts about [REDACTED] that would foreclose liability for possible antitrust violations that occurred when the transaction was completed and Respondent took control of its merger partner. *Id.* at 3. Complaint Counsel seek an order striking Respondent's Seventh Affirmative Defense and precluding Respondent from raising [REDACTED] as a defense to the allegations in the Complaint.

Respondent argues that because [REDACTED], the acquisition will not substantially lessen competition. ROpp at 3-4, 6. Respondent explains that it acquired Freedom on September 22, 2017, and received inquiries about the transaction from the FTC within a week. According to Respondent, [REDACTED]. *Id.* at 4, 5 n.5; Shotzbarger Decl., Exh. C. Respondent also states that it [REDACTED]. ROpp at 4; Shotzbarger Decl., Exh. D [REDACTED]. According to Respondent, whether the acquisition will substantially lessen competition "depends on a forward-looking evaluation," ROpp at



## Interlocutory Orders, Etc.

2, and [REDACTED] the acquisition of Freedom is not likely to result in a substantial lessening of competition. *Id.* at 3.<sup>2</sup>

For the reasons discussed below, Respondent's averment fails as an affirmative defense. We agree with Complaint Counsel that the averment is not sufficient to negate liability if the allegations in the Complaint are shown. Notwithstanding Respondent's affirmative defense label, the claim can appropriately be viewed as a denial. As Respondent repeatedly explains in its Opposition to the Motion, it asserts this factual issue in arguing that there will be no substantial lessening of competition. Courts typically do not strike negative averments pled as affirmative defenses rather than denials. Consequently, although the claim is not a valid affirmative defense, we will not strike it, and Respondent will remain entitled to develop and produce evidence regarding [REDACTED] as relevant to the claimed likely substantial lessening of competition and to [REDACTED].

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<sup>2</sup> Respondent also contends we should refer this motion to the Administrative Law Judge. Commission Rule 3.22(a) provides, "Motions to dismiss filed before the evidentiary hearing . . . , motions to strike, and motions for summary decision shall be directly referred to the Commission and shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge." 16 C.F.R. § 3.22(a). The Commission adopted this rule in 2009 "in order to further expedite its adjudicative proceedings, improve the quality of adjudicative decision making, and clarify the respective roles of the Administrative Law Judge ('ALJ') and the Commission in Part 3 proceedings." 73 Fed. Reg. 58,832 (Oct. 7, 2008) (Proposed Rule Amendments); *see also* 74 Fed. Reg. 1804 (Jan. 13, 2009) (Interim Final Rules); 74 Fed. Reg. 20,205 (May 1, 2009) (Amendments Adopted As Final). Since this rule's adoption in 2009, the Commission has consistently ruled upon such motions. *See, e.g., Impax Labs., Inc.*, Docket No. 9373 (F.T.C. Oct. 27, 2017) (Comm'n Op. and Order denying motion for partial summary decision); *1-800 Contacts, Inc.*, Docket No. 9372 (F.T.C. Feb. 1, 2017) (Comm'n Op. and Order granting motion for partial summary decision); *N.C. Bd. of Dental Examiners*, 151 F.T.C. 607 (2011) (Commission's Op. and Order Denying Mot. to Dismiss and Granting Mot. for Partial Summ. Decision). There is no reason to depart from normal Commission practice in this case. Contrary to Respondent's contention, our decision does not determine factual issues that should be developed before the Administrative Law Judge, and there is no reason to refer the motion to him.

Interlocutory Orders, Etc.

**I. Respondent's Averment as an Affirmative Defense**

“An affirmative defense is defined as “[a] defendant’s assertion raising new facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all allegations in the complaint are true.” *Saks v. Franklin Covey Co.*, 316 F. 3d 337, 350 (2d Cir. 2003) (quoting *Black’s Law Dictionary* 430 (7th ed. 1999)); *see also* *Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 449 (1st Cir. 1995) (describing an affirmative defense as “a bar to the right of recovery even if the general complaint were more or less admitted to”) (internal quotation marks omitted); *Drzik v. Haskell Co.*, 2011 WL 2981565, at \*1 (M.D. Fla. 2011) (“By definition, an ‘affirmative defense’ is established when a defendant admits to the essential facts of the complaint, but sets forth other facts in justification and/or avoidance.”); *Barnes v. AT&T Pension Ben. Plan-Nonbargained Prog.*, 718 F. Supp. 2d 1167, 1173 (N.D. Cal. 2010) (defining an affirmative defense as “a defense that does not negate the elements of the plaintiff’s claim, but instead precludes liability even if all of the elements of the plaintiff’s claim are proven”) (quoting *Roberge v. Hannah Marine Corp.*, 1997 WL 468330, at \*3 (6th Cir. 1997)). Respondent’s Seventh Affirmative defense raises [REDACTED]

[REDACTED] as a new, liability-barring fact. Consequently, in evaluating its sufficiency as an affirmative defense, we inquire whether [REDACTED] would defeat liability even if the Complaint’s allegations are established.

As an initial matter, Respondent’s Seventh Affirmative Defense is speculative: it rests on [REDACTED]

[REDACTED]

## Interlocutory Orders, Etc.

██████████. There are good grounds to reject Respondent's Seventh Affirmative Defense as an affirmative defense even assuming that ██████████

Respondent's Seventh Affirmative Defense rests entirely on ██████████; thus, by its own terms, it rests on the premise that the only appropriate time to consider the likelihood of future anticompetitive effects is ██████████. The challenged merger agreement, however, was entered and the merger was consummated on September 22, 2017. Several months already have passed, and ██████████ cannot eliminate the potential for demonstrating likely anticompetitive effects during the intervening period.

Respondent's Opposition to the Motion to Strike seeks to remedy this deficiency by pointing to ██████████, and by asserting that, after receiving inquiries from the FTC within a week of the merger's consummation, it ██████████. ROpp at 6. Even if these additional considerations were part of the Affirmative Defense,<sup>3</sup> however, they still would not suffice to defeat Complaint Counsel's claims if the Complaint's allegations are taken as true. The Complaint alleges that "Otto Bock and Freedom sales personnel no longer have an incentive to compete against each other for sales," Compl. ¶ 57. "Under common

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<sup>3</sup> Of course, standing alone, the representations about ██████████ do not preclude a finding of likely future anticompetitive effects. As courts and the Commission have repeatedly recognized, a merged firm's choice not to take anticompetitive actions while litigation is pending does not preclude a finding of likely anticompetitive effects. See, e.g., *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 504-05 (1974) ("If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending. . . . [T]he mere nonoccurrence of a substantial lessening of competition in the interval between acquisition and trial does not mean that no substantial lessening will develop thereafter . . ."); *Polypore Int'l, Inc.*, 150 F.T.C. 586, 599 n.16 (2010).

## Interlocutory Orders, Etc.

ownership and without the incentive to introduce innovations to take and defend sales from each other,” the Complaint continues, “Otto Bock does not have the same incentive to launch these [new] products on the same timeline or in the same form as Otto Bock and Freedom had independently pre-Merger.” Compl. ¶ 58. Nothing in Otto Bock’s Seventh Affirmative Defense or even in its arguments in opposing the Motion to Strike addresses the alleged change in incentives attributable to the consummated merger or the competitive harm that the Complaint alleges followed therefrom.

We find inapposite the cases cited as support for Respondent’s claim that [REDACTED].

All of those cases involved *unconsummated* mergers. Unlike here, the courts in those cases were analyzing the likely competitive harm that would result [REDACTED].

. In those circumstances, the courts ruled,

. *See*

.<sup>4</sup> Similarly, in

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<sup>4</sup> In each instance the courts’ reasoning was influenced by the fact that [REDACTED]

## Interlocutory Orders, Etc.

██████████<sup>5</sup> In those cases, unlike this one, the fact that the merger had not been consummated meant that ██████████  
██████████. Here, where the merger *has* already been consummated, likely anticompetitive effects may arise both ██████████, and the cited holdings have no applicability to the former period.

## II. Treating Respondent's Averment as a Denial

Respondent's Opposition repeatedly states that Respondent intends ██████████ to rebut the Complaint's allegation that the merger agreement and consummated transaction had the likely effect of substantially lessening competition. ROpp *passim*. In substance, this is part of Respondent's denial of Complaint Counsel's *prima facie* case, rather than a true affirmative defense. *See, e.g., Drzik*, 2011 WL 2981565, at \*1 (stating that a defense that points to a fact that would negate a factor in plaintiff's *prima facie* case "is not an affirmative defense, but a denial"); *Home Mgmt. Sols., Inc. v. Prescient, Inc.*, 2007 WL 2412834, at \*3 (S.D. Fla. 2007) (finding that a contention that a challenged joint venture agreement had been modified through subsequent agreements and the course of conduct and dealings was a denial rather than an affirmative defense); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1269 (3d ed. 2017) (discussing improper designation of a "negative averment" as an affirmative defense); *see also In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) ("A defense which points out a defect in the plaintiff's *prima facie* case is not an affirmative defense.").

In these circumstances, Respondent's choice of label as an affirmative defense is not dispositive. Courts typically do not strike such averments. "When a party incorrectly labels a 'negative averment as an affirmative defense rather than as a

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<sup>5</sup> The court noted that the parties were willing to make ██████████  
██████████.

## Interlocutory Orders, Etc.

specific denial[,] . . . the proper remedy is not [to] strike the claim, but rather to treat it as a specific denial.” *Drzik*, 2011 WL 2981565, at \*1 (quoting *Home Mgmt. Solutions*, 2007 WL 2412834, at \*3); *Wright & Miller, supra* § 1269, at 557 (“The federal courts have accepted the notion of treating a specific denial that has been improperly denominated as an affirmative defense as though it were correctly labeled.”). Mere choice of label should not prejudice a respondent that has sought to identify a specific element of its defense.<sup>6</sup> “[R]esearch has not revealed a single reported decision since the promulgation of the federal rules in which an erroneous designation resulted in any substantial prejudice to the pleader.” *Wright & Miller, supra* § 1269, at 557.

Under these circumstances we will not treat Respondent’s Seventh Affirmative Defense as a defense, but only as a denial. As such, this denial regarding [REDACTED] should not be stricken from Respondent’s pleading. To be clear, as discussed above, the averment which composes Respondent’s denial is insufficient in itself to defeat liability. We agree with Complaint Counsel’s analysis on that issue, and the fact that the divestiture remains uncertain reinforces our conclusion. Nonetheless, [REDACTED] could potentially be relevant to rebut a showing of likely anticompetitive effects [REDACTED], and Respondent remains entitled to develop and present relevant evidence regarding [REDACTED]. Moreover, in support of its denial, Respondent may develop and present relevant evidence regarding the [REDACTED] for any violation found. Those factual issues are properly addressed in the hearing before Chief Administrative Law Judge Chappell.

Accordingly,

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<sup>6</sup> Indeed, separate designation of such elements may have benefits by providing useful notice and identifying specific information that should be highlighted and to which respondent has better access. *See Wright & Miller, supra* § 1271, at 603-605.

Interlocutory Orders, Etc.

**IT IS ORDERED THAT** Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense is **DENIED**.

By the Commission.

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**IN THE MATTER OF**

**OTTO BOCK HEALTHCARE NORTH AMERICA,  
INC.**

*Docket No. 9378. Order, April 23, 2018*

Order granting Complaint Counsel and Respondent's joint motion to reschedule commencement of the evidentiary hearing in this proceeding.

**ORDER GRANTING JOINT MOTION TO RESCHEDULE THE DATE FOR  
THE HEARING**

On April 20, 2018, Complaint Counsel and Respondent Otto Bock HealthCare North America, Inc. ("Otto Bock") jointly moved to reschedule commencement of the evidentiary hearing in this proceeding to July 10, 2018. The parties represent that Chief Administrative Law Judge D. Michael Chappell agrees with this scheduling change.

The hearing currently is scheduled to begin on June 1, 2018, which is two weeks after the scheduled start of the evidentiary hearing in *In the Matter of Tronox Limited, et al.*, Docket No. 9377. Both hearings are assigned to Judge Chappell. If *Tronox* goes to trial as scheduled, the hearing in this matter may not be handled expeditiously. In these circumstances, it would be difficult to provide adequate notice to witnesses of the dates when they would be expected to testify and for counsel for each side efficiently to allocate their time and resources.

Consequently, we find that there is good cause to reschedule the hearing date. Accordingly,

**IT IS HEREBY ORDERED** that the evidentiary hearing in this proceeding shall commence on July 10, 2018, and that pre-hearing deadlines shall be appropriately extended by the Administrative Law Judge.

By the Commission.



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**IN THE MATTER OF**

**LOUISIANA REAL ESTATE APPRAISERS  
BOARD**

*Docket No. 9374. Order, April 24, 2018*

Order dealing with multiple issues arising from Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense.

**ORDER SEEKING SUPPLEMENTAL BRIEFING, SCHEDULING ORAL  
ARGUMENT, EXTENDING DEADLINE FOR COMMISSION RULING,  
AND RESCHEDULING COMMENCEMENT OF EVIDENTIARY HEARING**

On February 5, 2018, Complaint Counsel filed a Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense. That defense avers: "Louisiana Real Estate Appraisers Board has acted in good faith to comply with a federal regulatory mandate." Complaint Counsel argue that the regulatory compliance defense is inapplicable to this proceeding and ask the Commission to rule that the Fourth Affirmative Defense is not a valid defense to the Complaint. Respondent has opposed Complaint Counsel's Motion, and Complaint Counsel have filed a timely Reply in support thereof.

After a careful review of the parties' submissions and the applicable case law, we have determined that supplemental briefing and entertaining oral argument on this Motion would be beneficial. Although both parties should be prepared to present oral argument addressing all issues raised by Complaint Counsel's Motion, we instruct the parties to focus their supplemental briefing and presentations on the following questions:

1. How do the elements of the regulatory compliance defense differ from those applicable to implied immunity from the antitrust laws?
2. What are the consequences of successful application of the regulatory compliance defense? Does successful invocation of the defense universally bar antitrust liability

## Interlocutory Orders, Etc.

or can it represent a factor to be considered as part of a rule of reason inquiry?

3. Do any differences between the facts in this proceeding and those in telecommunications litigation, where regulatory compliance considerations have received the most extensive treatment, suggest differences in the availability or application of a federal regulatory compliance defense?
4. How should the extant regulatory compliance case law be read in conjunction with more recent Supreme Court authority establishing the requirements of the state action defense? Can these two strands of case law be successfully harmonized, or are they in conflict today?
5. How would a defense based on “compliance in good faith with . . . state regulation” (Memorandum of Respondent Louisiana Real Estate Appraisers Board in Opposition to Complaint Counsel’s Motion for Partial Summary Decision on Respondent’s Fourth Affirmative Defense at 3) relate to the state action and preemption doctrines?

The Commission has determined to conduct the oral argument on August 13, 2018, at 2:00 p.m. in Hearing Room 532 of the Headquarters Building of the Federal Trade Commission, located at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Each side will have 30 minutes to present its argument. Complaint Counsel, as moving party, will have the opportunity to open the argument and may reserve time for rebuttal. The Commission’s deadline for ruling upon the Motion will be extended to September 10, 2018. *See* 16 C.F.R. §§ 3.22(a), 4.3(b). In view of this adjustment of the litigation schedule in this proceeding and the timing of evidentiary hearings already scheduled in other proceedings, the evidentiary hearing in this proceeding, currently set to begin on June 11, 2018, will be rescheduled to open on October 15, 2018.

*See* 16 C.F.R. §§ 3.11(a)(4), 4.3(b). Accordingly,

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**IT IS HEREBY ORDERED** that Complaint Counsel will submit a supplemental brief on the questions raised in this order by June 11, 2018. Respondent's brief shall be submitted by June 25, 2018. Any reply brief shall be filed by July 2, 2018;

**IT IS FURTHER ORDERED** that the Commission will conduct oral argument regarding Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense on August 13, 2018, as specified above;

**IT IS FURTHER ORDERED** that the Commission's deadline for ruling on Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense is extended to September 10, 2018; and

**IT IS FURTHER ORDERED** that the evidentiary hearing in this proceeding before an Administrative Law Judge of the Federal Trade Commission will commence on October 15, 2018, at 10:00 a.m.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

**RED VENTURES HOLDCO, LP  
AND  
BANKRATE, INC.***Docket No. C-4627. Order, April 25, 2018*

Letter approving Red Ventures Holdco, LP's divestiture of the Caring.com Assets to Caring Holding, LLC.

## LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Peter Guryan, Esq.  
Simpson Thacher & Bartlett LLP

*Re: In the Matter of Red Ventures Holdco, LP, and Bankrate, Inc.  
File No. 171-0196, Docket No. C-4627*

Dear Mr. Guryan:

This letter is in reference to the Application For Commission Approval of Divestiture filed by Red Ventures Holdco, LP ("Red Ventures") and dated March 7, 2018 ("Application"). Pursuant to Paragraph II.A. of the Decision and Order in *FTC File No. 171-0196, Docket No. C-4627*, Red Ventures requests prior Commission approval of its proposal to divest the Caring.com Assets to Caring Holding, LLC.

After consideration of Red Ventures' Application and other available information, the Commission has determined to approve the proposed divestiture as set forth in the Application, and subsequently revised on April 22, 2018. In according its approval, the Commission has relied upon the information submitted and the representations made by Red Ventures in connection with Red Ventures' Application and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**LOUISIANA REAL ESTATE APPRAISERS  
BOARD**

*Docket No. 9374. Order, April 27, 2018*

Order denying respondent's motion for expedited review.

**ORDER DENYING MOTION FOR EXPEDITED REVIEW**

On April 20, 2018, Respondent Louisiana Real Estate Appraisers Board moved to stay this proceeding pending judicial review by the U.S. Court of Appeals for the Fifth Circuit of the Commission's April 10, 2018, Opinion and Order denying Respondent's Motion to Dismiss Complaint and granting Complaint Counsel's Motion for Partial Summary Decision regarding Respondent's state action defenses ("Motion to Stay"). On the same day Respondent also submitted a Motion for Expedited Review requesting that the Commission rule upon the Motion to Stay on or before May 2, 2018.<sup>1</sup>

On April 24, 2018, the Commission issued an Order Seeking Supplemental Briefing, Scheduling Oral Argument, Extending Deadline for Commission Ruling, and Rescheduling Commencement of Evidentiary Hearing. The Order moved the date for commencement of the evidentiary hearing in this proceeding from June 11, 2018, to October 15, 2018. Pre-trial deadlines established with reference to the previous June 11, 2018, hearing date may now be adjusted by the presiding Chief Administrative Law Judge. Respondent predicated its Motion for Expedited Review on the proximity of the start of trial, and the delay of the trial date removes those timing concerns.

On April 26, 2018, the United States Senate voted to confirm five nominees to the Federal Trade Commission, four of whom

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<sup>1</sup> Respondent also requested the Commission to direct Complaint Counsel to respond to the Motion to Stay by April 25. Complaint Counsel have already filed an Opposition to the Motion to Stay, so that portion of Respondent's motion for expedition is moot.

Interlocutory Orders, Etc.

are expected to receive their commissions in the coming days. Because the Commission is in the midst of change, it is appropriate to defer a ruling on the Motion to Stay until incoming Commissioners are able to participate. Although the Commission plans to address the Motion to Stay expeditiously, action by May 2, 2018, would not be consistent with the extant circumstances.

Accordingly,

**IT IS HEREBY ORDERED** that Respondent Louisiana Real Estate Appraisers Board's Motion for Expedited Review is **DENIED**.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**TRONOX LIMITED,  
NATIONAL INDUSTRIALIZATION COMPANY  
(TASNEE),  
NATIONAL TITANIUM DIOXIDE COMPANY  
LIMITED (CRISTAL),  
AND  
CRISTAL USA INC.**

*Docket No. 9377. Order, May 16, 2018*

Order denying Tronox Limited and the National Titanium Dioxide Company of the Kingdom of Saudi Arabia's motion to stay the Part 3 evidentiary hearing scheduled to begin on May 18, 2018, and to temporarily withdraw this matter from adjudication "to allow renewed settlement discussions."

**ORDER DENYING RESPONDENTS' MOTION TO STAY AND  
TEMPORARILY WITHDRAW THIS MATTER FROM ADJUDICATION**

On May 7, 2018, Tronox Limited ("Tronox") and the National Titanium Dioxide Company of the Kingdom of Saudi Arabia ("Cristal") moved the Commission to stay the Part 3 evidentiary hearing scheduled to begin on May 18, 2018, and to temporarily withdraw this matter from adjudication "to allow renewed settlement discussions." Motion at 2. Tronox and Cristal alternatively ask the Commission to reassess whether to seek a preliminary injunction in federal court in this matter. Motion at 5-6. Complaint Counsel oppose the requested stay and dispute the need for or benefit of seeking a preliminary injunction. For the reasons stated below, the Commission denies the Motion to Stay and Temporarily Withdraw this Matter from Adjudication.

Respondents argue that the Commission has good cause to stay this matter "to afford Respondents the opportunity to renew discussion with the Commission about the pro-competitive nature of this transaction" and to provide for settlement discussions. Motion at 2-3. Respondents explain that if the matter remains in Part 3 adjudication, settlement discussions might violate *ex parte* rules. Motion at 4.

## Interlocutory Orders, Etc.

Neither the completion of discovery nor progress regarding settlements with other competition authorities provides good cause to stay this proceeding, withdraw it from Part 3, and restart discussions about whether a complaint was warranted. When the Commission issued its Complaint, it found reason to believe that Tronox and Cristal had executed a merger agreement in violation of Section 5 of the FTC Act, 5 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. It is now in the public interest that the allegations in the Complaint be resolved expeditiously.

Importantly, Commission rules do not contemplate the actions Respondents seek. Commission Rule 3.25 provides a procedure for the withdrawal of a matter from Part 3 adjudication for the Commission to consider a *specific* settlement proposal after an administrative complaint has been issued. See 16 CFR § 3.25. Rule 3.25 does not provide for the withdrawal of a matter from adjudication for exploratory settlement talks or to allow respondents to renew discussions with Commissioners regarding the merits of a transaction.

Rule 3.25 requires that a motion to withdraw the matter from adjudication “be accompanied by a consent proposal.” 16 CFR § 3.25(b). Respondents do not provide a specific consent proposal; they only contend “recent events are likely to make settlement discussions productive.” Motion at 3. Moreover, the procedures provided by Rule 3.25 make clear that settlement discussions should be with Complaint Counsel, not the Commission.<sup>1</sup> If Respondents believe that “recent events are likely to make settlement discussions productive,” they may engage in settlement discussions with Complaint Counsel.

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<sup>1</sup> Rule 3.25(c) provides for a stay and withdrawal from adjudication when a consent agreement accompanying the motion to withdraw has been executed by one or more respondents and by Complaint Counsel and has been approved by the appropriate Bureau Director. It also provides an alternative mechanism to provide a specific proposal to the Commission if the Administrative Law Judge certifies the motion and proposal to the Commission “upon a written determination that there is a reasonable possibility of settlement.” The motion and the Administrative Law Judge’s certification “shall not stay the proceedings before the Administrative Law Judge unless the Commission shall so order.” 16 CFR § 3.25(c).



## Interlocutory Orders, Etc.

In the alternative, Respondents ask the Commission to reassess whether to file for a preliminary injunction in federal court. Respondents argue that this would be a “faster and more efficient means to resolve this matter.” Motion at 5. Respondents misunderstand the role of a preliminary injunction in the context of the Commission’s Part 3 adjudicative process. The Commission may seek a preliminary injunction to preserve the status quo, *i.e.*, to prevent consummation of the proposed transaction, until the administrative proceeding on the merits takes place. *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726-27 (D.C. Cir. 2001). At present, there is no need for a preliminary injunction action to preserve the status quo.

Accordingly,

**IT IS HEREBY ORDERED** that Respondents’ Motion to Stay and Temporarily Withdraw this Matter from Adjudication is **DENIED**.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**IMPAX LABORATORIES, INC.**

*Docket No. 9373. Order, May 31, 2018*

Order granting the joint motion to revise the briefing schedule for appeals in this matter.

**ORDER REVISING BRIEFING SCHEDULE FOR APPEALS**

Complaint Counsel and Respondent have filed a Joint Motion to revise the briefing schedule for appeals in this matter.<sup>1</sup> The parties requested these modest extensions due to the voluminous record and longstanding holiday and travel commitments that would be impacted in the absence of an extension. Pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), the Commission has determined, for good cause shown, to grant the Joint Motion. Accordingly,

**IT IS ORDERED THAT** opening briefs must be filed on or before July 2, 2018, and, if a party files an opening 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), 16 C.F.R. § 3.52(b);

**IT IS FURTHER ORDERED THAT** any answering brief must be filed on or before August 10, 2018; and

**IT IS FURTHER ORDERED THAT** any reply brief must be filed on or before August 24, 2018.

By the Commission.

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<sup>1</sup> At the time of the Joint Motion, only Complaint Counsel had filed a Notice of Appeal. Subsequently, Respondent filed a Notice of Cross-Appeal.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**ALIMENTATION COUCHE-TARD INC.  
AND  
CROSSAMERICA PARTNERS LP**

*Docket No. C-4631. Order, June 5, 2018*

Letter approving the divestiture of certain retail fuel assets to Marketplace Development LLC.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

David Gelfand  
Cleary Gottlieb Steen & Hamilton LLP

*Re: In the Matter of Alimentation Couche-Tard Inc. and  
CrossAmerica Partners LP Docket No. C-4631*

Dear Mr. Gelfand:

This is in reference to the petition for approval of the proposed divestiture of certain assets filed by Alimentation Couche-Tard Inc. and CrossAmerica Partners LP (collectively “ACT”) and received on March 12, 2018 (“Petition”). Pursuant to the Decision and Order in Docket No. C-4631, ACT requests prior Commission approval of its proposal to divest certain retail fuel assets to Marketplace Development LLC (“Marketplace”).

After consideration of ACT’s Petition and other available information, the Commission has determined to approve the proposed divestiture to Marketplace as set forth in the Petition. In according its approval, the Commission has relied upon the information submitted and the representations made by ACT and Marketplace 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****LOUISIANA REAL ESTATE APPRAISERS  
BOARD***Docket No. 9374. Order, June 6, 2018*

Order denying respondent's motion to stay proceedings pending review by the United States Court of Appeals for the Fifth Circuit.

**ORDER DENYING STAY PENDING APPELLATE REVIEW**

On April 10, 2018, the Commission issued an Opinion and Order denying Respondent's Motion to Dismiss Complaint and granting Complaint Counsel's Motion for Partial Summary Decision regarding Respondent's state action defenses ("April 10 Order"). Respondent filed a Petition for Review of the April 10 Order with the United States Court of Appeals for the Fifth Circuit and submitted to the Commission a Motion to Stay Proceedings Pending Appellate Review ("Motion to Stay").<sup>1</sup>

The administrative proceeding that Respondent seeks to stay involves allegations that the Louisiana Real Estate Appraisers Board ("the Board") violated Section 5 of the Federal Trade Commission Act by unlawfully restraining price competition for real estate appraisal services. The adjudication has now proceeded through the close of most discovery and the exchange of witness lists, most exhibits, and expert reports. The evidentiary hearing is scheduled to begin on October 15, 2018.

Respondent argues that a stay is appropriate to protect Louisiana's sovereign interests because the Board is immune from suit under the state action doctrine, and that immunity is lost if the Board must go through trial. Complaint Counsel oppose the Motion for Stay. They argue Respondent neither is entitled to interlocutory appellate review of the Commission's April 10 Order, nor has shown good cause to stay the proceeding.

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<sup>1</sup> Respondent subsequently moved for leave to file a reply in support of its Motion to Stay. The Commission grants the requested leave and has considered the contents of Respondent's Reply.

## Interlocutory Orders, Etc.

Commission Rule of Practice 3.41(f)(1), 16 C.F.R. § 3.41(f)(1), states, in relevant part:

The pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding: (i) Unless a court of competent jurisdiction, or the Commission for good cause, so directs . . . .

For the reasons explained below, the Commission does not find good cause to stay this proceeding.

Respondent's briefing in support of its Motion to Stay offers no good cause to stay this proceeding, and no reason why the Commission's April 10 Order should be overturned.<sup>2</sup> Respondent has not argued the state action issues – upon which its claim of immunity from suit relies – were wrongly decided. The Commission's April 10 Order comprehensively addressed applicability of the state action doctrine to this proceeding. That Order rejected Respondent's state action defenses as well as a mootness claim predicated on the state action doctrine. The Commission found that, to satisfy the state action defense, Respondent needed to demonstrate the State of Louisiana actively supervised its allegedly anticompetitive conduct. The Commission held there was no genuine dispute of fact that the Board's allegedly anticompetitive conduct was not actively supervised prior to revocation of its governing rule in 2017. Further, the Commission found the evidence the Board proffered was insufficient to show that the State of Louisiana actively supervised reissuance of that rule in 2017 or that it would actively supervise enforcement proceedings under the rule in the future. Respondent's briefing does not identify purported failures in the Commission's findings or reasoning.

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<sup>2</sup> Beyond this, the Commission has long taken the position that the state action defense does not confer immunity from suit and that rulings denying the state action defense do not give rise to an immediate right to interlocutory appeal. *See, e.g., S. C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006); Brief for the United States and the Federal Trade Commission as Amici Curiae, *Teladoc, Inc. v. Texas Med. Bd.*, No 16-50017 (5th Cir. Sept. 9, 2016).

## Interlocutory Orders, Etc.

Respondent's other contention – that a stay would avoid potentially unnecessary litigation expenses – is not persuasive. As noted above, discovery and other pretrial proceedings have almost finished, and their expenses have already been borne. A stay would stop the progress of this litigation just before it reaches its culmination. Under these circumstances, the general maxim – that routine expenses of litigation are insufficient grounds for staying proceedings<sup>3</sup> – applies.

The public interest supports denying a stay to avoid what may be ongoing anticompetitive conduct. The Complaint alleges that, through issuance and enforcement of its Rule 31101, the Board has prohibited appraisal management companies from arriving at real estate appraisal fees through the operation of the free market and that it has enforced the Rule in a way that tends to raise prices paid by appraisal management companies for real estate appraisal services. Complaint ¶¶ 3, 44. In the April 10 Order, the Commission found a controlling number of Board members were Board-licensed real estate appraisers. If the Complaint's allegations are substantiated, a Board controlled by real estate appraisers has been regulating appraisals in a manner that tends to raise appraisal fees. Until these allegations are resolved, the Board could continue to act in a manner that may be found anticompetitive. Accordingly, granting a stay could undermine the public interest in maintaining competition.

The public interest also favors the expeditious resolution of the Commission's complaints. *Cf.* Commission Rule of Practice 3.1, 16 C.F.R. § 3.1 (stating the Commission's policy to conduct its adjudicatory proceedings expeditiously). Commission opinions resolving competition issues provide valuable guidance not only to respondents, but also to third parties in similar circumstances. Here, resolving the Complaint's allegations may have particular utility for other states considering mechanisms to ensure that

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<sup>3</sup> *Cf.* Order Denying Respondent's Expedited Motion to Stay Part 3 Administrative Proceeding and Move the Evidentiary Hearing Date (Jan 12, 2018) ("Generally, routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters."). The Commission's January 12 Order addressed Respondent's third request to stay this proceeding. The current Motion to Stay is Respondent's fifth such request.

## Interlocutory Orders, Etc.

lenders and their agents compensate appraisers at “customary and reasonable” rates, given the backdrop of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 1639e(i)(1). A stay could delay substantially such guidance.

Accordingly,

**IT IS ORDERED** that the Motion of Louisiana Real Estate Appraisers Board to Stay Proceedings Pending Appellate Review is hereby **DENIED**.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

**WILH. WILHELMSSEN HOLDING ASA,  
WILHELMSSEN MARITIME SERVICES AS,  
RESOLUTE FUND II, L.P.,  
DREW MARINE INTERMEDIATE II B.V.,  
AND  
DREW MARINE GROUP, INC.**

*Docket No. 9380. Order, June 13, 2018*

Order granting, in part, respondents' Expedited Motion for Continuance of Administrative Hearing.

ORDER GRANTING 30-DAY CONTINUANCE OF THE  
ADMINISTRATIVE HEARING

Respondents Wilhelm Wilhelmsen and Wilhelmsen Maritime Services AS (together, "Wilhelmsen") and Resolute Fund II, L.P., Drew Marine Intermediate II B.V., and Drew Marine Group, Inc. have moved to postpone the administrative hearing, which is scheduled to begin on July 24, 2018, until October 22, 2018. Complaint Counsel respond that Respondents have not shown good cause for the requested continuance and consequently oppose the motion.<sup>1</sup>

Respondents argue that a parallel action brought by the Federal Trade Commission in federal district court, seeking a preliminary injunction barring Respondents from consummating the proposed transaction pending disposition of this administrative proceeding, will likely obviate the need for an administrative hearing. Wilhelmsen represents that "if the District Court enters a preliminary injunction . . . then Wilhelmsen Maritime Services AS will abandon the transaction without further litigating the administrative hearing." Motion,

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<sup>1</sup> On May 30, 2018, Respondents moved for leave to file a reply to Complaint Counsel's opposition filing. That motion is granted. In opposing Respondent's Motion for Leave to File a Reply, Complaint Counsel request leave to file a surreply at some future date. In view of our disposition of the underlying Motion for Continuance, we do not find that a surreply from Complaint Counsel is warranted.



## Interlocutory Orders, Etc.

Exhibit A. Respondents further point out that if the district court denies an injunction, under Commission Rule 3.26, the matter may be stayed or withdrawn from adjudication while the Commission determines whether it wishes to continue with the administrative proceeding. The hearing in district court began on May 29, 2018 and is scheduled to be completed by June 14. Complaint Counsel's Opposition to Respondent's Motion to Stay at 4. Respondents claim that a decision is expected in June or July 2018. Motion for Continuance at 1.

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 rule 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, 3.51-52. The three-month delay of the long-scheduled administrative hearing requested by Respondents would interfere with the Commission's commitment expeditiously to resolve contested matters, which interference the present circumstances do not warrant.

That is, however, not the only issue presented by the current schedule for this matter. The administrative hearing here is currently scheduled to begin on July 24, 2018, which is two weeks after the start of the evidentiary hearing in *In the Matter of Otto Bock HealthCare North America, Inc.*, Docket No. 9378. Both hearings are assigned to Chief Administrative Law Judge D. Michael Chappell. Under current schedules, the hearings in *Otto Bock* and in this matter are likely to clash. In these circumstances, it would be difficult to provide adequate notice to witnesses of the dates when they would be expected to testify and for counsel for each side to allocate their time and resources efficiently.

Consequently, we find that there is good cause to reschedule the hearing date. Deferring the start of the hearing by thirty days will avoid conflict with the *Otto Bock* hearing and provide additional time for resolution of the district court action collateral to this proceeding. Respondents and/or Complaint Counsel may

Interlocutory Orders, Etc.

seek a further extension of this continuance based on future circumstances. Accordingly,

**IT IS HEREBY ORDERED** that Respondent's Expedited Motion for Continuance of Administrative Hearing is **GRANTED IN PART**; and

**IT IS FURTHER ORDERED** that the evidentiary hearing in this proceeding shall commence on August 23, 2018, and that, unless modified by the Chief Administrative Law Judge, all related pre-hearing deadlines shall be extended by 30 days.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**CORELOGIC, INC.**

*Docket No. C-4458. Order, June 14, 2018*

Order to Show Cause and Order modifying the Order so that it is better able to achieve its stated purpose.

**ORDER TO SHOW CAUSE AND ORDER MODIFYING ORDER**

Pursuant to Commission Rule of Practice 3.72(b), the Commission issues this Order to Show Cause stating the changes the Commission proposes to make to the Decision and Order (“Order”) issued in this matter and the reasons the Commission deems these changes necessary. 16 C.F.R. §3.72(b).

The Commission issued the Order in May 2014 to resolve concerns regarding the competitive impact of the acquisition by CoreLogic, Inc. (“CoreLogic” or “Respondent”) of certain assets from TPG VI Ontario 1 AIV L.P. (“TPG”). Through the acquisition, Respondent acquired TPG subsidiary, DataQuick Information Systems, Inc. (“DataQuick”). Among other things, DataQuick licensed to customers nationwide, real property data known as assessor and recorder data. The Complaint alleged that the acquisition would significantly increase concentration in the market for national assessor and recorder data (“bulk data”). CoreLogic denied the Commission’s allegation but agreed to settle the matter through entry of the Order requiring divestiture of certain DataQuick assets. The Order became final on May 20, 2014.

The Order’s central requirement is that CoreLogic provide Commission-approved Acquirer Renwood RealtyTrac LLC (“RealtyTrac”) with bulk data and certain ancillary data marketed by DataQuick (collectively “licensed data”). Prior to the acquisition, DataQuick licensed the majority of its bulk data from CoreLogic. The Order requires that CoreLogic license and deliver bulk data to RealtyTrac and provide RealtyTrac with the same service, timeliness and quality as CoreLogic provided DataQuick. CoreLogic is further required to provide RealtyTrac with updated bulk data of the same scope and quality as

## Interlocutory Orders, Etc.

DataQuick used in its business for at least 5 years. The Order requires CoreLogic to provide DataQuick's existing licensed data and begin providing updated bulk data within 60 days of executing the Remedial Agreement. CoreLogic and RealtyTrac executed the Remedial Agreement on March 26, 2014 and sixty days after that date is May 25, 2014.

The Order also contains a number of provisions typically found in divestiture orders that ensure RealtyTrac has the information and assistance necessary to become a successful entrant. First, CoreLogic is required to provide RealtyTrac with DataQuick business records. Second, CoreLogic must provide RealtyTrac with access to knowledgeable employees and information related to "DataQuick's collection, manipulation, storage and provision" of data. Third, CoreLogic must allow certain legacy DataQuick customers to terminate their DataQuick contracts in order to do business with RealtyTrac, and, during a period lasting until nine months after the Divestiture Date, include a six month termination clause in all new agreements with former DataQuick bulk data customers. Fourth, the Order requires CoreLogic to facilitate RealtyTrac's ability to hire experienced DataQuick employees. Finally, the Order appoints Mr. Mitchell S. Pettit as monitor to oversee CoreLogic's compliance with the Order.

As required by Commission Rule 2.32, CoreLogic executed an Agreement Containing Consent Order ("Consent Agreement") consenting to entry of the Order. In the Consent Agreement, CoreLogic represented and warranted that it could fulfill the terms of, and accomplish the full relief contemplated by, the Order. Further, in April 2014, CoreLogic submitted its first verified report of compliance under the Order. In this report, Respondent asserted that it was delivering to RealtyTrac all bulk data required by the Order.

Nevertheless, soon after CoreLogic began delivering bulk data to RealtyTrac, RealtyTrac discovered that the deliveries were missing certain required data. RealtyTrac continued to uncover additional missing data for at least the next 2 years. CoreLogic responded to RealtyTrac requests for missing data but did not identify the full scope of bulk data that DataQuick had used.

## Interlocutory Orders, Etc.

Further, CoreLogic did not take adequate steps to ensure it was providing all of the required data to RealtyTrac. In addition, CoreLogic did not provide RealtyTrac, Commission staff, or the monitor with complete and accurate information regarding the manner in which DataQuick provided bulk data to customers.

CoreLogic also failed to deliver to RealtyTrac certain required data that DataQuick licensed from third parties. This data was included in the scope of licensed data in the Order and by signing the consent agreement CoreLogic represented it could provide this data to RealtyTrac. However, CoreLogic subsequently informed Commission staff that it could not produce certain existing bulk data and ancillary data because of limitations on its right to sublicense the data. CoreLogic offered to provide information and introductions to enable RealtyTrac to attempt to license the data directly. Although useful, this offer is not sufficient to comply with the Order because it does not guarantee access to the required data and requires RealtyTrac to expend resources not contemplated by the Order.

It further appears that CoreLogic did not provide the full level of support required by the Order. One example of this concerns an ancillary product, known as an AVM, which CoreLogic provided to RealtyTrac pursuant to the Order. In 2015, CoreLogic ceased standard third party testing of the AVM without informing RealtyTrac. RealtyTrac subsequently discovered a serious technical issue with the product that CoreLogic did not discover through internal quality control processes. The issue was resolved and third party testing resumed.

In February 2015, the Monitor hired a Technical Assistant who helped the Monitor develop and recommend a technical plan to (i) identify the data that CoreLogic was required to provide under the Order, (ii) provide all missing data and information to RealtyTrac, and (iii) verify that the required data and information had been provided. The parties are implementing this technical plan and are in the final stages of verifying that CoreLogic is providing all data and information necessary to duplicate DataQuick's bulk data offerings to customers. CoreLogic will

## Interlocutory Orders, Etc.

thereafter complete transfer of all required information regarding DataQuick's bulk data business.

CoreLogic's actions violated the Order and interfered with its remedial goals. CoreLogic slowed RealtyTrac's acquisition of the full scope of DataQuick bulk data and the information necessary to provide data in the same manner as DataQuick. Further, RealtyTrac appears to have relied on CoreLogic's assertions regarding the scope of DataQuick data that CoreLogic was delivering. This reliance harmed RealtyTrac's reputation and required that it expend technical and financial resources to uncover missing data and redress the effects of CoreLogic's order violations.

In light of the foregoing, the Commission proposes to modify the Order so that it is better able to achieve its stated purpose. The modifications require, among other things, CoreLogic to extend the initial licensing term and comply with a technical transfer addendum and a service level addendum. The addenda contain clearly defined obligations that promote the remedial purpose of the order. CoreLogic is also required to provide technical assistance for one year after the technology transfer to RealtyTrac is complete. In addition, CoreLogic and RealtyTrac have agreed to modify their license agreement to conform to these modifications. The Order incorporates the license agreement as a Remedial Agreement. As required by the Order, CoreLogic seeks permission to implement the agreed modifications to the Remedial Agreement.

Respondent denies that it has violated the terms of the Order and does not agree with the facts and conclusions as stated in the Order to Show Cause. However, in settlement of the Commission's claims regarding violation of the Order as described, Respondent consents to issuance of an Order Modifying Order, and waives any further rights it may have under Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. §3.72(b). Respondent, its attorney, and counsel for the Commission executed an Agreement Containing Order to Show Cause and Order Modifying Order ("Modification Agreement"). The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and

## Interlocutory Orders, Etc.

consideration of public comments. Now, in conformity with Rule §3.72(b) the Commission determines in its discretion that it is in the public interest to modify the Order in Docket No. C-4458.

Accordingly,

**IT IS ORDERED** that this matter be, and it hereby is, reopened; and

**IT IS FURTHER ORDERED** that **Paragraph II.F** of the Order in Docket No. C-4458 is revised to read as follows (revisions underlined):

- F. Continuing until one year after completion of paragraphs 1 to 10 of Technical Transfer Plan, Respondent shall, upon reasonable request, provide the Acquirer with access to knowledgeable employees and information related to DataQuick's collection, manipulation, storage and provision of Assessor Data, Recorder Data and Other Related Data as needed to assist the Acquirer in collecting, manipulating, storing and providing to customers the Licensed Data and Licensed Historical Data as required by the Order and the Remedial Agreement. As part of this obligation, Respondent shall, on or before the day the Remedial Agreement is executed, designate one or more employees as transition coordinator(s) and shall provide the name and contact information for the transition coordinator(s) to the Acquirer, to the Commission and the Monitor. The transition coordinator(s) shall be responsible for ensuring Respondent complies with its obligations to provide transition assistance as required by this Paragraph and the Remedial Agreement, including by timely providing knowledgeable employees and information to the Acquirer. Respondent shall ensure that the transition coordinator(s) has the authority, capability and resources necessary to meet Respondent's obligations under this paragraph and the Remedial Agreement.

## Interlocutory Orders, Etc.

**IT IS FURTHER ORDERED** that **Paragraph II.G** of the Order in Docket No. C-4458 is revised to read as follows (revisions underlined):

- G. In any agreement to provide a DataQuick Customer with Assessor Data or Recorder Data that Respondent executes less than 9 months after completing paragraphs 1 to 6 of the Technical Transfer Plan, Respondent shall include a provision allowing the customer to terminate the agreement in order to license or purchase Assessor Data or Recorder Data from the Acquirer so long as the DataQuick Customer provides 180-days' written notice of its intent to terminate the agreement, *provided, however*, that the DataQuick Customer may, at any time after providing its written termination notice, revoke or postpone the effective date of such notice.

**IT IS FURTHER ORDERED** that **Paragraph VI.A.1** of the Order in Docket No. C-4458 is revised to read as follows (revisions underlined):

- A. Respondent shall submit to the Commission and any Monitor appointed by the Commission:
1. Verified written reports:
    - a. Within 30 days after the date this Order becomes final and every 90 days thereafter until completion of paragraphs 1 to 10 of the Technical Transfer Plan;
    - b. On the first anniversary of the date on which this Order becomes final, and annually thereafter until one year after termination of the Remedial Agreement,

which reports shall set forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order and the Remedial Agreement since the filing of any



## Interlocutory Orders, Etc.

previous compliance report, and shall, *inter alia*, describe the status of any transition project plan in a Remedial Agreement, and identify all DataQuick Customers who have provided notice of termination pursuant to Paragraph II above, when such customer provided notice of termination and whether the relevant contract has been terminated; and

**IT IS FURTHER ORDERED** that the Order in Docket No. C-4458 is amended to include the following **Paragraph IX**:

**IX.**

**IT IS FURTHER ORDERED** that:

- A. As used in the Order and Modifying Order the following definitions shall apply:
1. “AVM” means Automated Valuation Model.
  2. “AVM Resale Agreement” means an agreement to resell the following automated valuation models (“AVMs”) owned by CoreLogic: PASS®, ValuePoint®4 (VP4), Prospector™, GeoAVM Core™, and GeoAVM Core Precision™ that conforms in substance to the form agreement attached to the Modifying Order as Confidential Addendum C.
  3. “DataQuick Architecture” means the architecture for the DataQuick Fulfillment Platform. A diagram of the DataQuick Architecture as of the entry of the Modifying Order is attached as Confidential Addendum D.
  4. “DataQuick AVM” means an automated valuation model that CoreLogic obtained from DataQuick.

## Interlocutory Orders, Etc.

5. “DataQuick Fulfillment Platform” shall have the meaning defined in the Technical Transfer Plan.
  6. “First Amendment to the CoreLogic-RealtyTrac Agreement,” means Amendment 1 to the Data License Agreement and Statement of Work between CoreLogic Solutions, LLC. (“CoreLogic”) and Attom Data Solutions (“Customer”).
  7. “Independent AVM Testing” means testing of the AVM by AVMetrics, LLC (or another recognized independent third party AVM testing company selected by CoreLogic and consented to in writing by the Acquirer) using national benchmark sales values to determine accuracy (unless otherwise agreed to by the Acquirer after entry of the Modifying Order).
  8. “Service Level Addendum” means the Service Level Addendum attached to the Modifying Order as Confidential Addendum A.
  9. “Technical Transfer Plan” means the Technical Transfer Plan attached to the Modifying Order as Confidential Addendum B.
- B. The Commission approves the First Amendment to the CoreLogic-RealtyTrac Agreement and incorporates it into the Order as part of the Remedial Agreement.
  - C. Respondent shall extend the initial license term of the Remedial Agreement for 3 years in accordance with the terms of the First Amendment to the CoreLogic-RealtyTrac Agreement.
  - D. Respondent shall comply with the requirements of the Service Level Addendum.
  - E. Respondent shall comply with the requirements of the Technical Transfer Plan.

## Interlocutory Orders, Etc.

- F. Within ten days of receiving a written request by the Acquirer, Respondent shall enter an AVM Resale Agreement with the Acquirer.
- G. So long as Acquirer is marketing, offering, selling or supplying a DataQuick AVM to customers, Respondent shall comply with the terms of Paragraph K of the Service Level Agreement. Respondent shall bear the cost of providing Independent AVM Testing required by paragraph K of the Service Level Addendum.
- H. Respondent shall not modify the DataQuick Architecture without providing at least 60 days' written notice to the Monitor and the staff of the Commission explaining the reason for the modification and providing a diagram of the revised DataQuick Architecture, which diagram shall be incorporated into Confidential Addendum D of the Modifying Order.
- I. The purpose of the Modifying Order is to resolve the matters described in the Order to Show Cause that occurred before Respondent executed the Modification Agreement.

By the Commission.

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IN THE MATTER OF

**ALIMENTATION COUCHE-TARD INC.  
AND  
CROSSAMERICA PARTNERS LP***Docket No. C-4631. Order, June 18, 2018*

Letter approving the divestiture of certain retail fuel assets to Marketplace Development LLC and to divest a third retail station and related retail fuel assets to PPBB LLC.

## LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

David Gelfand, Esq.  
Cleary Gottlieb Steen & Hamilton LLP

*Re: In the Matter of Alimentation Couche-Tard Inc. and  
CrossAmerica Partners LP Docket No. C-4631*

Dear Mr. Gelfand:

This is in further reference to the Petition for the approval of the proposed divestiture of certain assets filed by Alimentation Couche-Tard Inc. and CrossAmerica Partners LP (collectively “ACT”) and received on March 12, 2018 (“Petition”). In that Petition, pursuant to the Decision and Order in Docket No. C-4631, ACT requested prior Commission approval of its proposal to divest two retail fuel stations and related retail fuel assets to Marketplace Development LLC (“Marketplace”), and to divest a third retail station and related retail fuel assets to PPBB LLC (“PPBB”).

On June 5, 2018, the Commission approved the proposed divestiture to Marketplace, as set forth in the Petition. After consideration of ACT’s Petition and other available information, the Commission has now determined to approve the proposed divestiture to PPBB, as set forth in the Petition. In according its approval, the Commission has relied upon the information submitted and the representations made by ACT and PPBB in connection with the Petition, and has assumed them to be accurate and complete.

Interlocutory Orders, Etc.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

**IMPAX LABORATORIES, INC.***Docket No. 9373. Order, June 27, 2018*

Order granting Complaint Counsel's Motion to Dismiss Respondent's Notice of Cross-Appeal and scheduling briefing.

## ORDER OF THE COMMISSION

On May 11, 2018, Chief Administrative Law Judge D. Michael Chappell issued an Initial Decision concluding that the evidence adduced in this proceeding failed to prove a violation of Section 5 of the FTC Act and ordering that the Complaint be dismissed. After Complaint Counsel filed a Notice of Appeal, Respondent Impax Laboratories, Inc. (apparently now Impax Laboratories, LLC) filed a Notice of Cross Appeal, stating an intention to cross-appeal "portions of the Initial Decision . . . related to relevant market and market power, as well as any related findings of fact and conclusions of law." Respondent's Notice of Cross Appeal (May 29, 2019). On June 5, 2018, Complaint Counsel moved to Dismiss Respondent's Notice of Cross Appeal.

Complaint Counsel argue that Respondent's cross-appeal is improper because the Initial Decision dismissed the complaint and the cross-appeal seeks only to address alternative grounds for affirming the dismissal. Respondent opposes Complaint Counsel's motion. Respondent argues that Commission Rule 3.52(b)(1), 16 C.F.R. § 3.52(b)(1), which provides that "any party may file objections to the initial decision or order of the Administrative Law Judge" by filing a notice of appeal that "designat[es] the initial decision or order or part thereof appealed from," is not limited to parties that have been found to have violated the FTC Act. Commission Rule 3.52(b)(1), however, does not expressly address the setting where a respondent seeks to appeal an order dismissing the complaint.

The only recent case addressing the application of Rule 3.52(b)(1) was *In the Matter of LabMD, Inc.*, Docket No. 9357, Order (F.T.C. Dec. 18, 2015) ("LabMD Order"). In that case, the

## Interlocutory Orders, Etc.

respondent acknowledged the ALJ's Initial Decision and Order "were both correct and should be affirmed," but nonetheless submitted a conditional, "protective cross-appeal" on issues the ALJ's decision did not address. *Id.* at 2. The respondent argued the cross-appeal was necessary to preserve issues for appeal to a federal court. The Commission disagreed, explaining that rationale would permit "protective cross-appeals" by the successful party in essentially every case – a result "inconsistent with general appellate practice" that "would prove highly burdensome and wasteful for all involved." *LabMD* Order at 2.

Unlike *LabMD*, Respondent's cross-appeal here would challenge an issue on which the ALJ did rule – market definition and market power – albeit in the alternative. The Commission understands the importance of permitting parties to present their arguments on both the facts and the law for the Commission's *de novo* review, especially when, as here, there are numerous issues a Commission decision may (or may not) ultimately address. The parties have proposed an alternative: Increase the word limits in Respondent's answering and Complaint Counsel's reply briefs. The Commission believes this strikes the right balance between those considerations and the ones animating our decision in *LabMD*. While Respondent requested 10,000 additional words, the Commission finds an additional 7,000 words is appropriate. Seven thousand words represents a 50% increase to the normal 14,000 word limit, is consistent with the increase the Commission granted and found effective in *LabMD*, and should easily suffice to discuss the limited issues raised in Respondent's cross-appeal. To avoid any prejudice to Complaint Counsel, the Commission increases the word limit for Complaint Counsel's reply brief by 5,000 words.

Accordingly,

**T IS HEREBY ORDERED THAT** Complaint Counsel's Motion to Dismiss Respondent's Notice of Cross-Appeal is **GRANTED**;

**IT IS FURTHER ORDERED THAT** Complaint Counsel's opening brief must be filed on or before July 2, 2018, and, if Complaint Counsel files an opening appeal brief by that date,

Interlocutory Orders, Etc.

Complaint Counsel's appeal from the Initial Decision will be treated as having been perfected in accordance with Commission Rule 3.52(b), 16 C.F.R. § 3.52(b);

**IT IS FURTHER ORDERED THAT** while Respondent may not file an opening appeal brief, it may file an answering brief that shall not exceed 21,000 words. Any such answering brief must be filed on or before August 10, 2018; and

**IT IS FURTHER ORDERED THAT** Complaint Counsel may file a reply brief that shall not exceed 12,000 words. Any such reply brief must be filed on or before August 24, 2018.

By the Commission.



# RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

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## **SLAC, INC.**

*FTC File No. 172 3090 – February 13, 2018*

### RESPONSE TO SLAC, INC.'S PETITION TO LIMIT OR QUASH CIVIL INVESTIGATIVE DEMAND DATED DECEMBER 6, 2017

#### **By McSWEENEY, Commissioner:**

SLAC, Inc. has submitted a petition seeking to limit or quash the Civil Investigative Demand (CID) that the Commission issued on December 6, 2017. For the reasons described below, the petition is denied.

#### **I. BACKGROUND**

SLAC sells services to consumers who want to reduce their monthly student loan payments by applying for income-based repayment plans offered through the U.S. Department of Education. In connection with an investigation into whether the business practices of SLAC or other identified individuals, including SLAC's President Adam Owens, violate the FTC Act or the Telemarketing Sales Rule (TSR), the Commission issued a CID seeking information about the company and its business practices.

SLAC objects to two of the CID's specifications. It argues that Interrogatory 10, which asks for a description of "each step the Company takes to ensure that it does not collect payment from consumers until after [its student loan services] have been fully delivered or rendered," is beyond the stated scope of the investigation and therefore the Commission's jurisdiction. It also contends that Document Request 13, which asks for documents related to a presentation given by Mr. Owens at a conference of the Association for Student Loan Relief, is outside the scope of the Commission's investigation and abridges the First

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Amendment rights of both SLAC and Mr. Owens. As explained below, SLAC's objections lack merit.

## II. ANALYSIS

### A. Applicable legal standards

The power to investigate is vital to the Commission's ability to carry out its congressionally-mandated duty to prevent unfair or deceptive acts or practices.<sup>1</sup> Law enforcement agencies like the Commission "have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."<sup>2</sup> Administrative compulsory process such as a CID is proper if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant to the scope of the inquiry.<sup>3</sup>

Agencies have wide latitude to determine what information is relevant to their law enforcement investigations and are not required to have "a justifiable belief that wrongdoing has actually occurred."<sup>4</sup> Thus, "[t]he relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC's investigation, as set forth in the Commission's resolution."<sup>5</sup> The standard of relevance in an investigatory setting "is more relaxed than in an adjudicatory one."<sup>6</sup> Moreover,

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<sup>1</sup> *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (en banc); 15 U.S.C. § 45(a).

<sup>2</sup> *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

<sup>3</sup> *Id.*; *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *Texaco*, 555 F.2d at 874.

<sup>4</sup> *See, e.g., Morton Salt*, 338 U.S. at 642-43 ("[Administrative agencies have] a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.").

<sup>5</sup> *Texaco*, 555 F.2d at 874.

<sup>6</sup> *Invention Submission Corp.*, 965 F.2d at 1090; *see also id.* ("At the

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agencies are “free to determine, in the first instance, the scope of their own jurisdiction when issuing investigative subpoenas.”<sup>7</sup>

**B. The challenged specifications are within the scope of the Commission’s investigation.**

SLAC states that it “does not challenge the FTC’s statutory authority to investigate practices that it believes may constitute deceptive or unfair trade practices when used in the course of trade.”<sup>8</sup> Rather, it argues that the challenged specifications seek information “wholly unrelated to any purported fraud and deception being investigated.”<sup>9</sup>

Information sought in an administrative subpoena must be “reasonably relevant” to the Commission’s investigation.<sup>10</sup> Here, the Commission described the subject of the investigation in the CID Schedule:

Whether [SLAC], Adam Owens, Scott Brown, Mindy Fincher, and others have engaged in deceptive or otherwise unlawful activity in connection with the marketing, promotion, offering for sale, or sale of student loan debt relief products or services, as defined herein, in violation of the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*, or the Telemarketing Sales Rule, 16 C.F.R. Part 310, and whether the Commission action to obtain monetary relief would be in the public interest. See also attached resolution.<sup>11</sup>

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investigatory stage, the Commission does not seek information necessary to prove specific charges; it merely has a suspicion that the law is being violated in some way and wants to determine whether or not to file a complaint.”).

<sup>7</sup> *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001).

<sup>8</sup> Pet. at 3-4.

<sup>9</sup> *Id.* at 7.

<sup>10</sup> *Morton Salt*, 338 U.S. at 652.

<sup>11</sup> Pet. Exh. A (CID Schedule) at 2.

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SLAC argues that Interrogatory 10 seeks information outside the stated scope of the Commission's investigation because as a student loan document preparation and assistance company, its business is not covered by the TSR.<sup>12</sup> In particular, SLAC argues that it does not offer "debt relief services," as the TSR defines that term.<sup>13</sup> With regard to Document Request 13, SLAC argues that the specification "exceed[s] the FTC's investigatory power in that it seeks information related to lobbying efforts," and that such efforts are beyond the scope of the Commission's investigation.<sup>14</sup> SLAC argues further that the Commission's request violates the First Amendment rights of free speech and association of both SLAC and company President Owens.<sup>15</sup> Each of SLAC's arguments is addressed below.

### 1. Interrogatory 10

Interrogatory 10 asks SLAC to describe the steps it takes to ensure "that it does not collect payment from consumers until after [its student loan services] have been fully delivered or rendered." SLAC is correct in stating that the TSR prohibits telemarketers from collecting fees for "debt relief services" before delivering such services.<sup>16</sup> SLAC is incorrect, however, to suppose that the scope of the Commission's investigation is limited by SLAC's assertion that its services do not meet the TSR's definition of "debt relief services."

Whether or not SLAC is selling "debt relief services" as defined by the TSR turns on how the company *represents* its services to consumers. SLAC states that it does not negotiate or settle consumers' debts but instead provides "document preparation services" in connection with the Department of

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<sup>12</sup> Pet. at 8.

<sup>13</sup> *Id.* at 8-11; *see* 16 C.F.R. § 310.2(o) (defining "debt relief service"). *See also* Pet. Exh. A (CID Schedule) at 7 (definition of "Debt relief product or service").

<sup>14</sup> Pet. at 7, 11-13.

<sup>15</sup> *Id.* at 11-13.

<sup>16</sup> *Id.* at 8; *see* 16 C.F.R. § 310.4(a)(5).

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Education's student loan consolidation program.<sup>17</sup> Notwithstanding its own characterization of its business model, if SLAC represents to consumers, directly or by implication, that it will "renegotiate, settle, or in any way alter the terms of payment ... including, but not limited to, a reduction in the balance, interest rate, or fees owed" to a creditor, then it is engaged in the provision of "debt relief services" subject to the TSR.<sup>18</sup> The scope of the Commission's investigation includes not only determining whether SLAC has violated the FTC Act or the TSR in connection with the services it sells, but also whether those services are a "debt relief service" as defined in the TSR. The CID includes other requests seeking materials that will enable the Commission to determine how SLAC represented its services to consumers,<sup>19</sup> and if they meet the TSR definition in question. Therefore, the Commission has the "legitimate right" to satisfy itself "that [SLAC's] behavior is consistent with the law and the public interest,"<sup>20</sup> and is entitled to make its own determination as to the nature and legal status of the services SLAC provides.<sup>21</sup>

Moreover, regardless of the legal characterization of the services provided, seeking information regarding the timing of payments relative to the rendering of services is potentially relevant to the issue of monetary relief, should the Commission determine that a law violation has occurred.

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<sup>17</sup> Pet. at 8-11.

<sup>18</sup> 16 CFR § 310.2(o).

<sup>19</sup> See, e.g., Pet. Exh. A (CID Schedule) at 5 (Document Request 3 seeking copies of advertisements, and Document Request 5 seeking copies of sales scripts).

<sup>20</sup> *Morton Salt*, 338 U.S. at 652.

<sup>21</sup> We also note that at least one court has rejected arguments similar to the ones raised by SLAC here. In *CFPB v. Irvine WebWorks, Inc.*, the defendants argued that their services were simply assisting consumers in consolidating their loans with the Department of Education and therefore did not constitute a "debt relief service" under the TSR. 2016 U.S. Dist. LEXIS 36097, at \*19 (C.D. Cal. Feb. 5, 2016). The court rejected this position, however, explaining that the TSR defined "debt relief services" in "broad terms" that covered "entities that engage in practices substantially similar to those of loan consolidation middlemen." *Id.* at 18.

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Therefore, Interrogatory 10 is directly relevant to the stated purpose of the investigation. SLAC's argument that it need not respond to this interrogatory because it does not offer "debt relief services" is therefore without merit. We find no reason to limit or quash the CID's request for information in Interrogatory 10.

## 2. Document Request 13

Document Request 13 directs SLAC to produce notes and other materials relating to a presentation by its president at the annual conference of the Association for Student Loan Relief: "An Industry Under Fire by Regulators and What Can Be Done To Help Save Our Businesses!" SLAC argues that the materials requested are outside the scope of the Commission's investigation because, it claims, the presentation involved efforts to organize lobbying activities for the student loan relief industry. SLAC argues that the request is "an unlawful attempt to censor Mr. Owens' and SLAC's First Amendment rights."<sup>22</sup> These arguments are unfounded.

First, SLAC asserts that "[l]obbying efforts and a presentation made related to those efforts clearly fall outside the Scope of the CID."<sup>23</sup> But even assuming that the presentation related to lobbying efforts,<sup>24</sup> it does not follow that materials related to the presentation fall outside the scope of the investigation. Indeed, one reason businesses might decide to lobby for a change in the law could be that they believe their current practices are illegal. In such a case, the presentation could well contain relevant facts about both the practices and the presenter's knowledge that such practices are unlawful. Here, such facts would be relevant to the purpose of the Commission's investigation because Mr. Owens's conduct—and thus his knowledge of any illegality—is also a subject of the investigation. Accordingly, SLAC's assertion that Mr. Owens's presentation related to lobbying efforts does not

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<sup>22</sup> Pet. at 11-13.

<sup>23</sup> *Id.* at 4; *see also id.* at 12-13.

<sup>24</sup> SLAC does not offer any factual support for this assertion.

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show that the materials requested by the specification are outside the scope of the investigation.

Second, SLAC argues that by requesting information about the presentation, the Commission is “trying to bully or intimidate” SLAC, and is asking for information “as a way to silence those speaking out.”<sup>25</sup> SLAC further suggests that the CID is “an unlawful attempt to censor” SLAC and its President.<sup>26</sup> There is no basis for these claims.

To justify noncompliance with an administrative request for information such as the Commission’s CID, the recipient must make “a prima facie showing of arguable first amendment infringement.”<sup>27</sup> That showing requires “objective and articulable facts, which go beyond broad allegations or subjective fears.”<sup>28</sup> The recipient must show both “a causal link between the disclosure and the prospective harm” to its First Amendment rights and “adverse consequences” that could reasonably flow from the disclosure.<sup>29</sup>

SLAC’s First Amendment claims are based on the following allegations:

- 1) an executive of the Missouri Higher Education Loan Authority attended Mr. Owens’s presentation;
- 2) the Authority services student loan debt and therefore stands to lose money if students enroll in repayment plans;
- 3) the Authority services debt for the U.S. Department of Education; and

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<sup>25</sup> Pet. at 4.

<sup>26</sup> *Id.* at 13.

<sup>27</sup> *Brock v. Local 375, Plumbers Int’l Union*, 860 F.2d 346, 349 (9th Cir. 1988).

<sup>28</sup> *Id.* at 350 n.1.

<sup>29</sup> *Dole v. Local Union 375, Plumbers Int’l Union*, 921 F.2d 969, 972 (9th Cir. 1990)

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- 4) the executive later told the president of the conference sponsor that he intended to meet with the Commission and the Consumer Financial Protection Bureau to discuss the student loan industry.<sup>30</sup>

SLAC concludes from these allegations that the executive was an “undisclosed agent of the federal government” who (presumably through the Commission) is “penalizing SLAC and Mr. Owens” for exercising their free speech rights and “bullying the industry to cease all efforts to lobby legislators.”<sup>31</sup>

SLAC’s allegations are not “objective and articulable facts” that demonstrate an arguable First Amendment violation.<sup>32</sup> Even assuming SLAC’s averments are accurate, SLAC has not shown how producing information about the presentation would bully, censor, or intimidate SLAC or Mr. Owens. Indeed, SLAC does not describe any harm to its speech or association rights beyond broad, conclusory allegations and subjective fears. Nor has SLAC identified any consequences that could flow from producing the requested materials. The petition thus provides no reason to limit or quash the request for documents regarding Mr. Owens’s presentation.

### III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition to Limit or Quash Civil Investigative Demand filed by SLAC be, and it hereby is, **DENIED**.

**IT IS FURTHER ORDERED THAT** all responses to the specifications in the Civil Investigative Demand to SLAC must now be produced on or before March 6, 2018.

By the Commission.

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<sup>30</sup> Pet. at 2-3.

<sup>31</sup> *Id.*

<sup>32</sup> *Brock*, 860 F.2d at 349.



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**NORDIC CLINICAL, INC.**  
**AND**  
**ENCORE PLUS SOLUTIONS, INC.**

*FTC File Nos. 172 3132 & 172 3143 – Decision, March 12, 2018*

RESPONSE TO NORDIC CLINICAL, INC. AND ENCORE PLUS SOLUTIONS, INC.’S PETITION TO STAY CIVIL INVESTIGATION AND QUASH CIVIL INVESTIGATIVE DEMANDS DATED DECEMBER 19, 2017

**By McSWEENY, Commissioner:**

Nordic Clinical, Inc. and Encore Plus Solutions, Inc. have filed a Petition seeking to stay a Federal Trade Commission investigation, and to quash two Civil Investigative Demands for Oral Testimony (“CIDs”) issued on December 19, 2017. Because replacement CIDs have now been issued, the Petition is therefore moot. Accordingly,

**IT IS ORDERED THAT** the Petition By Nordic Clinical, Inc. and Encore Plus Solutions, Inc. To Stay Investigation and Quash Civil Investigative Demands be, and it hereby is, **DENIED** as moot.

By the Commission.

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**NORDIC CLINICAL, INC.**  
**AND**  
**ENCORE PLUS SOLUTIONS, INC.***FTC File Nos. 172 3132 & 172 3143 – Decision, March 12, 2018***RESPONSE TO NORDIC CLINICAL, INC. AND ENCORE PLUS SOLUTIONS, INC.’S PETITION TO STAY CIVIL INVESTIGATION AND QUASH CIVIL INVESTIGATIVE DEMANDS DATED DECEMBER 19, 2017****By McSWEENY, Commissioner:**

Nordic Clinical, Inc. (“Nordic Clinical”) and Encore Plus Solutions, Inc. (“Encore Plus”) have petitioned to (1) stay two Commission investigations; and (2) quash two civil investigative demands (“CIDs”) for corporate testimony pending resolution of related criminal investigations. For the reasons stated below, the petition is denied.

**I. BACKGROUND**

Nordic Clinical is a Delaware corporation owned by two Canadian citizens, Vito Proietti and Vincent DiCriscio. Encore Plus is a Florida corporation owned by Mr. Proietti. The companies are direct mail marketers of nutritional supplements that they claim treat a number of age-related health conditions. Although the companies now contend they principally conduct business in Montreal, Canada, Nordic Clinical responded to an earlier CID interrogatory that its principal address is in Fort Lauderdale, Florida, and Encore Plus likewise acknowledged that its principal address is in Miami, Florida.

In Spring 2017, the Commission began investigating the companies’ marketing claims. Nordic Clinical markets its Neurocet product as an extremely strong and long-lasting pain reliever. Encore Plus sells two substantively identical products under the names Regenify and Resetigen-D, which it markets as pain relievers, memory enhancers, and treatments to reverse age-related health problems. The investigations are intended to determine whether the companies have “made false or

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unsubstantiated representations about the health-related benefits” of their products in violation of Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52, and whether Commission action to obtain monetary relief for injured consumers is in the public interest. Pet. Exhs. A, B.

On June 15, 2017, the Commission issued CIDs to both companies seeking corporate documents and information regarding, among other things, corporate location, officers and owners, marketing claims, consumer complaints, sales and refunds, and the identities of affiliated entities.<sup>1</sup> The companies produced documents and responded to interrogatory requests in August 2017, and Nordic Clinical produced additional responsive documents in December 2017.

As part of its continuing investigations, on March 9, 2018, the Commission issued CIDs to both companies for oral testimony. Pet. Exhs. A, B. The CIDs seek testimony on a range of topics, including: the companies’ responses to the June 2017 CIDs; their business structure; sales and refunds; consumer complaints; endorsements and testimonials; product manufacturing, substantiation, and marketing; and their relationship with affiliated companies and individuals. The CIDs also ask about the roles of Proietti and DiCriscio at the companies, as well as their background, training, and experience. Pet. Exh. A at 2-3, Pet. Exh. B at 2-3. The CIDs require the companies to designate persons who could “testify on [their] behalf” at an investigational hearing in Fort Lauderdale, Florida “about information known or reasonably available to the” companies. Pet. Exh. A at 1-2 (citing 16 C.F.R. § 2.7(h)), Pet. Exh. B at 2 (same).

On April 3, 2018, the companies filed a petition asking the Commission to stay its investigations and temporarily quash the CIDs until criminal investigations purportedly involving their products are resolved. The companies claim there are “at least

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<sup>1</sup> The CIDs were issued under Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, and were authorized by an August 13, 2009, Commission Resolution, permitting the use of compulsory process in agency investigations into possible false advertising or marketing claims for dietary supplements, foods, or drugs.

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three separate criminal investigations related to the nutritional supplements identified in the CIDs.” Pet. 2. They support their claim with (1) a search warrant issued by an Idaho court in September 2017 for products located at a facility in Nampa, Idaho; (2) a motion filed by Nordic seeking the return of property seized from the Idaho facility and pleadings related to that motion; and (3) two December 2017 Canadian search warrants for products at two locations in Montreal. Pet. Exhs. C, D, E, F, G.

Petitioners argue the CIDs demand information about Proietti and DiCriscio that is unrelated to the FTC’s investigation, but instead is “obviously designed to glean information for criminal charges against” them. Pet. 5. According to petitioners, compelling such testimony would violate the Fifth Amendment right against self-incrimination, although it is less than clear whether they mean their own or that of Proietti and DiCriscio. Pet. 7-9. The companies assert a stay is necessary in order to “assure that Fifth Amendment rights are not compromised.” Pet. 10. Finally, the companies contend the CIDs cannot require their Canadian owners to testify in Florida.

For the reasons stated below, we deny the petition.

## II. ANALYSIS

### A. The requested testimony is not covered by the Fifth Amendment

The CIDs are directed to two companies—Nordic Clinical and Encore Plus—not to Messrs. Proietti and DiCriscio personally. Pet. Exhs. A, B. The companies have no Fifth Amendment rights against self-incrimination and must designate a representative who faces no such risk to testify on their behalf.

When the Commission issues a CID for oral testimony from a corporation or other business entity, “the entity must designate one or more officers, directors, or managing agents, or designate other persons who consent, to testify *on its behalf* \* \* \*.” 16 C.F.R. § 2.7(h) (emphasis added). The witnesses appear on

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behalf of the company, not in their individual capacities.<sup>2</sup> It has long been established that the Fifth Amendment privilege “is a purely personal one,” and that “it cannot be utilized by or on behalf of any organization, such as a corporation.” *United States v. White*, 322 U.S. 694, 699 (1944); *see also Bellis v. United States*, 417 U.S. 85, 89-90 (1974) (“the privilege against compulsory self-incrimination should be ‘limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.’”) (citing *White*, 322 U.S. at 701).

Petitioners nonetheless maintain that the CIDs, issued “in the midst of ongoing criminal investigations, \* \* \* seek[] to compel testimony about” Proietti and DiCriscio that implicate their Fifth Amendment rights. Pet. 7-9. This claim fails for several reasons.

First, the companies have provided no evidence that they or Proietti and DiCriscio have a reasonable fear of self-incrimination or face a real threat of a criminal indictment to justify invoking any Fifth Amendment rights. *See United States v. Argomaniz*, 925 F.2d 1349, 1353 (11th Cir. 1991) (the privilege against self-incrimination “applies only in ‘instances where the party has reasonable cause to apprehend danger’ of criminal liability”) (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

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<sup>2</sup> The companies are thus in error when they assert the CIDs are directed to Proietti and DiCriscio “in their individual capacities” because, as owners and officers of the companies, they fall within the CID’s definition of the “Company.” Pet. 5, 8. To the contrary, the CIDs are directed only to the companies, although they ask for corporate information that employees or other agents would have about the company. That does not transform the CIDs into requests addressed to Proietti and DiCriscio in their personal capacities. The companies also claim the CID queries focused on Proietti and DiCriscio are irrelevant to the FTC’s investigation and are being asked only to pursue criminal charges against them. Pet. 6. This claim too is unfounded because the companies’ August 2017 CID responses showed that Proietti and DiCriscio, as owners of the companies, played a central role in product development and marketing. Indeed, the companies asserted that Proietti and DiCriscio are not only responsible for product advertising and promotion, but they “conducted their own research,” reviewed relevant literature, and even took the products themselves to determine if the products’ benefits were consistent with their marketing claims. The CID inquiries as to Proietti and DiCriscio are thus directly relevant to our inquiry into whether the companies’ marketing violated the FTC Act.

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The supporting materials provided by the petitioners show, at most, that Nordic Clinical may be the subject of criminal investigations into Neurocet and other products, but there is no indication that the company faces a reasonable danger of criminal liability. The United States District Court for the District of Idaho recognized as much this past February when it denied Nordic Clinical's motion to return seized property. As the court noted, no indictments had been issued and "it is unknown whether the Government will prosecute any person or entity involved in its investigation, including Nordic." *In the Matter of the Search of: Specialty Fulfillment Center*, No. 1:17-mc-09979-CWD, 2018 WL 785861, at \*7 (D. Idaho Feb. 8, 2018). Petitioners provide no evidence that Encore Plus faces a threat of a criminal indictment.

Second, even if Proietti or DiCriscio faces a genuine threat of criminal indictment, that would not excuse the companies from compliance with the CID. The companies themselves have no Fifth Amendment privilege as discussed above.<sup>3</sup> Even if the two owners are unavailable to testify, the companies still must select an officer, employee, or "agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation." *Kordel*, 397 U.S. at 8 (citations omitted); *see generally* 8 Charles Alan Wright, Arthur R. Miller, *et al.*, Federal

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<sup>3</sup> The companies' reliance on *United States v. Hubbell*, 530 U.S. 27 (2000), Pet. 8, is misplaced. *Hubbell* involved a subpoena issued to the target of a criminal investigation in his individual capacity; the Court did not address the Fifth Amendment status of corporations. As courts have consistently recognized, *Hubbell* did not reverse long-standing Supreme Court precedent that corporations lack Fifth Amendment rights. *See, e.g., In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d 255, 263 n.2 (3d Cir. 2015); *Amato v. United States*, 450 F.3d 46, 51 (1st Cir. 2006); *Armstrong v. Guccione*, 470 F.3d 89, 98 (2d Cir. 2006). The companies also get no help from *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which they claim also cast doubt on the inapplicability of the Fifth Amendment to corporations. Pet. 9. Those two cases address the application of the *First* Amendment to corporations. Nothing in them signals any departure from century-old precedents recognizing the *Fifth* Amendment privilege against self-incrimination as an individual right. *See, e.g., Grand Jury*, 786 F.3d at 261 & n.1 ("[W]e discern nothing in Supreme Court jurisprudence that suggests the Court has, in any way, signaled its readiness to depart from its longstanding precedent regarding corporate custodians' inability to invoke the Fifth Amendment privilege against self-incrimination.").

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Practice & Procedure § 2018 (3d ed. 2010) (“[T]he burden on the corporation is to designate someone to answer on its behalf who can furnish as much of the requested information as is available to the corporation without fear of self-incrimination”).<sup>4</sup>

Indeed, the companies cannot resist complying with the CIDs by designating Proietti and DiCriscio as their corporate representatives if the executives will simply assert the Fifth Amendment privilege at the investigational hearings. “In their official capacit[ies],” the executives “have no privilege against self-incrimination.” *White*, 322 U.S. at 699. Further, the Supreme Court has held that a corporation may not designate as its representative an officer who could assert a personal Fifth Amendment privilege and, in this way, “secure for the corporation the benefits of a privilege it does not have.” *United States v. Kordel*, 397 U.S. 1, 8 (1970) (quoting *U.S. v. 3963 Bottles of Enerjol Double Strength*, 265 F.2d 332, 336 (7th Cir. 1959)). The Court explained that “[s]uch a result would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agents.” *Kordel*, 397 U.S. at 8. Nor may a corporate officer rely on the Fifth Amendment to avoid producing corporate records he holds in a representative capacity, even if those records might incriminate him. *Braswell v. United States*, 487 U.S. 99, 108-09 (1988).

In sum, there is no basis to quash the CIDs on Fifth Amendment grounds.

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<sup>4</sup> Indeed, even where there is no such person at the company who can testify, the company must retain a person with whom it was not previously associated and provide that person with sufficient knowledge to be able to testify on the company’s behalf. *See, e.g., City of Chicago, Ill., v. Wolf*, No. 91 C 8161, 1993 WL 177020, at \*1-2 (N.D. Ill. May 21, 1993) (“The corporations, however, can be compelled to answer the [30(b)(6)] questions through an agent who will not invoke the privilege”) (citations omitted); *Martinez v. Majestic Farms, Inc.*, No. 05-60833-CIV, 2008 WL 239164, at \*2 (S.D. Fla. Jan. 28, 2008) (citing *Wolf*). To avoid prejudicing the employee who has a legitimate Fifth Amendment right from testifying indirectly through the designated representative, the employee would not be required to provide information to the corporate designee that is solely contained in the employee’s memory and is not implied by a document. *Martinez*, 2008 WL 239164, at \*3; *Wolf*, 1993 WL 177020, at \*2.

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**B. A stay of the Commission's investigations is not warranted**

The companies relatedly contend that the Commission should stay its investigations of the two companies pending resolution of the criminal investigations. Pet. 10-16. We deny that request for many of the same reasons discussed above.

“[T]he Constitution rarely, if ever, requires \* \* \* ‘a stay of civil proceedings pending the outcome of criminal proceedings.’” *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98 (2d Cir. 2012) (citing *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir. 1986) (internal quotation omitted)). Indeed, “‘a stay of a civil case’ to permit conclusion of a related criminal prosecution has been characterized as ‘an extraordinary remedy,’” although a court has the discretion to do so “when related criminal proceedings are imminent or pending, \* \* \*.” *Id.* (citations omitted). The party seeking such “a stay ‘bears the burden of establishing its need.’” *Id.* at 97 (citing *Clinton v. Jones*, 520 U.S. 681, 708 (1997)). And contrary to the companies’ suggestion, Pet. 12, a criminal defendant “has no absolute right” to remain free “to choose between testifying in a civil matter and asserting his Fifth Amendment privilege.” To the contrary, it is “permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege,” and “it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding.” *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).<sup>5</sup>

Courts consider a number of factors when deciding whether to stay a civil proceeding pending a criminal matter. These include: (1) the status of the criminal case, including whether the defendants have been indicted and their Fifth Amendment rights

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<sup>5</sup> Contrary to the companies’ contentions, Pet. 5, there is nothing improper with the FTC sharing information it receives pursuant to process with another domestic or foreign law enforcement agency if the information is used for official law enforcement purposes as authorized by the FTC Act, 15 U.S.C. §§ 46(f), 57b-2(b)(6), and 16 C.F.R. §§ 4.11(c) and (j).



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are implicated;<sup>6</sup> (2) the plaintiff's interest in proceeding expeditiously in the civil matter and the potential prejudice to the plaintiff of a delay; (3) the extent to which the issues in the criminal and civil cases overlap; (4) the private interests of and burden on the defendants; (5) the interests of non-parties and the public; and (6) the convenience to the court and judicial economy. See *Malletier*, 676 F.3d at 99-100 & nn.13-14 (declining to stay civil counterfeiting case pending related criminal proceeding); *Keating*, 45 F.3d at 324-25 (declining to stay civil case pending resolution of criminal action because burden on the defendant was outweighed by "the public's interest in a speedy resolution of the [civil] controversy") (citing *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902-03 (9th Cir. 1989)); see also *Dresser Industries*, 628 F.2d at 1374 (allowing parallel civil and criminal suits to continue "[i]n the absence of substantial prejudice to the rights of the parties involved, \* \* \*").

Those factors plainly counsel against a stay here. First, as discussed above, petitioners point only to possible future criminal proceedings; neither the companies themselves nor their owners have been indicted—and they have shown no genuine threat of criminal liability at this point. Even if they did, no Fifth Amendment rights would be implicated by our investigation of the companies, because the companies have no Fifth Amendment rights as explained above. The very cases cited by petitioners recognize that "a stay in a civil proceeding when no indictment has yet issued in the criminal proceeding is rare, \* \* \*." *SEC v. Healthsouth Corp.*, 261 F. Supp. 2d 1298, 1327 (N.D. Ala. 2003). While some courts have granted pre-indictment stays, Pet. 12-13,

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<sup>6</sup> The strongest case for staying a civil proceeding is where the defendant "is already under indictment for a serious criminal offense" involving the same matter, *Malletier*, 676 F.3d at 101; *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir. 1980), or at least is facing a "real and appreciable" risk of criminal liability. *Kordel*, 397 U.S. at 9. But as discussed below, courts often decline to stay civil cases even in the face of related criminal proceedings. By contrast, "[p]re-indictment requests to stay parallel civil litigation are routinely denied." *United States v. Bauer*, No. 1:14-CV-1660, 2014 WL 5493184, at \*2 (M.D. Pa. Oct. 30, 2014) (citations omitted). "[T]he risk of self-incrimination is reduced at the pre-indictment stage," and it is uncertain "when, if ever, indictments will be issued." *State Farm Mut. Auto. Ins. Co. v. Beckham-Easley*, No. CIV.A 01-5530, 2002 WL 31111766, at \*2 (E.D. Pa. Sept. 18, 2002) (citations omitted).

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those cases nearly always involved imminent or near-certain indictments. *See, e.g., Chao v. Fleming*, 498 F. Supp. 2d 1034, 1039-40 (W.D. Mich. 2007) (granting short stay of civil case where government had indicated “that it has sufficient evidence to seek an indictment,” such that an indictment was “but ‘an eventuality’”); *Healthsouth*, 261 F. Supp. 2d at 1326 (stay issued in civil case where indictment is “but an eventuality”).

Further, both the Commission and the public have a very strong interest that the civil investigation proceed expeditiously given the potentially false claims made by the companies that their products can prevent and treat a variety of serious health conditions. *See, e.g., Kordel*, 397 U.S. at 11 (denying stay of civil action that sought to prevent distribution of misbranded drugs); *Dresser Industries*, 628 F.2d at 1377 (denying stay where doing so might permit the “[d]issemination of false or misleading information by companies” to investors). The Commission and the public would be prejudiced by being “force[d] \* \* \* to wait until the unknown culmination of a criminal case, for which no indictment has even been issued.” *FTC v. Adept Mgmt., Inc.*, No 1:16-cv-00720-CL, 2017 WL 722586, at \*4 (D. Or. Feb. 23, 2017).

For these reasons, we deny the companies’ request to stay the Commission’s investigations pending resolution of the criminal investigations.

**C. The CIDs properly seek testimony in Florida**

Petitioners assert that they cannot be compelled to provide testimony in Florida. The CIDs require each company to provide oral testimony where the company “resides, is found, or transacts business.” 15 U.S.C. § 57b-1(c)(14)(C). Both companies previously stated in their August 2017 CID interrogatory responses that the “principal address” for each one is in Florida: Nordic Clinical in Fort Lauderdale and Encore Plus in Miami. Now, in direct contrast to these answers, they claim they principally conduct business in Montreal. Pet. 2. Petitioners having previously told us that their principal addresses were both in Florida, we see no reason why they cannot designate a witness to testify there.

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**III. CONCLUSION**

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Nordic Clinical, Inc. and Encore Plus Solutions, Inc. to Stay Civil Investigation and Quash Civil Investigative Demands be, and it hereby is, **DENIED**, and

**IT IS FURTHER ORDERED THAT** Petitioners Nordic Clinical, Inc. and Encore Plus Solutions, Inc., shall comply with the Commission's CIDs and designate a corporate representative who will testify on their behalf, on a date set after consultation with Commission staff.

By the Commission.

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**CORPUS CHRISTI POLYMERS LLC,  
ALFA S.A.B. DE C.V.,  
INDORAMA VENTURES PLC,  
FAR EASTERN NEW CENTURY  
CORPORATION,  
ALOKE LOHIA  
AND  
SUCHITRA LOHIA**

*FTC File No. 181 0030 – Decision, June 26, 2018*

RESPONSE TO BANIBU II HOLDINGS, INC.’S PETITION  
TO LIMIT OR QUASH SUBPOENAS DATED MAY 7, 2018

**By SLAUGHTER, Commissioner:**

Banibu II Holdings, Inc. (“Banibu”) has filed a petition to limit and quash a subpoena *duces tecum* (“SDT”) and a subpoena *ad testificandum* (“SAT”) issued by the Commission on May 7, 2018. The SDT and SAT ask “the Company” – defined to include Banibu, its parents (most notably, Banco Inbursa, S.A. (“Inbursa”)), and its officers and employees – to produce documents and provide testimony. Inbursa created Banibu for the sole purpose of bidding in a bankruptcy auction for certain manufacturing assets in Corpus Christi, Texas. Banibu refuses to provide, however, what it considers to be “Inbursa-related” information.

Banibu’s petition to limit and quash advances three arguments: (1) that the request for any documents maintained by Inbursa is not valid because Inbursa was not served in Mexico; (2) that Banibu does not possess or control subpoenaed documents maintained by Inbursa; and (3) that the Federal Trade Commission (“FTC” or “Commission”) lacks the authority to compel Banibu’s Mexican principals to travel to the United States to testify at an investigational hearing. For the reasons described below, we deny Banibu’s petition to limit and quash, although we modify the location of the SAT.

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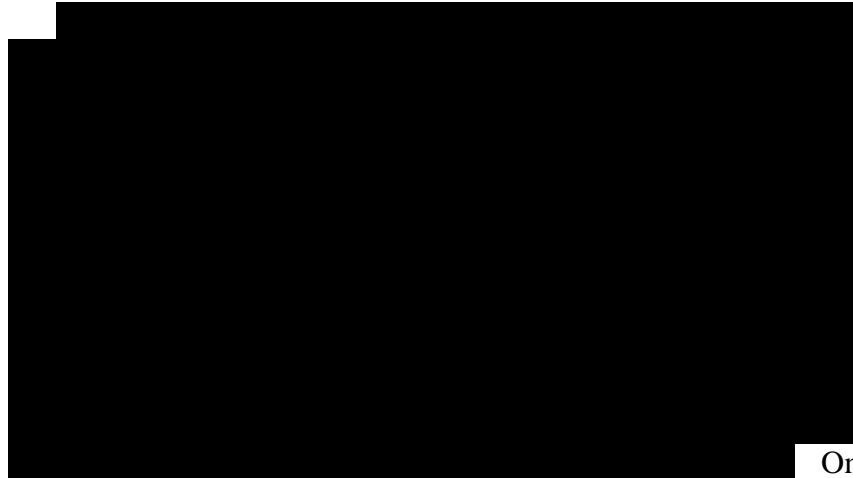
**I. BACKGROUND**

The FTC is investigating a proposed acquisition of a Corpus Christi-based production facility for polyethylene terephthalate (“PET”) resin, a plastic polymer used to make synthetic clothing fibers (referred to by its common name, polyester), bottles, and food packaging. The North American PET resin market is highly concentrated and dominated by only a few market participants.

The transaction under investigation arises out of a bankruptcy proceeding. M&G USA Corporation, Inc. (“M&G”), an American subsidiary of an Italian corporation, was building, in Corpus Christi, Texas, what was expected to be the largest and most efficient vertically integrated PET resin facility in North America. Before the project was completed, M&G filed for Chapter 11 bankruptcy protection on October 30, 2017. *In re: M&G USA Corp.*, No. 17-12307-BLS (Bankr. D. Del.). On March 29, 2018, the bankruptcy court approved the sale of the Corpus Christi assets for \$1.1 billion to a trilateral joint venture named Corpus Christi Polymers LLC, consisting of Indorama Ventures USA (“Indorama”), DAK Americas LLC (“DAK”), and Far Eastern New Century Corporation. FTC staff is investigating the potential competitive effects of this proposed transaction. The bankruptcy court also approved Banibu as the backup bidder for the Corpus Christi assets. *See M&G USA Corp.*, *supra* (Doc. No. 1300). Banibu will acquire the assets if the joint venture fails to close the transaction.

On February 27, 2018, Inbursa, a Mexican financial institution, created Banibu, a Delaware corporation, as its wholly owned subsidiary, specifically to bid on the Corpus Christi assets. Pet. 2-3. Banibu has four directors, who also serve as its only officers: Javier Foncerrada Izquierdo (President), Luis Roberto Frias Humphrey (Vice President, Treasurer), Guillermo Rene Caballero Padilla (Vice President, Secretary), and Frank Ernesto Aguado Martinez (Vice President). Pet. 3. These same four individuals are also officers, directors, or senior employees of Inbursa. Inbursa was the principal lender for M&G’s PET resin facility project, and it is the primary lienholder and largest secured creditor on the Corpus Christi assets. [REDACTED]

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On March 12, 2018, GFI filed the required pre-merger notification, regarding Banibu's bid for the Corpus Christi assets, to the Commission under the Hart-Scott-Rodino Act. *See* 16 C.F.R. pt. 803.

Pursuant to its investigation, on May 7, 2018, the Commission issued two substantively identical subpoenas to Banibu – one for documents and one for testimony. Pet. Exhs. A, B.<sup>1</sup> On May 9, 2018, the SDT and SAT were served via FedEx to Banibu's antitrust counsel in Washington, D.C. Both subpoenas ask about: "the Company's" financial interest in, rationale for bidding on, and evaluation of, the Corpus Christi assets; communications with M&G, other lienholders, bidders, potential bidders, and any other persons about the potential acquisition of the Corpus Christi assets or the bankruptcy proceeding; plans for the assets, should

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<sup>1</sup> The SDT and SAT were issued pursuant to a January 11, 2018 resolution authorizing compulsory process to investigate whether the proposed acquisition of the Corpus Christi assets by Indorama and/or DAK would violate the FTC Act or the Clayton Act. *See* Pet. Exhs. A (last page), B (last page).

## Responses to Petitions to Quash

the Company acquire them (including whether the Company intends to operate or sell the assets); and an April 17, 2018 letter from Inbursa's counsel to FTC staff concerning the bid and the Company's future plans regarding the assets. This information is relevant to the Commission's investigation. Among other things, it will enable an assessment of what would likely happen to the assets if Banibu acquired them as the backup bidder, and in analyzing any "failing firm" defense that the joint venture might raise. The SAT requests that the Company designate a person "to testify on its behalf," pursuant to Commission Rule 2.7(h), 16 C.F.R. § 2.7(h).

On May 17, 2018, Banibu filed its petition to limit and quash the SDT and SAT. It asserts it will produce responsive non-privileged documents it possesses or controls (including "documents relating to its formation, bid proposal, and related business," Pet. 5), but not documents within the possession, custody, or control of its parent Inbursa (and presumably GFI). Banibu also requests that the SAT be quashed, because all of its corporate representatives are Mexican nationals residing in Mexico.

## II. ANALYSIS

### A. The subpoena *duces tecum* should be enforced.

Under Section 9 of the FTC Act, 15 U.S.C. § 49, the Commission has the authority "to require by subpoena. . . the production of. . . documentary evidence relating to any matter under investigation . . . from any place in the United States, at any designated place of hearing. . . ." *See also* 16 C.F.R. § 2.7(c) (FTC's implementing rule). We have held that Section 9 authorizes subpoenas, issued both in agency investigations and in administrative adjudicatory proceedings, for testimony and documents located abroad if the subpoena is served properly on a domestic corporation over which the Commission has jurisdiction. *See In re Petition to Quash Subpoena, Nippon Sheet Glass Co.*, 113 F.T.C. 1202, 1204, 1209 (1990) (Section 9 provides authority to serve an investigational subpoena on the U.S. agent or alter ego of a foreign entity); *In re General Foods Corp.*, 95 F.T.C. 383, 383-384, 1980 WL 339002, at \*1 (1980) ("Section 9 authorizes

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the Commission to subpoena documents located abroad, as well as documents located anywhere within the United States.”) (citations omitted). Courts analyzing identical language in other statutes likewise have held that the language did not limit an agency’s ability to subpoena documents located abroad in response to an administrative subpoena validly served in the United States. *See Federal Maritime Comm’n v. DeSmedt*, 366 F.2d 464, 471 (2d Cir. 1966) (agency could “require a resident by subpoena to produce documents under his control wherever they are located” pursuant to a statute authorizing the agency to compel documents “from any place in the United States.”); *SEC v. Minas de Artemisia, S.A.*, 150 F.2d 215, 217-18 (9th Cir. 1945) (court could enforce an SEC subpoena for the production of books and records located in Mexico, “provided only that service of the subpoena is made within the territorial limits of the United States” where the statute authorized the SEC to require the production of documents “from any place in the United States.”).

**1. Banibu must produce documents in its possession, custody, or control.**

While Section 9 itself does not expressly define the scope of a document demand, we are guided by analogous law that the person subpoenaed must produce responsive non-privileged documents within its “possession, custody, or control.” *See, e.g.*, 15 U.S.C. § 57b-1(c)(1) (FTC’s civil investigative demands); Fed. R. Civ. P. 34(a), 45(a) (party and nonparty production in federal civil litigation). Thus, Banibu – a Delaware corporation, whose principal place of business is in Corpus Christi, Texas – must produce all documents within its possession, custody, or control, even if those documents are located abroad or held by a foreign parent. *See, e.g., United States v. First Nat’l City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968) (requiring production of documents from German branch of United States bank in criminal antitrust investigation, holding that “a federal court has the power to require the production of documents located in foreign countries if the court has *in personam* jurisdiction of the person [corporation] in possession or control of the material”) (citation omitted); *Camden Iron and Metal, Inc. v. Marubeni America Corp.*, 138 F.R.D. 438, 442-44 (D.N.J. 1991) (United States subsidiary had control of documents possessed by Japanese parent



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relating to transaction); *NML Capital Ltd. v. Republic of Argentina*, No. 2:14-cv-492-RFB-VCF, 2014 WL 3898021, at \*10 (D. Nev. Aug. 11, 2014) (federal court's subpoena power under Rule 45 "reaches all documents – no matter where they are located – that are within a resident corporation's custody or control") (citation omitted); *see also* 9A Charles Alan Wright and Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 2456 (3d ed. April 2018 update) (records kept beyond the territorial jurisdiction of the issuing court are covered by Rule 45 if they are controlled by a person, including a corporation, subject to the court's jurisdiction).

Banibu argues that the SDT is invalid to the extent it asks for documents from Inbursa because the FTC did not serve Inbursa pursuant to the Hague Convention, which it asserts is the only authorized method to obtain such materials from the Mexican company. Pet. 6-7. To support this argument, Banibu relies on cases that quashed compulsory process where an individual or corporation was improperly served outside of the United States. *See, e.g., CFTC v. Nahas*, 738 F.2d 487, 493-95 (D.C. Cir. 1984) (administrative subpoena improperly served on a Brazilian citizen in Brazil where the agency lacked statutory authority to serve subpoena extraterritorially); *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) (service of FTC investigatory subpoena by registered mail on French company in France was unauthorized as it was not the customary and legitimate method of serving administrative compulsory service abroad). But here the Commission lawfully served its subpoena in the United States on Banibu, a Delaware corporation, which is obligated to produce all documents within its possession, custody, or control, whether or not its Mexican parent Inbursa maintains those materials.

**2. Documents maintained by Inbursa are in Banibu's possession, custody, or control.**

Banibu next argues that it does not possess or have control over Inbursa or its documents. Pet. 8-9. We agree with Banibu that the separate corporate identities of parent and subsidiary ordinarily should be respected. We conclude, however, that

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Banibu has an obligation to produce documents it argues belongs to Inbursa for two reasons.

First, it is very likely that Banibu's principals possess many of the requested documents, even beyond the specific Banibu-related documents that it has or has stated it will produce. The SDT is narrowly focused on documents relating to the Corpus Christi assets, including why the Company bid on the assets, its evaluation of and plans for those assets, and its discussions with M&G, other lienholders, bidders, and potential bidders. Thus, responsive documents relating to the topics in the SDT possessed by Banibu's four principals must be produced. *See, e.g., General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973) ("knowledge of officers and employees of [defendant corporation], relevant to the subject matter of the instant cause, is imputed to the corporation itself.") (citation omitted); *see also Gerling Int'l Ins. Co. v. Comm'r of Internal Revenue*, 839 F.2d 131, 138 (3d Cir. 1988) ("knowledge of officers and key employees of a corporation, if relevant to the subject matter of an interrogatory or production request direct to the corporation, may be imputed to the corporation itself.") (citations omitted).<sup>2</sup> Banibu's four officers and directors are also officers, directors, or senior employees of Inbursa, which has a major investment stake in the Corpus Christi assets, and were directly involved in Banibu's bid for the Corpus Christi assets.<sup>3</sup> Indeed, [REDACTED]

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<sup>2</sup> At the same time, we are unpersuaded by Banibu's reliance on *Gerling* to support its petition. *See* Pet. 9. In *Gerling*, the Third Circuit held that the president of a Delaware corporation, which had a contractual relationship as a reinsurer of a Swiss insurance company, had no obligation to disclose the extent of his holdings in the Swiss company, which he owned in his *personal* capacity. 839 F.2d at 139. Indeed, *Gerling* reiterated the well-established principle that corporate officers and directors have an obligation to provide business information they possess *on behalf of the corporation* they operate, but not personal information obtained outside the scope of their official duties. *See id.* ("Nothing in the record suggests that Gerling's ownership in [the Swiss company] has anything to do with the business of [the Delaware company]"). Here, the SDT is only requesting documents from Banibu and its officers and directors in their official, not personal, capacities.

<sup>3</sup> [REDACTED]

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[REDACTED] and the Asset Purchase Agreement submitted with Banibu's bid indicated that all notices and communications should be directed to Messrs. Frias and Caballero. See *M&G USA Corp.*, *supra* (Doc. No. 1277-13 at PDF pg. 100) (Exh. H-1 at 94).

Second, we conclude that Banibu has the requisite control over all the documents responsive to the SDT, including those maintained by Inbursa. As Banibu acknowledges, an entity has the requisite "control" of documents if it has the "the legal right, authority or ability to obtain documents upon demand." Pet. 8 (quoting *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 254 (D.C. Cir. 2005) (citation omitted)); accord *Bush v. Ruth's Chris Steak House, Inc.*, 286 F.R.D. 1, 5 (D.D.C. 2012) ("Control does not require that the party have legal ownership or actual physical possession of the documents at issue, but rather 'the right, authority or practical ability to obtain the documents from a non-party to the action.'" (citation omitted); *Texas v. Ysleta del Sur Pueblo*, No. EP-17-CV-179-PRM, 2018 WL 2348669, at \*2 (W.D. Tex. May 23, 2018) (same) (citations omitted); *Shell Global Solutions (US) Inc. v. RMS Eng'g, Inc.*, No. 4:09-cv-3778, 2011 WL 3418396, at \*2 (S.D. Tex. Aug. 3, 2011) (same) (citations omitted). The D.C. Circuit has recognized five instances in which a subsidiary has the requisite control over documents in its parent corporation's possession, more specifically where:

- (1) the alter ego doctrine ... warranted 'piercing the corporate veil';
- (2) the subsidiary was an agent of the parent in the transaction giving rise to the lawsuit;
- (3) [t]he relationship is such that the agent-subsiary can secure documents of the principal-parent to meet its own business needs and documents helpful for use in litigation;
- (4) [t]here is access to documents when the need arises in the ordinary course of business; [or]

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(5) [the] subsidiary was [a] marketer and servicer of the parent's product. . . in the United States.

*ASAT*, 411 F.3d at 254 (citing *Camden Iron*, 138 F.R.D. at 441-42 (citing *Gerling*, 839 F.2d at 140-41)); accord *CMACO Auto. Systems, Inc. v. Wanxiang America Corp.*, No. 05-60087, 2007 WL 656893, at \*2 (E.D. Mich. Feb. 26, 2007) (citing *Camden Iron* and applying same factors), *aff'd*, 2007 WL 2331863 (E.D. Mich. Aug. 13, 2007); *Shell Global*, 2011 WL 3418396, at \*2 (applying similar factors) (citation omitted); *Uniden America Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 306 (M.D.N.C. 1998) (applying similar grounds to conclude that subsidiary may be required to produce parent's documents where there is sufficient "intermingling of directors, officers, or employees, or business relations."). A finding of any one of the five factors can satisfy the "control" requirement. See *Camden Iron*, 138 F.R.D. at 441; *Pitney Bowes, Inc. v. Kern Intern., Inc.*, 239 F.R.D. 62, 66-67 (D. Conn. 2006). The party seeking the documents has the burden to show that the subsidiary controls the parent's documents. *ASAT*, 411 F.3d at 254.

We conclude that the *ASAT* factors demonstrate that Banibu "controls" the documents requested in the SDT, even if they are nominally possessed by Inbursa. Documents produced in the bankruptcy proceeding, and those reflecting communications both before and after the bankruptcy auction, reveal that Banibu is acting as Inbursa's agent "in the transaction giving rise to" a portion of the Commission's investigation – Banibu's potential acquisition of the Corpus Christi assets (satisfying the second *ASAT* factor). Inbursa created Banibu as a shell corporation, for the express purpose of bidding on the Corpus Christi assets, installed its own principals as Banibu's principals, [REDACTED]

[REDACTED] Further, as noted above, [REDACTED]

[REDACTED] and those regarding Banibu's asset purchase agreement with Messrs. Frias and Caballero.

Satisfaction of the second *ASAT* factor is sufficient to find that Banibu has the requisite control over the requested documents.

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But, additionally, we conclude that given Banibu's purpose and Inbursa and Banibu's close relationship, including overlapping officers, directors, and employees, it is highly likely that Banibu would have access to Inbursa's documents regarding its potential acquisition of the Corpus Christi assets "when the need arises in the ordinary course of business," and the ability to "secure documents of [Inbursa] to meet its own business needs" – even those prepared before Banibu was created. This satisfies the third and fourth *ASAT* factors.

The documents sought in the SDT relate specifically to the activities for which Inbursa incorporated Banibu and its plans for the assets should it obtain them. While Banibu has produced some documents relating to the bid itself, it claims not to possess or have control over documents relating to other aspects of the Corpus Christi assets that are important to the FTC staff's investigation (particularly those created prior to Banibu's creation), such as how Inbursa valued the assets and came up with its bid amount, what its future plans are for the site, and what return it expects if it obtains the assets and sells them. These are relevant documents for the Commission's investigation and must be produced pursuant to the SDT.

Inbursa should not be able to create a shell corporation as an acquisition vehicle under the protection of United States law with the express purpose of engaging in a significant business transaction here, yet disclaim any obligation to respond to valid law enforcement inquiries about that proposed transaction. Banibu was created for the sole purpose of doing business in the United States on behalf of its principal Inbursa and should not be allowed to evade law enforcement inquiries due to such machinations. In sum, we find there is a sufficient "nexus between the subpoenaed documents and [Banibu's] relationship with [Inbursa], taking into account, among other things, [Banibu's] business responsibilities," *ASAT*, 411 F.3d at 255, to support our conclusion that Banibu controls the requested documents.<sup>4</sup>

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<sup>4</sup> Indeed, these facts may show that Banibu was Inbursa's alter ego for purposes of the Corpus Christi asset transaction such that the corporate veil between them should be pierced to allow Commission access to the documents.

## Responses to Petitions to Quash

Courts have found sufficient control by subsidiaries over documents nominally possessed by their parent corporations in situations very similar to here. *See, e.g., Camden Iron*, 138 F.R.D. at 442-44 (finding control by wholly owned domestic subsidiary of transaction-related documents possessed by its foreign parent, which played a significant role in setting up and benefitting from transaction and where subsidiary obtained documents relating to transaction from parent in the normal course of business, even where there was little overlap of the companies' officers and directors); *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 919-20 (S.D.N.Y. 1984) (finding control by a domestic distributor and service company over subpoenaed service manual and blueprint documents possessed by foreign airplane manufacturer affiliate such that it would have been "inconceivable that [the domestic company] would not have access to these documents and the ability to obtain them for its usual business."); *CMACO Auto. Syst.*, 2007 WL 656893, at \*2 (holding that domestic subsidiary controlled subpoenaed documents held by foreign counterparts under the second, third, and fourth ASAT factors); *see also Ysleta del Sur Pueblo*, 2018 WL 2348669, at \*3 (defendant Indian tribe controlled documents held by nominally independent tribal fraternal organization because tribe had legal right and practical ability to obtain documents, where organization was "wholly controlled" by tribe and tribal official was also official of the organization with apparent access to the requested documents).

The cases upon which Banibu relies in its petition present circumstances distinguishable from the instant case. In those cases, courts found insufficient control by the domestic subsidiary over its foreign parent's documents where the subsidiary did not have routine access to the subpoenaed documents, which were unrelated to the subsidiary's business activities. *See, e.g., ASAT*, 411 F.3d at 255 (finding lack of control by subsidiary of documents possessed by foreign parent because "[i]t is quite conceivable that [the subsidiary] does not have routine access to [its foreign parents' subpoenaed] documents because they do not seem to relate directly to its principal activities."); *Power*

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But we need not make that finding to conclude that Banibu has sufficient control over the requested documents to comply with the SDT.

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*Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 233 F.R.D. 143, 145-46 (D. Del. 2005) (finding lack of control where domestic subsidiary had arms-length vendor relationship with foreign parent and subsidiary did not use the subpoenaed information “in the normal course of its business”). The current matter is more analogous to those cases finding the domestic subsidiary controls documents maintained or possessed by a parent corporation, given the complete overlap of Banibu’s officers and directors with Inbursa, the interconnectedness of Inbursa’s and Banibu’s business interests and activities regarding the Corpus Christi assets, and the SDT’s request for documents relating specifically to those assets. For these reasons, we reject Banibu’s objections and deny its petition to quash the SDT.

**B. The subpoena *ad testificandum* should be enforced.**

Banibu also argues that the SAT must be quashed because it exceeds the Commission’s Section 9 subpoena authority by “compel[ing] a Mexican national to travel to the United States and sit for a deposition.” Pet. 10-11. It relatedly argues, relying on Fed. R. Civ. P. 45, that it has “no representative within the jurisdictional reach of any U.S. district [court].” *Id.* Both arguments fail for the reasons described below.

**1. The Commission’s subpoena authority under Section 9 compels testimony of Banibu’s officers, directors, or managing agents, or designees who consent, to testify on its behalf.**

Like its authority to require the production of relevant documentary materials, the Commission has broad authority to require the testimony of United States corporations in furtherance of its investigations. *See supra* at 3. Under Section 9 of the FTC Act, the Commission has the “power to require by subpoena the attendance and testimony of witnesses. . . relating to any matter under investigation. . . . Such attendance of witnesses. . . may be required from any place in the United States, at any designated place of hearing. . . . The Commission may order testimony to be taken by deposition in any proceeding or investigation . . . at any stage of such proceeding or investigation. . . .” 15 U.S.C. § 49; *see also* 16 C.F.R. § 2.7(c) (FTC’s implementing rule). When the

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Commission issues a subpoena for oral testimony from a corporate entity, “the entity must designate one or more officers, directors, or managing agents, or designate other persons who consent, to testify *on its behalf*. . . .” 16 C.F.R. § 2.7(h) (emphasis added); *cf.* Fed. R. Civ. P. 30(b)(6) (applying similar language for corporate depositions in federal civil discovery). The witnesses appear on behalf of “the Company,” not in their individual capacities.

Banibu asserts that the Commission “has no power to subpoena an alien nonresident to appear before it from a foreign land.” Pet. 10 (quoting *Nahas*, 738 F.2d at 495 (quoting *SEC v. Zanganeh*, 470 F. Supp. 1307 (D.D.C. 1978))). The cases on which Banibu relies involve service on a foreign national on foreign soil (*Nahas*) or service in the United States requiring a particular nonresident alien to appear before the agency from a foreign land (*Zanganeh*). But here, the Commission subpoenaed Banibu – a Delaware corporation, whose principal business activity is related to its bid on the Corpus Christi assets in Texas. Banibu is indisputably within the Commission’s subpoena authority. The SAT seeks testimony from knowledgeable corporate officers, directors, managing agents, or designees, not particular individuals located in Mexico, personally. While Banibu may designate its Mexican officers to testify on its behalf, the SAT does not require it to do so.

**2. Banibu’s invocation of Fed. R. Civ. P. 30(b)(6) and 45 is unavailing.**

Banibu further argues, citing Fed. R. Civ. P. 30(b)(6) and 45(c), that the SAT must be quashed because Banibu does not employ anyone within 100 miles of any United States judicial district. Pet. 10-11. It cites no authority, however, that the Commission’s subpoena authority under Section 9 of the FTC Act is subject to Rule 45’s territorial limits. Indeed, as noted above, Section 9 explicitly states that witness testimony “may be required from any place in the United States, at any designated place of hearing.”

But, as noted above, even if we were to consider the Federal Rules of Civil Procedure as guidance for our investigatory



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subpoenas, Banibu's argument still fails. Rule 45(c)(1)(A) limits a subpoena issued to a nonparty to testify "within 100 miles of where the person resides, is employed, or regularly transacts business in person." The cases relied upon by Banibu simply stand for the unremarkable proposition that a nonparty nonresident organization cannot be compelled to designate a suitable employee to testify who works over 100 miles from the district where the litigation is pending or a deposition is noticed. *See, e.g., Estate of Klieman v. Palestinian Auth.*, 293 F.R.D. 235, 239 (D.D.C. 2013) (subpoena issued to the BBC based in the United Kingdom where relevant documentary was produced), order stayed on other grounds, 18 F. Supp. 3d 4 (D.D.C. 2014); *Krueger Invs. LLC v. Cardinal Health 110, Inc.*, No. CV 12-0618-PHX-JAT, 2012 WL 3264524, at \*3 (D. Ariz. Aug. 9, 2012) (no responsive DEA witness worked within 100 miles of Arizona litigation). But the subpoenas were issued to Banibu, a domestic corporation over which the Commission indisputably has jurisdiction. Thus, even using Rule 45(c)(1)(A) as guidance (which we are not obliged to do given the language of Section 9), Banibu needs to designate an officer, director, managing agent, or other person to testify on its behalf, who resides, works, or regularly transacts business within 100 miles of a suitable investigational hearing location.

While Banibu claims that all four of its officers and directors are Mexican nationals who work and reside in Mexico, Pet. 3, Exh. C ¶ 4, Banibu has an affirmative obligation to "select a designee and educate her in accordance with its duty" to designate a corporate deponent whose testimony "represents the knowledge of the corporation," because "the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation." *Wultz v. Bank of China Ltd.*, 298 F.R.D. 91, 99 (S.D.N.Y. 2014) (citations omitted); *accord NML Capital*, 2014 WL 3898021, at \*10 ("the unique status of the corporate person permits a federal court to compel a non-party resident corporation to designate a nonresident employee to 'thoroughly educate' an in-forum employee to testify on the corporation's behalf") (citing *Wultz*); *Rahman v. The Smith & Wollensky Rest. Group, Inc.*, No. 06 Civ. 6198LAKJCF, 2009 WL 773344, at \*1 (S.D.N.Y. Mar. 18, 2009) ("A corporation has an affirmative duty to prepare the designee 'to the extent matters

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are reasonably available, whether from documents, past employees, or other sources.”) (citations omitted). In *Wultz*, the court found that requiring a nonparty bank in Israel with a New York branch office, to educate a person in New York to comply with a corporate subpoena, did not impose an undue burden. 298 F.R.D. at 99. Therefore, Banibu must either send one of its four Mexican officers to the United States to testify, or designate and prepare a person with relevant knowledge to testify on its behalf.<sup>5</sup>

Finally, we note that one court, in requiring a foreign witness to travel more than 100 miles, from abroad, to testify on behalf of nonparty resident shell corporations, observed that “[a] company cannot purposefully avail itself of the law’s benefits by incorporating in this jurisdiction and then excuse itself from the court’s subpoena power by abusing the corporate form. This would allow a corporation to exploit the benefits created by the law without shouldering the concomitant burdens and responsibilities imposed by the law.” *NML Capital*, 2014 WL 3898021, at \*11-\*12 (observing that shell corporations “exalt artifice above reality,” citing *Abramski v. United States*, 134 S. Ct. 2259, 2270 (2014)). While we do not suggest that Inbursa incorporated Banibu for a nefarious purpose, we conclude that similar considerations apply here. Foreign companies that operate in the United States through shell companies, enjoying the benefits and protections of United States law, and engaging in significant domestic transactions, should not be permitted to shield their officers or directors with knowledge of the transaction from the reach of a United States law enforcement investigation. Nothing indicates that Congress intended to limit the Commission’s investigatory subpoena authority under Section 9 in the manner that Banibu suggests.

For the reasons described above, we deny Banibu’s motion to quash the SAT. While we are not bound by the Federal Rules of Civil Procedure, in an effort to lessen the burden on witnesses consistent with the purposes underlying Rule 45(c), we are modifying the place for the investigative hearing, and order that it

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<sup>5</sup> Indeed, we note that the Company retains several agents working in the United States in various consulting and advisory roles, including the Company’s attorneys and corporate restructuring consultants.

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take place within 100 miles of either Corpus Christi, Texas (where Banibu transacts business) or Wilmington, Delaware (where Banibu is incorporated), or at another place in the United States agreed to by the parties.

**III. CONCLUSION**

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Banibu II Holdings, Inc.'s Petition to Limit and Quash Subpoena Duces Tecum and Subpoena Ad Testificandum Dated May 7, 2018 be, and it hereby is, **DENIED**.

**IT IS FURTHER ORDERED THAT** Banibu II Holdings, Inc. shall comply in full with the Commission's subpoena *duces tecum* by 10 days from the date of this order; and shall appear to testify on the topics in the subpoena *ad testificandum* at a mutually agreeable date and location, which is within 100 miles of either Corpus Christi, Texas or Wilmington, Delaware, or at another place in the United States agreed to by the parties.

By the Commission.

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