FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS JULY 1, 2018, TO DECEMBER 31, 2018

PUBLISHED BY THE COMMISSION

VOLUME 166

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

MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JULY 1, 2018 TO DECEMBER 31, 2018

JOSEPH J. SIMONS, *Chairman*
Took oath of office May 1, 2018

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

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

CHRISTINE S. WILSON, *Commissioner*
Took oath of office September 26, 2018

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

CONTENTS

TABLE OF CASES

VOLUME 166

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JULY 1, 2018, TO DECEMBER 31, 2018

IN THE MATTER OF

WILHELM WILHELMSEN, WILHELMSEN MARITIME SERVICES AS, RESOLUTE FUND II, L.P., DREW MARINE INTERMEDIATE II B.V., AND DREW MARINE GROUP, 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. 9380; File No. 171 0161
Complaint, February 22, 2018 – Decision, July 31, 2018

This case addresses the $400 million acquisition by Wilhelm Wilhelmsen of Drew Marine Technical Solutions. The complaint alleges that the acquisition would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the market for marine water treatment chemicals and services to global fleets. The Order dismissed the Complaint without prejudice, in light of the Respondents' decision to abandon the proposed acquisition, and Respondent Wilhelmsen's withdrawal of its Hart-Scott-Rodino Notification and Report Forms.

Participants

For the *Commission*: *Llewellyn Davis, Amy Dobrzynski, Daniel Freer, Josh Goodman, Frances Anne Johnson, Michael Lovinger* and *Merrick Pastore.*

For the *Respondents*: *Paul Hewitt, Akin Gump; Mark Ryan, Mayer Brown.*

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 Wilhelm Wilhelmsen and Wilhelmsen Maritime Services AS (collectively "Wilhelmsen") and the Resolute Fund II, L.P., Drew Marine Intermediate II B.V., and Drew Marine Group, Inc. (collectively "Drew") 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:

NATURE OF THE CASE

1. Marine water treatment chemicals are chemicals used aboard vessels to prevent corrosion, remove impurities, and enhance the operation of a vessel's operational systems—primarily the vessel's boiler water or engine cooling water systems.

2. Respondents are the two largest suppliers of marine water treatment chemicals and related services in the world.

3. Respondents' customers include owners and operators of fleets of globally-trading vessels that call in ports around the world ("Global Fleets"). Global Fleet customers seek marine water treatment chemical suppliers with global sales, delivery, and service presence.

4. By a wide margin, Respondents are the two leading water treatment suppliers to Global Fleets.

5. Respondents are each other's closest competitor. Respondents recognize this closeness of competition. For example, Drew's CEO agrees that Wilhelmsen is Drew's "biggest competitor" and Wilhelmsen refers to Drew internally as its "key global competitor."

6. Respondents are each other's closet competitor on many important dimensions of competition for the water treatment business of Global Fleets including: Scope, quality, consistency, and reliability of water treatment product and service offerings; technical service capability; global distribution footprint; and the ability to offer their customers a full range of other marine products for vessels through their global distribution footprint, such as marine gases, marine cleaning chemicals, fuel treatment chemicals, and refrigerants.

7. Direct, head-to-head competition between Wilhelmsen and Drew provides substantial benefits to Global Fleets in the form of lower prices and better service. If consummated, the Acquisition would eliminate that competition, threatening significant harm to Global Fleets from lost competition. As one Drew employee put it, a potential merger between Wilhelmsen and Drew "could increase our ability to charge far better prices and win across all segments."

8. Respondents supply marine water treatment chemicals and services to a variety of Global Fleets, consisting of various large vessels including tankers, container ships, bulk carriers, cruise ships, and military support vessels.

9. Respondents sell their water treatment chemicals to Global Fleets as part of a "program" or "solution" that includes not only the individual chemical blends, but also customer service, worldwide delivery capabilities, and technical services, such as on-board technical visits, training for crew, testing, and technical analysis. In other words, the "products" that Respondents

provide to Global Fleets are not simply chemicals but include a suite of associated services and capabilities.

10. Global Fleets typically seek a marine water treatment chemical supplier with a sophisticated and reliable global logistics operation capable of delivering a consistent product to ports around the world.

11. Global Fleets tend to arrange to purchase marine water treatment chemicals either through a formal request for proposal ("RFP") process or through direct negotiations. Respondents consistently compete head-to-head in such proceedings. They are often the two finalists in RFPs or other negotiations to supply Global Fleets because they have the broadest global networks with consistent products and services, the best prices across ports, the strongest reputations for quality and consistency, and the highest levels of customer service. Owners and operators of Global Fleets often use Respondents' similar offerings to pit one Respondent against the other in negotiations to obtain lower prices and better service. Indeed, both Respondents frequently lower prices, increase discounts, and offer additional incentives to take business away from each other and to avoid losing business to each other. For many Global Fleets, Respondents are the two best options for the supply of marine water treatment chemicals and services. According to one Drew document, "Drew Marine has essentially only one global competitor – Wilh. Wilhelmsen Holding ASA."

12. Other marine water treatment chemical suppliers present significant disadvantages for Global Fleets as compared to Respondents. Regional and local suppliers are generally perceived to offer lower quality products with less reliable product consistency, to have more limited service capabilities, and to face logistical challenges when serving Global Fleets. As one Wilhelmsen employee explained, "most of the biggest opportunities we lose are to Drew as small competitor[s] often cannot handle the amount of business or the trading pattern of those customers." Indeed, regional and local marine chemical suppliers have smaller distribution footprints, and to the extent that they serve customers outside their primary geographies, they frequently have higher prices or offer more limited services. While some of these suppliers may claim to possess a "global network," they often have very limited sales outside of their primary region. As a result of their various limitations, local and regional suppliers have very modest overall sales of these products today, and have significantly smaller shares of sales to Global Fleets than either Defendant.

13. The Acquisition would create a firm with a dominant share of the relevant market and significantly increase market concentration. The relevant market is the supply of marine water treatment chemicals and services to Global Fleet customers. Post-Acquisition, Wilhelmsen would control at least 60% of the relevant market. The next-largest competitor would possess less than 5% 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 at least 3600 by

revenue, and would increase HHIs in an already concentrated market by multiples above 200 points. Thus, under the Merger Guidelines, the Acquisition is presumptively unlawful.

14. New entry or expansion by existing producers would not be timely, likely, or sufficient to counteract the anticompetitive effects of the Acquisition. Owners and operators Global Fleets have many demands of their suppliers of marine water treatment chemicals and services that collectively impose substantial barriers to entry. To replace the competitive significance of Drew in the market, a potential entrant would need to establish a worldwide distribution network, strong customer service, marine engineering services, high-quality and consistent products, specialized testing and dosing equipment, a strong brand, and an established reputation for excellence, as well as obtain both manufacturer approvals and government safety and regulatory approvals. Expansion or repositioning by the remaining firms sufficient to offset the Acquisition's anticompetitive effects is also unlikely. The next-closest competitors in the supply of water treatment chemicals and services are a fraction of the size of Wilhelmsen or Drew, and it is unlikely they will be able to grow to replace the competitive significance of Drew in a timely manner.

15. Respondents cannot show cognizable merger-specific efficiencies that would offset the likely and substantial competitive harm resulting from the Acquisition.

I. JURISDICTION

16. 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.

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

II. RESPONDENTS

18. Wilhelmsen is the largest supplier of water treatment chemicals and services to Global Fleets around the world. Respondent Wilhelmsen Maritime Services AS is a wholly owned subsidiary of Respondent Wilhelm Wilhelmsen Holding ASA, a publicly traded corporation, headquartered in Norway with 4,500 employees. Wilhelmsen and its predecessors have developed a decades-long reputation for excellence in the supply of water treatment chemicals and services. Wilhelmsen had 2016 global revenues of approximately [redacted], of which approximately [redacted] were for water treatment chemicals and services, and at least [redacted] were for water treatment chemicals and services to Global Fleets. Wilhelmsen supplies marine products at 2,200 ports worldwide through a network of approximately 180 stock points.

19. Drew is the second-largest supplier of water treatment chemicals and services to Global Fleets around the world. Established in 1928, Drew has developed its reputation as a quality supplier of marine products and services over more than 80 years. Drew has approximately 500 employees. Respondents Drew Marine Intermediate II B.V. and Drew Marine

Group, Inc. are part of the portfolio of Respondent The Resolute Fund II, L.P., a private equity fund managed by The Jordan Company. Drew earned global revenues of approximately [redacted] in 2016, of which approximately [redacted] were for water treatment chemicals, and at least [redacted] were for water treatment chemicals and services to Global Fleets. Drew serves more than 900 ports worldwide through a network of 81 warehouses.

III. THE ACQUISITION

20. Pursuant to a Share Purchase Agreement, dated April 27, 2017, Wilhelmsen proposes to acquire 100% of the voting securities of Drew for approximately $400 million in cash.

IV. MARKET PARTICIPANTS AND INDUSTRY DYNAMICS

21. Wilhelmsen and Drew are by far the largest competitors for the supply of marine water treatment chemicals and services to Global Fleets. In addition to water treatment products, Respondents sell maritime customers several additional categories of products, including cleaning chemicals, fuel treatment chemicals, welding gases, and refrigerants.

22. After the parties, the next largest supplier is Greek-based Marichem-Marigases ("Marichem")—a distant third to Wilhelmsen and Drew with approximately [redacted] employees. Marichem earned global revenues of approximately [redacted] in 2016, of which approximately [redacted] were water treatment revenues. Marichem is considerably more popular among Greek shipping customers than it is anywhere else in the world: [redacted] of Marichem's top ten customers by revenue are Greek shipping companies.

23. The remaining suppliers of marine water treatment chemicals and services to Global Fleets are even smaller than Marichem. These fringe market participants are significantly smaller than Respondents and lack comparable global distribution networks and other attributes that Global Fleet customers desire. Further, many fringe market participants specialize in niche product offerings, such as tank cleaning chemicals, and devote only a small percentage of their business to the sale of water treatment products.

24. Given these dynamics, many Global Fleets owners and operators view Respondents as their two best options for the supply of water treatment chemicals and services, and view Marichem as a distant third.

V. RELEVANT MARKET

25. The relevant market is the global supply of marine water treatment chemicals and services to Global Fleets. Global Fleets operate in multiple regions around the world and seek suppliers with global sales, service, and delivery capabilities. A hypothetical monopolist of the supply of marine water treatment chemicals and services to Global Fleets would find it profit-maximizing to impose at least a small but significant and non-transitory increase in price ("SSNIP").

A. Relevant Product Market

26. The relevant product market in which to assess the effects of the proposed acquisition is the supply of marine water treatment chemicals and services to Global Fleets.

27. Marine water treatment chemicals are chemicals used aboard ships to prevent corrosion, remove impurities, and enhance the operation of the ship—primarily, the ship's boiler water or engine cooling water systems.

28. Marine water treatment chemicals have distinct uses from any other category of product. Respondents analyze their business and market their products for marine water treatment separately from other products. Respondents sell their water treatment chemicals as part of a "program" or "solution" for marine customers that includes not only the individual chemical blends, but also related technical services and other value-added offerings. For example, both Respondents offer their water treatment customers: on-board technical visits to troubleshoot problems; training for the crew in the correct use of the products; water testing kits optimized to match the chemistry of their products; software to log and analyze test results; and sophisticated and reliable global logistics operations capable of taking orders from Global Fleets and making deliveries in ports around the world without undue delay. Respondents also provide their customers with consistent water treatment chemicals throughout their distribution network.

29. There are no reasonably interchangeable substitutes for marine water treatment chemicals and services, and vessels could not realistically switch to other products in the face of a SSNIP.

30. Global Fleets comprise a distinct set of customers for the supply of marine water treatment chemicals and services. Global Fleets are comprised of vessels that call in ports around the world and seek suppliers with global sales, service, and delivery capabilities.

31. Global Fleets may consist of various types of vessels including tankers, container ships, bulk carriers, cruise ships, and military support vessels.

32. Global Fleets also typically purchase water treatment chemicals and services pursuant to framework agreements reached with suppliers through RFPs or through direct negotiations. These individual negotiations enable price discrimination based on a customer's status as a Global Fleet.

33. Global Fleets have distinct characteristics within the broader universe of maritime vessels, and Respondents recognize and claim to satisfy their distinct demands. Global Fleets have a number of key attributes, including, but not limited to:

a. Worldwide Operations: Global Fleets operate in ports in multiple regions around the world and seek suppliers with global sales and delivery capability.

b. Desire to Consolidate Spending in One or Two Suppliers: Global Fleet owners and operators want to standardize operations across their fleet by relying on one or two primary suppliers for water treatment. Consolidating suppliers offers administrative and operational efficiencies and enables Global Fleets to obtain the best pricing with higher purchase volumes.

c. Consistency and Reliability: Owners and operators of Global Fleets value a water treatment chemical's consistency and reliability that enables them to run their international business or organizations more efficiently. They are unlikely to turn to untested suppliers that cannot guarantee consistent water treatment products globally and lack a reputation for consistency and reliability because doing so would require the fleets to assume added risks.

d. Integrated Products and Services: Global Fleet owners and operators desire cost-effective water treatment "programs" or "solutions" as opposed to individual or spot purchases of chemicals. Technical and customer service availability are an important part of the water treatment programs or solutions for Global Fleets.

34. Respondents recognize that Global Fleets are distinct from smaller local or regional shippers. For example, Wilhelmsen defines its "Core" market as "[l]arger sailing vessels trading globally".

35. Thus, the supply of marine water treatment chemicals to Global Fleets is the relevant product market in which to analyze the Acquisition's likely effects.

B. Relevant Geographic Market

36. The relevant geographic market is global. The targeted customers in the relevant product market are Global Fleets that seek suppliers with a global network. Because these customers seek global suppliers, the relevant geographic market is also global.

VI. MARKET CONCENTRATION AND THE ACQUISITION'S PRESUMPTIVE ILLEGALITY

37. Wilhelmsen and Drew are by far the two largest suppliers of marine water treatment chemicals and services to Global Fleets. Post-Acquisition, the relevant market would be highly concentrated and would be significantly more concentrated as a result of the Acquisition.

38. 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 pre and post-Acquisition. 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.

39. The market for the supply of water treatment chemicals and services to Global Fleets is already highly concentrated, and the Respondents control the majority of sales. Post-Acquisition, the market would be substantially more highly concentrated than it is today. Post-Acquisition, Wilhelmsen would control more than 60% of this relevant market. Marichem, the next largest competitor, would possess less than 5% of the relevant market. Post-Acquisition, the HHI would be at least 3,600, far exceeding the 2,500 under the Guidelines for a highly concentrated market, and would increase HHIs in an already highly concentrated market by multiples over 200 points. Thus, the Acquisition would result in concentration well above the amount necessary to establish a presumption of competitive harm.

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

VII. THE MERGER WOULD ELIMINATE VITAL HEAD-TO-HEAD COMPETITION BETWEEN RESPONDENTS

41. Respondents are each other's closest competitors. They are the two largest suppliers of marine water treatment chemicals and services to Global Fleets in the world. The scale and capabilities of Wilhelmsen and Drew are similarly matched to one another, and are much larger and more robust than that of the next-largest marine water treatment supplier, Marichem.

42. Wilhelmsen and Drew offer a collection of product and service attributes that no other supplier of marine water treatment chemicals and services can match – a global distribution footprint, strong brands, consistent and quality products available globally at competitive prices, and superior technical services.

43. Wilhelmsen and Drew also offer their customers the ability to purchase a full range of maritime products in addition to water treatment chemicals, such as fuel treatment chemicals, marine cleaning products, and marine gases. Many Global Fleets value the ability of Wilhelmsen and Drew to provide this full suite of products along with the supply of marine water treatment chemicals and services.

44. Respondents acknowledge that they are each other's closest competitors and the two leading suppliers of marine water treatment chemicals and services to Global Fleets. As one of Drew's own executives testified, "there's no question that Drew Marine and Wilhelmsen are the two leading suppliers in this area. So we're often competing with Wilhelmsen in the accounts that we're trying to acquire or retain."

45. Respondents are most frequently the first and second choice for Global Fleets when selecting a marine water treatment chemical and service supplier. Respondents predominantly win Global Fleet business from, and lose Global Fleet business to, each other.

46. Respondents compete aggressively with each other on price and non-price terms to win and retain the business of Global Fleets. Wilhelmsen and Drew frequently must lower

prices, increase discounts, offer free chemicals or other monetary incentives, and improve their offers to customers on non-price terms to win business from each other.

47. Global Fleets benefit from the competition between Respondents. That competition enables customers to pit Wilhelmsen and Drew against each other in negotiations to obtain lower prices.

48. Wilhelmsen and Drew also compete aggressively on non-price terms, such as technical service, network breadth, and product quality and innovation, to win the business of Global Fleets. Respondents currently risk losing business to each other if Global Fleet owners and operators perceive one Respondent's product or service as inferior. After the Acquisition, Wilhelmsen would face substantially less competition for Global Fleets, and would have less incentive to improve, or even maintain, its current level of product quality and service to win or keep business.

49. The Acquisition would eliminate this intense head-to-head competition for Global Fleets. Post-Acquisition, Wilhelmsen would face significantly less meaningful competition than it does today. Wilhelmsen would not need to compete as aggressively on price and non-price terms to win or keep the business of many Global Fleets, and would have the incentive and ability to raise prices and lower service quality as a result of its significantly enhanced market power.

50. Most Global Fleets consistently view Wilhelmsen and Drew as the two largest and best competitors for the supply of marine water treatment chemicals and services, while viewing Marichem as a distant third. The Respondents' business documents reveal that they also view Marichem as an inferior competitor, with a lower-quality product offering.

51. Fringe market participants will be unable to make up for the competition lost as a result of the Acquisition in a timely manner. Global Fleet owners and operators are often unwilling to use these suppliers due to their lack of a global distribution network; lack of technical service offerings; higher prices to deliver to Global Fleets' network of ports; lower quality or less consistent products; and inability to provide a full suite of marine products, such as fuel treatment products, marine cleaning products, and marine gases, in addition to water treatment chemicals and services. Due to the importance of marine water treatment chemicals to vessels, customers are often unwilling to use new, untested suppliers. In addition, many of these smaller suppliers specialize in niche areas and offer smaller product portfolios. Many suppliers specialize in tank cleaning chemicals, with minimal sales in water treatment chemicals.

52. Ship chandlers are retailers that fill a role similar to general stores for shipping vessels. Ship chandlers are not meaningful alternatives for the supply of marine water treatment chemicals and services for most Global Fleets. Ship chandlers do not specialize in marine water treatment chemicals, and when they do sell marine water treatment chemicals, they often sell them at a much higher price than when customers buy from Wilhelmsen or Drew directly. When customers request marine water treatment chemicals from ship chandlers, ship chandlers often tell them to go to Wilhelmsen or Drew directly.

53. Industrial chemical suppliers are not viable alternative suppliers for most Global Fleets. While some industrial chemical companies do manufacture water treatment chemicals for land-based industrial uses, these firms do not typically supply marine customers and generally lack the dedicated marine sales force, marine-focused technical service and service offerings, and global maritime distribution networks that Respondents offer their customers. As a result, such firms do not meaningfully compete with Respondents today and would not likely constrain the combined firm's exercise of market power post-Acquisition.

VIII. LACK OF COUNTERVAILING FACTORS

A. Barriers to Entry and Expansion

54. 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.

55. Global Fleets have many demands from suppliers of marine water treatment chemicals and services that collectively impose significant barriers to entry and expansion. In particular, Global Fleets seek a supplier with a global distribution network; the ability to provide consistent, high-quality products; strong technical service and customer service capabilities; equipment manufacturer approvals; and the relevant regulatory and safety approvals. Additionally, customers place value on the reputation of a water treatment supplier's brand, and tend to stick with products and brands that they know in order to lessen the risk of damage associated with using an untested product.

56. Expansion by the remaining firms post-Acquisition that would defeat anticompetitive effects is unlikely.

B. Efficiencies

57. Respondents cannot demonstrate cognizable merger-specific efficiencies that would be sufficient to rebut the strong presumption and evidence of the Acquisition's likely significant anticompetitive effects.

IX. VIOLATION

Count I – Illegal Agreement

58. The allegations of Paragraphs 1 through 57 above are incorporated by reference as though fully set forth herein.

59. The 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

60. The allegations of Paragraphs 1 through 57 above are incorporated by reference as though fully set forth herein.

61. 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-fourth day of July, 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.

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 Wilhelmsen and Drew were offering and planning to offer prior to the Acquisition.

2. A prohibition against any transaction between Wilhelmsen and Drew 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, Wilhelmsen and Drew 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 Drew 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 twenty-second day of February, 2018.

By the Commission.

ORDER DISMISSING COMPLAINT

On February 22, 2018, the Commission issued an Administrative Complaint alleging that Respondents Wilhelm Wilhelmsen and Wilhelmsen Maritime Services AS (collectively "Wilhelmsen") and the Resolute Fund II, L.P., Drew Marine Intermediate II B.V., and Drew Marine Group, Inc. (collectively "Drew") had executed an acquisition agreement in violation of

Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. The Administrative Complaint further alleged 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 FTC Act.

On May 4, 2018, pursuant to Section 13(b) of the FTC Act and Section 16 of the Clayton Act, the Commission filed a complaint in the United States District Court for the District of Columbia seeking a temporary restraining order and a preliminary injunction to prevent Respondents from consummating the proposed acquisition until final resolution of this administrative proceeding.[1] On July 21, 2018, the District Court issued an Order granting the Commission's request for a preliminary injunction.[2]

Complaint Counsel and Respondents have now filed a Joint Motion to dismiss the Administrative Complaint, as subsequently amended, on the grounds that the Respondents have terminated their proposed acquisition, and that Wilhelmsen has withdrawn its Hart-Scott-Rodino Notification and Report Forms filed for this proposed acquisition, and has no intent to refile.[3]

The Commission has determined to dismiss the Complaint without prejudice, in light of the Respondents' decision to abandon the proposed acquisition, and Respondent Wilhelmsen's withdrawal of its 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.[4]

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

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

By the Commission.

---

1 *FTC v. Wilh. Wilhelmsen Holding ASA, Wilhelmsen Maritime Services AS, Resolute Fund II L.P., Drew Marine Intermediate II B.V., and Drew Marine Group Inc., Defendants*, Civil Action No. 1:18-cv-00414-TSC (D.D.C.), Amended Complaint For Temporary Restraining Order and Preliminary Injunction Pursuant To Section 13(b) of the Federal Trade Commission Act (Filed May 4, 2018).

2 *See* Statement by FTC Bureau of Competition Acting Deputy Director Haidee L. Schwartz (July 23, 2018).

3 *See* Joint Motion To Dismiss Amended Complaint (Filed July 26, 2018).

4 *See, e.g., In the Matter of CDK Global, Inc., et al., Docket No. 9382,* Order Dismissing Complaint (March 26, 2018); *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 (March 20, 2017).

IN THE MATTER OF

CRH PLC

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

Docket No. C-4653; File No. 171 0230
Complaint, June 12, 2018 – Decision, August 1, 2018

This consent order addresses the $3.5 billion acquisition by CRH plc of Ash Grove Cement Company. The complaint alleges that the acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in certain regional markets in the United States for the manufacture and sale of portland cement, sand and gravel, and crushed limestone. The consent order requires CRH to divest (1) the Trident cement plant and quarry located in Three Forks, Montana to Grupo Cementos de Chihuahua SAB de CV; (2) two sand-and-gravel plants and one sand-and-gravel pit located in Omaha, Nebraska to Martin Marietta Materials, Inc.; and (3) two limestone quarries and a hot-mix asphalt plant located in Olathe, Kansas, as well as an additional limestone quarry and hot-mix asphalt plant located in Louisburg, Kansas, to Summit Materials, Inc.

Participants

For the *Commission*: *Nandu V. Machiraju* and *Elyssa L. Wenzel.*

For the *Respondent*: *John R. Fornaciari* and *Thomas E. Hogan, Baker & Hostetler 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 CRH plc ("CRH"), a company subject to the jurisdiction of the Commission, has agreed to acquire Ash Grove Cement Company ("Ash Grove"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45; that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent CRH is a public limited company registered in Ireland, with its office and principal place of business located at Stonemason's Way, Rathfarnham, Dublin 16, D16KH51, Ireland. CRH's principal U.S. subsidiary, CRH Americas, Inc. (formerly Oldcastle, Inc.), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its U.S. headquarters and principal place of business located at 900 Ashwood Parkway, Suite 600, Atlanta, Georgia, 30338.

2. Ash Grove is a closely held company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its U.S. headquarters and principal place of business located at 11011 Cody Street, Overland Park, Kansas, 66210.

3. Respondent and Ash Grove 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 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 September 20, 2017 ("Agreement"), CRH proposes to acquire 100 percent of the existing voting securities of Ash Grove in a transaction valued at approximately $3.5 billion (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

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

a. portland cement, including, but not limited to, blended cement, masonry cement, mortar, and clinker;

b. sand and gravel; and

c. crushed limestone.

6. Portland cement is the essential binding ingredient in concrete. Portland cement is a fine powder composed of a chemical combination of calcium, silicon, aluminum, iron, and small amounts of other ingredients. Users mix cement with water and aggregates (crushed stone, sand, or gravel) to form concrete, a fundamental building material that is widely used in residential, commercial, and public infrastructure construction projects.

7. Sand and gravel are widely used in materials for the construction industry, including in concrete, road base, asphalt, and construction fill. These aggregates are dredged from river banks and shallows then sent to a processing plant for washing and sizing.

8. Crushed limestone is a sedimentary rock used as an input in cement, concrete, asphalt, metal refining, construction base, and a wide variety of other construction products. Crushed limestone is produced by mining the limestone in quarries, breaking it into smaller pieces using specialized crushing equipment, and screening it to sort it by size.

9. For the purposes of this Complaint, the relevant geographic area in which to analyze the effects of the Acquisition on the portland cement market is Montana.

10. For the purposes of this Complaint, the relevant geographic area in which to analyze the effects of the Acquisition on the sand and gravel market is Omaha, Nebraska/Council Bluffs, Iowa.

11. For the purposes of this Complaint, the relevant geographic area in which to analyze the effects of the Acquisition on the crushed limestone market is Johnson County, Kansas.

IV. THE STRUCTURE OF THE MARKETS

12. Respondent and Ash Grove are significant participants in each of the relevant markets, and each relevant market is already highly concentrated. The Acquisition would further increase concentration levels, resulting in the merged company becoming the largest supplier of portland cement, sand and gravel, or crushed limestone in each relevant market.

a. CRH and Ash Grove are two of three significant suppliers of portland cement to customers in the Montana market, and operate the only two cement plants in Montana;

b. CRH and Ash Grove are the two leading suppliers of sand and gravel to customers in the Omaha, Nebraska/Council Bluffs, Iowa market;

c. CRH and Ash Grove are the two largest suppliers of crushed limestone in the Johnson County, Kansas market and are located adjacent to one another.

V. ENTRY CONDITIONS

13. 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. The cost to construct a new portland cement plant of sufficient size to be competitive would likely cost over $500 million and take more than five years. Building rail cement distribution terminals can take more than two years and several million dollars, and requires a firm to have a cement plant in sufficiently close proximity to economically supply the terminal by rail.

14. New entry into the sand and gravel markets may take over two years to complete. Sand and gravel entrants face significant barriers because federal and local permits are required before they can commence operation, and the permitting process can exceed two years.

15. Opening a new quarry to mine and process crushed limestone in Kansas City typically costs $3 to 4 million and takes about five years to accomplish. Additionally, Johnson County has not approved a new quarry site in more than twenty-five years due to public opposition. Given the difficulties of entry in these three relevant markets, it is unlikely that any new entry could be accomplished in a timely manner to defeat a likely price increase caused by the proposed acquisition.

VI. EFFECTS OF THE ACQUISITION

16. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by eliminating actual, direct, and substantial competition between Respondent CRH and Ash Grove and reducing the number of significant competitors in each relevant market, thereby increasing the likelihood that the merged company would unilaterally exercise market power in the relevant markets and consumers would be forced to pay higher prices. Moreover, if consummated, the Acquisition would leave only one alternative supplier of cement in Montana, increasing the likelihood that the remaining firms in the relevant markets to engage in collusion or coordinated interaction between or among each other.

VII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twelfth day of June, 2018 issues its Complaint against said Respondent.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed merger of Respondent CRH plc ("CRH") and Ash Grove Cement Company. The Commission's Bureau of Competition prepared and furnished to Respondent the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondent and the Bureau of Competition executed an agreement ("Consent Agreement") containing (1) an admission by Respondent 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 Respondent 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 Respondent has 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. 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 Order to Maintain Assets:

1. Respondent CRH plc is a public limited company organized, existing, and doing business under, and by virtue of, the laws of Ireland, with its office and principal place of business located at Stonemason's Way, Rathfarnham, Dublin 16, D16KH51, Ireland. CRH's United States address for service of process, the complaint, and the Decision and Order is CRH Americas, Inc. (formerly Oldcastle, Inc.), 900 Ashwood Parkway, Suite 600, Atlanta, Georgia 30338.

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

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Order 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. "CRH" means CRH plc, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by CRH (including Ash Grove Cement Company after the Merger), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "Acquirer" means any Person that acquires any of the Building Materials Assets pursuant to the Decision and Order.

D. "Asset Maintenance Period" means for each of the Building Materials Assets, the period commencing on the date this Order to Maintain Assets is issued by the

Commission and ending on the respective date of divestiture of each Building Materials Assets.

E. "Building Materials Assets" means the Cement Assets, Gravel Assets, and Limestone Assets.

F. "Building Materials Business" means the Cement Business, Gravel Business, and Limestone Business.

G. "Building Materials Employee" means any full-time, part-time, or contract individual employed by CRH at any time and whose job responsibilities relate or related to any Building Materials Business.

H. "Confidential Information" means any and all of the following information:

1. all information that is a trade secret under applicable trade secret or other law;

2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, software and computer software and database technologies, systems, structures, and architectures;

3. all information concerning the relevant business, including 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.

I. "Consent" means any approval, consent, ratification, waiver, or other authorization.

J. "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.

K. "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.

L. "Merger" means the merger of CRH and Ash Grove Cement Company as described in the Agreement and Plan of Merger by and among CRH plc, AMAT Venture, Inc., Ash Grove Cement Company and Venture Stockholder Representative, LLC (solely with respect to Article IX), dated as of September 20, 2017.

M. "Merger Date" means the date the Merger is completed.

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

O. "Person" means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.

II.

IT IS FURTHER ORDERED that during the Asset Maintenance Period:

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

1. Maintaining the (i) Building Materials Assets and Building Materials Business in substantially the same condition (except for normal wear and tear) existing at the time Respondent signs the Consent Agreement, and (ii) relations and good will with suppliers, customers, landlords, creditors, agents, and other having business relationships with the Building Materials Business and Building Materials Assets;

2. Providing the Building Materials Business with sufficient financial and other resources to (i) operate the Building Materials Business and Building Materials 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 Merger Date; (ii) perform all maintenance to, and replacements or remodeling of, the assets of the Building Materials 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 Building Materials Business and Building Materials Assets as an ongoing business and not take any affirmative action, or fail to take any action within Respondent's control, as a result of which the viability, competitiveness, and marketability of the Building Materials Business and Building Materials Assets would be diminished.

B. Respondent shall obtain all Governmental Authorizations and Consents from any Person that are necessary to transfer any of the Building Materials Assets no later than the date that such assets are divested; *provided*, *however*, that in the event that Respondent is unable to obtain any Governmental Authorization, Respondent shall provide such assistance as Acquirer may reasonably request in Acquirer's efforts to obtain a comparable authorization.

C. Respondent shall cooperate and assist with an Acquirer's due diligence investigation of the relevant Building Materials Assets and Building Materials 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. Respondent shall:

1. No later than 10 days before Respondent executes a Divestiture Agreement for any of the Building Materials Assets (i) identify each relevant Building Materials Employee, (ii) allow an Acquirer to inspect the personnel files and other documentation of each relevant Building Materials Employee, to the extent permissible under applicable laws; and (iii) allow an Acquirer an opportunity to meet with any relevant Building Materials Employee outside the presence or hearing of Respondent;

2. Remove any contractual impediments that may deter any Building Materials Employee from accepting employment with an Acquirer, including, any non-compete or confidentiality provision of an employment contract;

3. Not offer any incentive to any Building Materials Employee to decline employment with an Acquirer or otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Building Materials Employee by an Acquirer; and

4. Provide each Building Materials Employee with a financial incentive as necessary to accept an offer of employment with an Acquirer, including vesting all current and accrued benefits under Respondent's retirement plans as of the date of transition of employment with an Acquirer for any Building Materials Employee who accepts an offer of employment from an Acquirer.

For purposes of Paragraphs II.C and II.D., "Acquirer" shall include any Person with whom Respondent engages in negotiations to acquire any of the Building Materials Assets.

III.

IT IS FURTHER ORDERED that:

A. Respondent shall (i) not disclose (including as to Respondent's employees) and (ii) not use for any reason or purpose, any Confidential Information received or maintained by Respondent relating to the Building Materials Assets, Building Materials Business, and the post-divestiture Building Materials Business; *provided, however,* that Respondent 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 Building Materials Assets or Building Materials Business or as required by law.

B. If disclosure or use of any Confidential Information is permitted to Respondent's employ-ees or to any other Person under Paragraph III.A. of this Order to Maintain Assets, Respondent 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. Respondent shall enforce the terms of this Paragraph III. as to its employees or any other Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph III.,

including implementation of access and data controls, training of its employees, and all other actions that Respondent would take to protect its own trade secrets and proprietary information.

IV.

IT IS FURTHER ORDERED that:

A. William Hill ("Monitor") shall serve to monitor Respondent's compliance with all of its obligations and responsibilities as required by this Order, Decision and Order, and any Divestiture Agreement.

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 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 to Maintain Assets:

1. The Monitor shall (i) monitor Respondent's compliance with the obligations set forth in this Order and (ii) 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;

2. Respondent shall (i) ensure that the Monitor has full and complete access to all Respondent's 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 Respondent, 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 Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

4. Respondent 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. 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.

C. The Monitor shall report in writing to the Commission (i) every 30 days after the Merger Date and (ii) at any other time as requested 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 under this Order to Maintain Assets 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 Respondent, which consent shall not be unreasonably withheld:

1. If Respondent has 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 Respondent of the identity of any substitute Monitor, then Respondent shall be deemed to have consented to the selection of the proposed substitute Monitor; and

2. Respondent 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 his or her duties and responsibilities pursuant to this Order to Maintain Assets on the same terms and conditions as provided in this Paragraph IV.

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

V.

IT IS FURTHER ORDERED that:

A. Respondent shall:

1. No later than 5 days after the Merger Date, notify the Commission via email at bccompliance@ftc.gov of the Merger Date; and

2. No later than 10 days after the divestiture of any of the Building Materials Assets has been completed, (a) notify the Commission of the date such divestiture closed and (b) submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov.

B. Respondent shall submit verified written reports ("Compliance Reports") in accordance with the following:

1. Respondent shall submit interim Compliance Reports 30 days from the date Respondent signs the Consent Agreement (as set forth in the Consent Agreement) and every 30 days thereafter until this Order to Maintain Assets terminates; and

2. Each Compliance Report shall set forth in detail the manner and form in which Respondent intends to comply, is complying, and has complied with this Order to Maintain Assets, including, as applicable:

(a) the status of the divestiture and transfer of the Building Materials Assets;

(b) if GCC, Martin Marietta, or Hamm do not acquire the relevant Building Materials Assets as set forth in this Order to Maintain Assets, a description of all substantive contacts with any proposed substitute acquirer; and

(c) a description of any dispute between Respondent and an Acquirer under this Order to Maintain Assets or a Divestiture Agreement.

C. Respondent shall verify each Compliance Report with a notarized signature or sworn statement or in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondent shall submit an original and two 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 and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent 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 is issued, the compliance reports required by this Paragraph V. may be consolidated with and submitted to the Commission on the same timing as the compliance reports required by the Decision and Order.

VI.

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to (i) preserve the Building Materials Assets and Building Materials Business 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 Merger as alleged in the Commission's Complaint.

VII.

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

A. Any proposed dissolution of CRH plc;

B. Any proposed acquisition, merger, or consolidation of CRH plc; or

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

VIII.

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 5 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.

IX.

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

A. Three 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 business days after the date that Respondent completes the divestiture required by Paragraphs II.A.-C. 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 business days after the Decision and Order becomes final.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") initiated an investigation of the proposed merger of Respondent CRH plc ("CRH") and Ash Grove Cement Company. The Commission's Bureau of Competition prepared and furnished to Respondent the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondent and the Bureau of Competition executed an agreement ("Consent Agreement") containing (1) an admission by Respondent 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 Respondent 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 Respondent has 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 makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent CRH plc is a public limited company organized, existing, and doing business under, and by virtue of, the laws of Ireland, with its office and principal place of business located at Stonemason's Way, Rathfarnham, Dublin 16, D16KH51, Ireland. CRH's United States address for service of process, the complaint, and the Decision and Order is CRH Americas, Inc. (formerly Oldcastle, Inc.), 900 Ashwood Parkway, Suite 600, Atlanta, Georgia 30338.

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

ORDER

I.

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

A. "CRH" means CRH plc, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by CRH (including Ash Grove Cement Company after the Merger), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "Acquirer" means any Person that acquires any of the Building Materials Assets pursuant to this Order.

D. "Building Materials Assets" means the Cement Assets, Gravel Assets, and Limestone Assets.

E. "Building Materials Business" means the Cement Business, Gravel Business, and Limestone Business.

F. "Building Materials Employee" means any full-time, part-time, or contract individual employed by CRH at any time and whose job responsibilities relate or related to any Building Materials Business.

G. "Cement" means any of the products produced by the Cement Business.

H. "Cement Acquisition Agreement" means the Asset Purchase Agreement by and among Oldcastle Materials Cement Holdings, Inc., CRH Americas Materials, Inc., GCC Three Forks, LLC, and GCC of America, Inc., dated as of May 11, 2018, including related ancillary agreements, amendments, exhibits, and schedules.

I. "Cement Assets" means all of Respondent's 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 Cement Business, including, but not limited to, the Designated Assets; *provided, however,* that the Cement Assets need not include any of (i) the Retained Assets or (ii) any assets that would otherwise be part of the Cement Assets if not needed by Acquirer and the Commission approves the divestiture without such assets.

J. "Cement Business" means all business activities conducted by CRH prior to the Merger Date at or relating to CRH's Three Forks, Montana cement facility, including but not limited to researching, developing, manufacturing, and selling cement and other products.

K. "Confidential Information" means any and all of the following information:

1. all information that is a trade secret under applicable trade secret or other law;

2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, software and computer software and database technologies, systems, structures, and architectures;

3. all information concerning the relevant business, including 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 Designated 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.

L. "Consent" means any approval, consent, ratification, waiver, or other authorization.

M. "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.

N. "Designated Assets" means:

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 a relevant business since the date of the announcement of the Merger 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;

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 Respondent (to the extent transferable or licensable), going concern value, goodwill, and telephone and telecopy listings.

O. "Divestiture Agreement" means the:

1. Cement Acquisition Agreement or any other agreement between Respondent (or between a Divestiture Trustee) and an Acquirer relating to the divestiture of any of the Cement Assets that has been approved by the Commission pursuant to this Order; including any related ancillary agreements, amendments, exhibits, and schedules;

2. Gravel Acquisition Agreement or any other agreement between Respondent (or between a Divestiture Trustee) and an Acquirer relating to the divestiture of any of the Gravel Assets that has been approved by the Commission pursuant to this Order; including any related ancillary agreements, amendments, exhibits, and schedules; and

3. Limestone Acquisition Agreement or any other agreement between Respondent (or between a Divestiture Trustee) and an Acquirer relating to the divestiture of any of the Limestone Assets that has been approved by the Commission pursuant to this Order; including any related ancillary agreements, amendments, exhibits, and schedules.

P. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Paragraph VI. of this Order.

Q. "GCC" means GCC Three Forks, LLC, a limited liability 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 600 S. Cherry Street, 10th Floor, Glendale, Colorado 80246.

R. "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.

S. "Gravel Acquisition Agreement" means the Agreement of Purchase and Sale of Assets by and between OMG Midwest, Inc. and Martin Marietta Materials, Inc., dated as of May 11, 2018, including related ancillary agreements, amendments, exhibits, and schedules.

T. "Gravel Assets" means all of Respondent's 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 Gravel Business, including, but not limited to, the Designated Assets; *provided, however,* that the Gravel Assets need not include any of (i) the Retained Assets or (ii) any assets that would otherwise be part of the Gravel Assets if not needed by Acquirer and the Commission approves the divestiture without such assets.

U. "Gravel Business" means all business activities conducted by CRH prior to the Merger Date at or relating to CRH's sand and gravel facilities located at (i) 10710 N. 312th, Circle Valley, Nebraska 68064 (KMG pit), (ii) 26245 West Center Road, Waterloo, Nebraska 68069 (Graske pit); and 2501 N. 264th Street, Waterloo, Nebraska 69069 (Eihlers reserves), including but not limited to researching, developing, manufacturing, and selling sand, gravel, and other products.

V. "Hamm" means Hamm, Inc., a wholly-owned subsidiary of Summit Materials, LLC, is a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 609 Perry Place, Perry, Kansas 66073.

W. "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.

X. "Limestone Acquisition Agreement" means the Agreement of Purchase and Sale of Assets by and between APAC-Kansas, Inc. and Hamm, Inc., dated as of May 14, 2018, including related ancillary agreements, amendments, exhibits, and schedules.

Y. "Limestone Assets" means all of Respondent's 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 Limestone Business, including, but not limited to, the Designated Assets; *provided, however,* that the Limestone Assets need not include any of (i) the Retained Assets or (ii) any assets that would otherwise be part of the Limestone Assets if not needed by Acquirer and the Commission approves the divestiture without such assets.

Z. "Limestone Business" means all business activities conducted by CRH prior to the Merger Date at or relating to CRH's:

1. Limestone facilities and reserves located at 23775 W. 159th Street, Olathe, Kansas 66061 (Olathe Quarry), 1600 West 151st Street, Olathe, Kansas 66061 (Lone Elm Quarry), and 8811 West 247th Street, Louisburg, Kansas 66053 (Louisburg Quarry), including but not limited to, researching, developing, mining, manufacturing, and selling limestone and other products;

2. Asphalt facilities located at the Louisburg Quarry and Olathe Quarry, including but not limited to, researching, developing, manufacturing, and selling asphalt and other products; and

3. Construction and demolition landfill in Olathe, Kansas.

AA. Martin Marietta means Martin Marietta Materials, Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at 2710 Wycliff Road, Raleigh, North Carolina 27607.

BB. "Merger" means the merger of CRH and Ash Grove Cement Company as described in the Agreement and Plan of Merger by and among CRH plc, AMAT Venture, Inc., Ash Grove Cement Company and Venture Stockholder Representative, LLC (solely with respect to Article IX), dated as of September 20, 2017.

CC. "Merger Date" means the date the Merger is completed.

DD. "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.

EE. "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.

FF. "Retained Assets" means:

1. The regional office located at 7415 W. 130th Street, Suite 300, Overland Park, Kansas 66213; and all other corporate or regional offices that are not located in the Three Forks, Montana; Omaha, Nebraska; or Kansas City, Missouri metropolitan areas unless such other office is primarily related to one or more Building Materials Business;

2. cement terminals located in Lethbridge, Canada, and Edmonton, Canada;

3. corporate, business, or other names of CRH, or any logo, trademark, service mark, domain name, trade or other name or any derivation thereof of CRH or e-mail addresses that contain such names;

4. software that can readily be purchased or licensed from sources other than Respondent and that has not been materially modified (other than through user preference settings);

5. enterprise software that Respondent used primarily to manage and account for businesses other than the Building Materials Business;

6. the portion of any Record that contains information about any business other than the business divested to an Acquirer; and

7. any Record that Respondent has a legal, contractual, or fiduciary obligation to retain the original; *provided, however,* that Respondent 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.

GG. "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.

HH. "Transitional Services" means any service relating to any Building Materials Business that CRH provides from a property or facility that is not included in the Building Materials Assets that is reasonably necessary for an Acquirer to operate any aspect of a Building Materials Business, including but not limited to, payroll, employee benefits, accounting, IT systems, distribution, warehousing, access to know-how, use of trademarks or trade names, or other logistical, administrative, or operational support or training; *provided, however,* Transition Services does not include providing cement terminal or throughput services.

II.

IT IS FURTHER ORDERED that:

A. No later than 10 days from the Merger Date, Respondent shall divest the Cement Assets, absolutely and in good faith, to GCC pursuant to the Cement Acquisition Agreement; *provided, however,* that if Respondent has divested the Cement Assets to GCC prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that:

1. GCC is not acceptable as the Acquirer of the Cement Assets, then Respondent shall immediately rescind the Cement Acquisition Agreement, and shall divest the Cement 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 to GCC was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications (that shall be incorporated into a revised Cement Acquisition Agreement) to the manner of divestiture of the Cement Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

B. No later than 10 days from the Merger Date, Respondent shall divest the Gravel Assets, absolutely and in good faith, to Martin Marietta pursuant to the Gravel Acquisition Agreement; *provided, however,* that if Respondent has divested the Gravel Assets to Martin Marietta prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that:

1. Martin Marietta is not acceptable as the Acquirer of the Gravel Assets, then Respondent shall immediately rescind the Gravel Acquisition Agreement, and shall divest the relevant 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 to Martin Marietta was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications (that shall be incorporated into a revised Gravel Acquisition Agreement) to the manner of divestiture of the Gravel Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

C. No later than 10 days from the Merger Date, Respondent shall divest the Limestone Assets, absolutely and in good faith, to Hamm pursuant to the Limestone Acquisition Agreement; *provided, however,* that if Respondent has divested the Limestone Assets to Hamm prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that:

1. Hamm is not acceptable as the Acquirer of the Cement Assets, then Respondent shall immediately rescind the Limestone Acquisition Agreement, and shall divest the Limestone 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 to Hamm was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications (that shall be incorporated into a revised Limestone Acquisition Agreement) to the manner of divestiture of the Limestone Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

D. Respondent shall obtain all Governmental Authorizations and Consents from any Person that are necessary to transfer any of the Building Materials Assets no later than the date that such assets are divested; *provided, however,* that in the event that Respondent is unable to obtain any Governmental Authorization, Respondent shall provide such assistance as Acquirer may reasonably request in Acquirer's efforts to obtain a comparable authorization.

E. In connection with the divestiture of any of the Building Materials Assets or any portion of the Building Materials Assets, Respondent shall:

1. At the option of any Acquirer (exercised at any time up to 3 months after such assets are divested) and in a manner that receives the prior approval of the Commission, provide Transitional Services to the Acquirer for up to 12 months after divestiture of the applicable assets;

2. At the option of the Acquirer of the Cement Assets and in a manner that receives the prior approval of the Commission:

a. Purchase Cement from the Acquirer as a customer for 36 months after divestiture of the Cement Assets; and

b. Provide terminaling and throughput services to the Acquirer at Respondent's cement terminals relating to the Cement Business in Lethbridge and Edmonton, Alberta, Canada for 36 months after divestiture of the Cement Assets; and

3. Provide the assistance set forth in Paragraphs II.E.1. and 2. (collectively "Transitional Assistance") on terms and conditions sufficient to conduct the applicable Building Materials Business in a manner consistent with the operation of such business prior to the Merger Date (including the ability to develop new products, increase sales of current products, and make reasonable modifications to and maintain the competitiveness of the applicable Building Materials Business);

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

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

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

F. For a period of 2 years after the divestiture of any of the Building Materials Assets, Respondent shall not solicit or induce any Building Materials Employee who has accepted an offer of employment with an Acquirer to terminate such employment; *provided, however,* that Respondent 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 Respondent, so long as such employees were not solicited by Respondent in violation of this paragraph.

G. The purpose of the divestiture of the Building Materials 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 Merger by Respondent and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Respondent shall cooperate and assist with an Acquirer's due diligence investigation of the applicable Building Materials Business and Building Materials Assets, 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. Respondent shall:

1. No later than 10 days before Respondent executes a Divestiture Agreement for any of the Building Materials Assets (i) identify each relevant Building Materials Employee, (ii) allow an Acquirer to inspect

the personnel files and other documentation of each relevant Building Materials Employee, to the extent permissible under applicable laws; and (iii) allow an Acquirer an opportunity to meet with any relevant Building Materials Employee outside the presence or hearing of Respondent;

2. Remove any contractual impediments that may deter any Building Materials Employee from accepting employment with an Acquirer, including, any non-compete or confidentiality provision of an employment contract;

3. Not offer any incentive to any Building Materials Employee to decline employment with an Acquirer or otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Building Materials Employee by an Acquirer; and

4. Provide each Building Materials Employee with a financial incentive as necessary to accept an offer of employment with an Acquirer, including vesting all current and accrued benefits under Respondent's retirement plans as of the date of transition of employment with an Acquirer for any Building Materials Employee who accepts an offer of employment from an Acquirer.

For purposes of this Paragraph III., "Acquirer" shall include any Person with whom Respondent engages in negotiations to acquire any of the Building Materials Assets.

IV.

IT IS FURTHER ORDERED that:

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

1. Performing its obligations or as permitted under this Order, the Order to Maintain Assets, or 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 Building Materials Assets or Building Materials Business or as required by law.

B. If disclosure or use of any Confidential Information is permitted to Respondent's employees or to any other Person under Paragraph IV.A. of this Order, Respondent 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. Respondent shall enforce the terms of this Paragraph IV. as to its employees or any other Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph IV., including implementation of access and data controls, training of its employees, and all other actions that Respondent would take to protect their own trade secrets and proprietary information.

V.

IT IS FURTHER ORDERED that:

A. William Hill ("Monitor") shall serve to monitor Respondent's compliance with all of its obligations and perform all of its responsibilities as required by this Order and any Divestiture Agreement.

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 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:

1. The Monitor shall (i) monitor Respondent's compliance with the obligations set forth in this Order and (ii) 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 Respondent or of the Commission;

2. Respondent shall (i) ensure that the Monitor has full and complete access to all Respondent's personnel, books, records, documents, and facilities relating to compliance with this Order or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order;

3. The Monitor (i) shall serve at the expense of Respondent, 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 Respondent, such consultants, accountants, attorneys, and other

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

4. Respondent 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. 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.

C. The Monitor shall report in writing to the Commission concerning Respondent's compliance with this Order (i) every 30 days after the Merger Date for a period of 6 months (ii) every 90 days thereafter until Respondent has completed its obligations to provide Transitional Assistance, including a report ("Final Report") no later than 10 days after Respondent has completed such obligations, and (iii) at any other time as requested by the staff of the Commission.

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 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 Respondent, which consent shall not be unreasonably withheld:

1. If Respondent has 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 Respondent of the identity of any substitute Monitor, then Respondent shall be deemed to have consented to the selection of the proposed substitute Monitor; and

2. Respondent 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 his or her duties and responsibilities pursuant to this Order on the same terms and conditions as provided in this Paragraph V.

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

VI.

IT IS FURTHER ORDERED that:

A. If Respondent has 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 any of the Building Materials Assets and perform Respondent's 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, Respondent 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 Respondent to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within 10 days after appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission,

transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the 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, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the 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 Building Materials Assets and perform Respondent's other obligations in a manner that satisfies the requirements of this Order;

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 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. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph 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 Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona

fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further*, *however*, that Respondent shall select such entity within 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 Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission 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 Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;

6. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence 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 Respondent and to the Commission every 60 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality

agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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

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

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

VII.

IT IS FURTHERED ORDERED that:

A. If GCC, Martin Marietta, or Hamm do not acquire the Building Materials Assets as described in this Order, Respondent shall set forth the manner in which it will accomplish the relevant divestiture and other obligations under this Order in one or more agreements with one or more other Acquirers and submit such agreements to the Commission for prior approval.

B. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondent to comply with the terms 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 the Order. To the extent any provision in the Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondent cannot fully comply with both, Respondent shall comply with the Order.

C. Respondent shall not modify, replace, or extend the terms of the Divestiture Agreement after the Commission issues this 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. Respondent shall:

1. No later than 5 days after the Merger Date, notify the Commission via email at bccompliance@ftc.gov of the Merger Date; and

2. No later than 10 days after the divestiture of any of the Building Materials Assets has been completed, (a) notify the Commission of the date such divestiture closed and (b) submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov.

B. Respondent shall submit verified written reports ("Compliance Reports") in accordance with the following:

1. Respondent shall submit:

(a) Interim Compliance Reports 30 days after this Order is issued and every 30 days thereafter until Respondent has fully complied with the provisions of Paragraphs II.A.-C. of this Order; and

(b) Annual Compliance Reports one year after the date this Order is issued and annually thereafter for the next nine 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 Respondent intends to comply, is complying, and has complied with this Order, including, as applicable:

(a) the status of the divestiture and transfer of the Building Materials Assets;

(b) if GCC, Martin Marietta, or Hamm do not acquire the relevant Building Materials Assets as set forth in this Order, a description of all substantive contacts with any proposed substitute acquirer; and

(c) a description of any dispute between Respondent and an Acquirer under this Order or a Divestiture Agreement.

C. Respondent shall verify each Compliance Report with a notarized signature or sworn statement or in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondent shall submit an original and two 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 and to the

Compliance Division at bccompliance@ftc.gov. In addition, Respondent shall provide a copy of each Compliance Report to the Monitor if the Commission has appointed one in this matter.

IX.

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

A. Any proposed dissolution of Respondent CRH plc;

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

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

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 5 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.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on August 1, 2028.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") designed to remedy the anticompetitive effects resulting from CRH plc's ("CRH") proposed acquisition of Ash Grove Cement Company ("Ash Grove"). Under the terms of the proposed Consent Agreement, CRH is required to divest the Trident cement plant and quarry located in Three Forks, Montana to Grupo Cementos de Chihuahua SAB de CV ("GCC"). The Consent Agreement additionally requires CRH to divest two sand-and-gravel plants and one sand-and-gravel pit located in Omaha, Nebraska to Martin Marietta Materials, Inc. ("Martin Marietta"). Last, the Consent Agreement requires CRH to divest two limestone quarries and a hot-mix asphalt plant located in Olathe, Kansas, as well as an additional limestone quarry and hot-mix asphalt plant located in Louisburg, Kansas, to Summit Materials, Inc. ("Summit").

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

THE TRANSACTION

Pursuant to an Agreement and Plan of Merger dated September 20, 2017, CRH proposes to acquire 100 percent of the existing voting securities of Ash Grove in a transaction valued at $3.5 billion. The Commission's Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in certain regional markets in the United States for the manufacture and sale of portland cement, sand and gravel, and crushed limestone. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the proposed acquisition.

THE PARTIES

CRH is a multinational corporation headquartered in Dublin, Ireland that specializes in manufacturing construction products and materials. In North America, CRH operates under the name CRH Americas, Inc. ("CRH Americas") (formerly Oldcastle, Inc.) in forty-four U.S. states and six Canadian provinces. CRH Americas operates three cement plants, one inland import terminal, and four inland terminals. In addition, CRH Americas operates 419 sand-and-gravel sites, 232 quarries, 315 ready-mix concrete plants, 457 hot-mix asphalt plants, and 26 product packaging facilities. CRH Americas operates a cement plant in Three Forks, Montana, sand-and-gravel operations in Omaha, Nebraska under the subsidiary Mallard Sand & Gravel Co., and a crushed limestone business in Olathe, Kansas under the subsidiary APAC-Kansas.

Ash Grove is a closely held corporation headquartered in Overland Park, Kansas, also specializing in the manufacture of construction products and materials. Ash Grove is the sixth-

largest cement manufacturer in North America and the second-largest manufacturer west of the Mississippi River. Ash Grove owns eight cement plants, 23 cement terminals, 10 fly ash terminals, two deep-water import terminals, 52 ready-mix concrete plants, 20 limestone quarries, 25 sand-and-gravel pits, and nine product packaging facilities. Ash Grove has a cement plant in Montana City, Montana, a sand-and-gravel business in Omaha, Nebraska operating under the subsidiary Lyman-Richey Corporation, and a crushed limestone business in Olathe, Kansas that operates under the subsidiary Johnson County Aggregates.

THE RELEVANT PRODUCTS AND STRUCTURE OF THE MARKETS

The transaction raises competition concerns in three relevant product markets: the manufacture and sale of portland cement, sand and gravel, and crushed limestone. In the United States, both parties manufacture and sell portland cement. Users mix portland cement with water and aggregates (crushed stone, sand, or gravel) to form concrete, a fundamental building material that is widely used in residential, commercial, and public infrastructure construction projects. Because portland cement has no close substitutes and the cost of cement usually represents a relatively small portion of a project's overall construction costs, few customers are likely to switch to other products in response to a small but significant increase in the price of portland cement.

Both parties also supply construction-grade sand and gravel, which are alluvial deposits used in concrete, road base, asphalt, construction fill, and other construction products. Because sand and gravel have no close substitutes in the Omaha, Nebraska/Council Bluffs, Iowa market, it is appropriate to treat sand and gravel as a separate relevant market because Omaha customers are unlikely to switch to other products when faced with a small but significant increase in the price of sand and gravel.

Both parties also produce crushed limestone, which is used as an input in cement, concrete, asphalt, metal refining, construction base, and other construction products. Because there are no close substitutes for crushed limestone in the Johnson County, Kansas City market, it is appropriate to treat crushed limestone as a separate relevant market because Johnson County customers are unlikely to switch to other products in the event of a small but significant increase in the price of crushed limestone.

The primary purchasers of portland cement are ready-mix concrete producers. The primary purchasers of sand and gravel and crushed limestone are producers of ready-mix concrete and hot-mix asphalt. Because these products are heavy and relatively inexpensive commodities, the distance over which they can be trucked economically is limited. As a result, cement and aggregates markets are local or regional in nature, though their precise scope depends on a number of factors, including the traffic density of the specific region and local transportation costs, and available rail lines. For the purposes of analyzing the effects of the proposed acquisition on the portland cement market, the relevant geographic market is the state of Montana. The geographic market in which to analyze the effects of the proposed transaction on sand and gravel is the Omaha, Nebraska/Council Bluffs, Iowa region. The geographic market in which to analyze the effects of the proposed transaction on crushed limestone is the Johnson County, Kansas region.

These relevant markets are already highly concentrated. In Montana, the parties are two of only three suppliers of cement. In the Omaha/Council Bluffs market, the parties are the two leading suppliers of sand and gravel. In the Johnson County, Kansas, the parties are the two largest suppliers of crushed limestone and are located across the street from each other in Olathe, Kansas.

ENTRY

Entry into the relevant portland cement, sand and gravel, and crushed limestone markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed transaction. Entry into the cement market is expensive and slow. The cost to construct a new portland cement plant of sufficient size to be competitive would likely cost over $500 million and take more than five years. Building a rail terminal, though less difficult and expensive than building a plant, can take more than two years and several million dollars, and is only an option for firms with cement plants in sufficiently close proximity to supply the terminal economically.

New entry into the sand and gravel markets may take more than two years to complete. Sand-and-gravel entrants face significant hurdles because federal and local permits are required before they can commence operation, and the permitting process can exceed two years.

Opening a new quarry to mine and process crushed limestone in Kansas City typically costs $3 to 4 million and takes approximately five years to accomplish. Additionally, Johnson County has not approved a new quarry site in more than twenty-five years due to municipal opposition.

Given the difficulties of entry in these three relevant markets, entry would not be likely, timely, and sufficient to defeat the likely anticompetitive effects of the proposed transaction in the relevant markets.

EFFECTS OF THE ACQUISITION

Unless remedied, the proposed merger would likely result in competitive harm in each of the relevant portland cement, sand and gravel, and crushed limestone markets. The merger would eliminate head-to-head competition between the parties in each of these markets and significantly increase market concentration. For many customers in these markets, the merger would combine their two closest competitors, leaving the merged entity with the power to increase prices to these customers unilaterally. The merger would produce a *de facto* monopoly in the supply of sand and gravel in Omaha, leave only two suppliers of cement in Montana, and consolidate the two largest suppliers of crushed limestone in Johnson County. Further, if consummated without a remedy, the Acquisition would enhance the possibility of higher prices in the Montana cement market through collusion or coordinated action between the remaining two competitors.

THE CONSENT AGREEMENT

The proposed Consent Agreement eliminates the competitive concerns raised by CRH's proposed acquisition of Ash Grove by requiring the parties to divest assets in each relevant market. CRH is required to divest its cement plant in Three Forks, Montana to GCC. GCC is a Mexican multinational corporation and experienced producer of cement, aggregates, and downstream construction materials such as concrete. It owns seven cement plants in the United States, including one in nearby Rapid City, South Dakota, and 21 cement terminals. Because the CRH cement plant in Montana currently sells a significant amount of cement into Canada through two CRH terminals in Alberta, Canada, and GCC does not have a presence in Canada, GCC will have the option to use a portion of the throughput of those CRH terminals for a period of three years. Additionally, CRH has agreed to purchase, at GCC's option, cement produced at the plant for distribution in Canada for up to three years. CRH is required to divest two sand-and-gravel operations and one pit in Omaha, Nebraska to Martin Marietta. CRH is further required to divest a hot-mix asphalt plant and two limestone quarries in Olathe, Kansas, as well as another hot-mix asphalt plant and another limestone quarry in Louisburg, Kansas, to Summit. Each of the identified buyers possesses the experience and capability to replace one of the merging parties as a significant competitor in the relevant markets. The parties must accomplish the divestitures to these buyers within ten days after the proposed acquisition is accomplished.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the proposed acquisition. If the Commission determines that any of the identified buyers is not an acceptable acquirer, the proposed Order requires the parties to divest the assets to a Commission-approved acquirer within 90 days of the Commission notifying the parties that the proposed acquirer is not acceptable. If the Commission determines that the manner in which any divestiture was accomplished is not acceptable, the Commission may direct the parties, or appoint a divestiture trustee, to effect such modifications as may be necessary to satisfy the requirements of the Order.

To ensure compliance with the proposed Order, the Commission has agreed to appoint a Monitor to ensure that CRH and Ash Grove comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the rights and assets to appropriate purchasers.

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

Complaint

IN THE MATTER OF

MIKEY & MOMO, INC.,
FORMERLY D/B/A
MIKEY & MOMO LLC,
ALSO D/B/A
AROMAFLAGE,
MICHAEL FENSTERSTOCK,
AND
MELISSA MATARESE FENSTERSTOCK

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

Docket No. C-4655; File No. 162 3234
Complaint, August 7, 2018 – Decision, August 7, 2018

This consent order addresses Mikey & Momo, Inc.'s advertising for Aromaflage and Aromaflage Wild sprays and candles. The complaint alleges that the respondents violated Section 5(a) of the FTC Act by representing that their sprays and candles effectively repelled mosquitoes, including mosquitoes that carry Zika virus and other diseases, worked as well as products containing 25% DEET, were effective for 2.5 hours, and that their efficacy was scientifically proven. The complaint also alleges that the respondents violated Section 5(a) by disseminating 5-star reviews by purported ordinary consumers and failing to disclose that certain endorsers had material connections with the respondents and their products, namely that several were close relatives and, in one instance, one of the respondents herself. The consent order prohibits any representation that a covered product repels insects, or about its health benefits, performance, efficacy, safety, or side effects, unless it is non-misleading and supported by competent and reliable scientific evidence.

Participants

For the *Commission*: *Mary Johnson, Karen Mandel* and *Shira Modell.*

For the *Respondents*: *Spencer Elg, Dana Rosenfeld* and *Kristi Wolfe, Kelley Drye & Warren.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Mikey & Momo, Inc. and Michael Fensterstock and Melissa Matarese Fensterstock, individually and as officers of Mikey & Momo, Inc., (collectively, "Respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Mikey & Momo, Inc., formerly doing business as Mikey & Momo LLC, also doing business as Aromaflage, is a Delaware corporation with its principal office or place of business in Englewood, New Jersey.

2. Respondent Michael Fensterstock is an officer of the Corporate Respondent, Mikey & Momo, Inc. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the Corporate Respondent. His principal office or place of business is the same as that of the Corporate Respondent.

3. Respondent Melissa Matarese Fensterstock is an officer of the Corporate Respondent, Mikey & Momo, Inc. Individually or in concert with others, she formulates, directs, or controls the policies, acts, or practices of the Corporate Respondent. Her principal office or place of business is the same as that of the Corporate Respondent.

4. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed products to consumers, including: Aromaflage and Aromaflage Wild "botanical fragrance & insect repellent" sprays; and Aromaflage and Aromaflage Wild "botanical insect repelling" candles (collectively, "Aromaflage sprays and candles").

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

6. Respondents advertise their Aromaflage sprays and candles as effective mosquito repellents.

7. Aromaflage sprays and candles are advertised as DEET-free and containing the following:

A. Aromaflage spray contains alcohol, water, and essential oils of vanilla, cedarwood, orange, patchouli, and vanillin (Ex. A at 3);

B. Aromaflage Wild spray contains alcohol, water, and essential oils of geranium, lemon grass, cedar leaf, cedarwood, thyme, rosewood, balsam, lavandin, spruce, patchouli, and cardamom (Ex. A at 5);

C. Aromaflage candles contain "100% vegan soy wax" with "the same essential oil blend as Aromaflage®" plus "nourishing Vitamin E" (Ex. B at 2); and

D. Aromaflage Wild candles contain "all natural soy wax" with "Spicy cardamom, warm cedarwood, & snappy spruce - a spa like scent" (Ex. B at 4).

8. Since at least 2013, Respondents have sold Aromaflage sprays and candles on their website, Aromaflage.com. Respondents also have sold the products in certain retail stores and on Amazon.com. Respondents have charged $30 for an 8 milliliter bottle of spray, $65 for a 50-milliliter bottle of spray, and $40 for a 7.5-ounce candle.

9. To induce consumers to purchase Aromaflage sprays and candles, Respondents have disseminated or caused to be disseminated advertisements, packaging, and promotional materials, including, but not necessarily limited to, the attached Exhibits A through H. These materials contain the following statements, among others:

A. **Exhibit A, Selected pages from Aromaflage.com website (captured 9/7/2016, bracketed text supplied)**

YOU'RE A MOSQUITO MAGNET?

enjoy the outdoors with our bug repelling fragrances

***

THE FRAGRANCE THAT DOES BOTH

2-in-1 fragrance + bug repeller The Bug Spray That Smells Nice

***

Aromaflage is a 2-in-1 fine fragrance with function. Scientifically tested, effective, and beautiful, Aromaflage® is a new category in beauty and wellness: fragrance with function. Our first line of fine fragrances & candles naturally repels mosquitoes as well as the leading brand.

***

AROMAFLAGE® 50ML

[Tab labeled "Tested and Effective"]

THE INTEGRITY OF OUR PRODUCTS

- Aromaflage has been rigorously tested at one of the world's leading Universities and found to be as effective at repelling mosquitoes as the leading brand.

***

- Aromaflage repels mosquitoes that may carry Zika, Dengue, Chikungunya, and Yellow Fever.

- As effective as 25% Deet over 2.5 hours[.]

***

AROMAFLAGE® WILD 50ML

[Tab labeled "Tested and Effective"]

THE INTEGRITY OF OUR PRODUCTS

- Aromaflage Wild has been rigorously tested at one of the world's leading Universities and found to be as effective at repelling mosquitoes as the leading brand.

***

- Aromaflage Wild repels mosquitoes that may carry Zika, Dengue, Chikungunya, and Yellow Fever.

- As effective as 25% Deet over 2.5 hours[.]

***

HOW DOES AROMAFLAGE® BOTANICAL FRAGRANCE & INSECT REPELLENT WORK?

AROMAFLAGE SCIENTIFIC STUDIES

- One of our core principles is efficacy. We develop products that work. We've tested Aromaflage in a world renowned mosquito University laboratory and demonstrated that Aromaflage **outperforms** DEET at 7% as well as Citronella. Aromaflage works as well as 25% DEET over 2.5 hours.

- Testing also showed that Aromaflage repels mosquitoes that may carry Zika, Dengue, Chikungunya, and Yellow Fever[.]

B. **Exhibit B, Selected pages from Aromaflage.com website (captured by Internet Archive 9/26/2016, downloaded 8/22/2017, bracketed text supplied)**

AROMAFLAGE® 7.5OZ CANDLE

[Tab labeled "Description"]

- Aromaflage™ is a fine fragrance that also repels insects

- Free of DEET, chemicals, and parabens

- Repels mosquitoes that may carry Zika, Dengue, Chikungunya, and Yellow Fever

ABOUT US

Scientifically tested, efficacious, and beautiful, Aromaflage is a new category.

***

AROMAFLAGE® WILD 7.5OZ CANDLE

[Tab labeled “Tested and Effective”]

THE INTEGRITY OF OUR PRODUCTS

- Aromaflage Wild has been rigorously tested at one of the world’s leading Universities and found to be as effective at repelling mosquitoes as the leading brand.

- Aromaflage Wild repels mosquitoes that may carry Zika, Dengue, Chikungunya, and Yellow Fever.

Category: best outdoor candle, bug repellent, insect repellent, mosquitoes, natural, natural bug repellent, natural bug spray, travel bug spray

Type: Candle

C. **Exhibit C, Package labeling for Aromaflage spray**

Aromaflage®

botanical fragrance & insect repellent

***

TESTED & EFFECTIVE

NO DEET, NO HARSH CHEMICALS

Aromaflage®

fragrance with function

AROMAFLAGE® IS A FINE FRAGRANCE THAT NATURALLY REPELS MOSQUITOES. SCIENTIFICALLY TESTED, AROMAFLAGE® IS AS EFFECTIVE AS DEET BASED PRODUCTS & WITHOUT ANY HARSH CHEMICALS.

***

SPRAY LIBERALLY ON EXPOSED SKIN. BEST IF RUBBED INTO SKIN. REAPPLY EVERY 2.5 HOURS TO OPTIMIZE PROTECTION & TO MAINTAIN FRESH SCENT.

D. **Exhibit D, Package labeling for Aromaflage candle**

Aromaflage™

botanical insect repelling candle

Repels mosquitoes that may carry Dengue, Chikungunya, & Yellow Fever

E. **Exhibit E, Amazon.com storefront for Aromaflage Wild spray (captured 2/22/2017, bracketed text supplied) (*See* Ex. F for similar endorsements)**

Aromaflage wild-fragrance with function. Aromaflage is a fine fragrance that also repels insects. Scientifically tested and effective. In efficacy studies, aromaflage wild was as effective as 25 percent deet over 2.5 hours. Aromaflage repels mosquitoes that may carry zika, dengue, chikungunya and yellow fever. Free of deet, chemicals, and parabens and other harsh chemicals. . . .

***

★★★★★**I love Wild. I wear it every day as a ...**

By Sheri Matarese on July 26, 2016

Scent Name: Aromaflage Wild Size: 4 Fluid Ounce

I love Wild. I wear it every day as a perfume. It also really works to keep the bugs away. It smells very musky and woodsy. Its [sic] an amazing product.

***

★★★★★**Both men and women love it.**

By Stacey Tompkins on July 26, 2016

Scent Name: Aromaflage Wild Size: 4 Fluid Ounce

We use this at our lakehouse all summer. Both men and women love it….Our guests are happy and with no bug bites[.]

***

Finally felt like a lady outdoors

By Melissa Matarese on July 26, 2016

Scent Name: Aromaflage Wild Size: 4 Fluid Ounce

I wouldn't have survived my last trip to Nevis without this. Finally felt like a lady outdoors. It works too. no [sic] bites!

***

Five Stars

By Mary Denker on July 28, 2016

Scent Name: Aromaflage Wild Size: 4 Fluid Ounce

Was the must have item on my trip to the Costa Rican jungle.

F. **Exhibit F, Amazon.com storefront for Aromaflage Wild candle (captured 2/22/2017)**

Aromaflage wild-fragrance with function. A fine candle that also repels insects. Scientifically tested and effective. In efficacy studies, aromaflage wild was as effective as 25 percent deet. Free of deet, chemicals, and parabens and other harsh chemicals. . . .

10. Respondents Michael Fensterstock and Melissa Matarese Fensterstock also personally promoted the efficacy of their Aromaflage sprays and candles. For example, they published a series of YouTube videos in which they promote the products, including one in which they both appear and Melissa Matarese Fensterstock made the following statements:

Exhibit G, Transcript of You Tube Video "How to Use Aromaflage Botanical Fragrance and Insect Repellent"

MELISSA FENSTERSTOCK: Unlike other fragrances, Aromaflage needs to be rubbed in. So make sure you do that. It will be effective for about two and a half hours, and then it needs to be reapplied.

***

So remember to reapply every two and a half hours and to rub it in.

11. Respondent Melissa Matarese Fensterstock also appeared on QVC to promote the Aromaflage candle in a video the Respondents later disseminated on the Aromaflage website and YouTube, in which she stated, among other things, "We've done university testing and the

product works as well as a number of the leading brands out there." (Ex. H, Transcript of QVC Video, at 5.)

12. The Respondents commissioned testing of several formulations of the Aromaflage and Aromaflage Wild sprays, including the two marketed versions. The testing also included four commercially-available insect repellents, including an EPA-registered product containing 25% DEET, and water.

A. The test methodology consisted of placing twenty *Aedes Aegypti* mosquitoes in a static air chamber that contained untreated paper at one end and paper treated with one of the substances listed above at the other end, then comparing how many mosquitoes were in each half of the chamber at timed intervals for 150 minutes.

B. The testing did not: (1) include Aromaflage or Aromaflage Wild candles; (2) use human subjects, even though the Aromaflage products are intended to overcome mosquitoes' attraction to human odors; or (3) use more than one species of mosquito, even though other species can carry many of the diseases cited in Respondents' advertising and can react differently to the same repellent.

C. The testing results show (1) at the 30-minute mark, more mosquitoes were in the Aromaflage spray-treated half of the chamber than in the untreated half, and at the 60-minute mark, nearly one-third of the mosquitoes were still in the treated half; (2) the Aromaflage spray performed worse than water for the first thirty minutes; and (3) the 25%-DEET product performed better than the Aromaflage and Aromaflage Wild sprays for at least the first ninety minutes.

13. According to the Environmental Protection Agency, DEET [N,N-diethyl-meta-toluamide] is the active ingredient in many insect repellent products and "DEET repels . . . mosquitoes from two to twelve hours depending on the percentage of DEET in the product." (*See* https://www.epa.gov/insect-repellents/deet, last accessed Oct. 17, 2017.)

Count I

False or Unsubstantiated Insect Repellency Claims

14. In connection with the manufacturing, advertising, labeling, offering for sale, sale, or distribution of Aromaflage sprays and candles, Respondents have represented, directly or indirectly, expressly or by implication, that:

A. Aromaflage sprays and candles effectively repel mosquitoes, including mosquitoes that may be carrying Zika virus, dengue, chikungunya, and yellow fever;

B. Aromaflage sprays and candles repel mosquitoes as effectively as 25% DEET;

C. Aromaflage sprays effectively repel mosquitoes for 2.5 hours; and

D. Aromaflage sprays repel mosquitoes as effectively as 25% DEET for 2.5 hours.

15. The representations set forth in Paragraph 14 are false or misleading, or were not substantiated at the time the representations were made.

Count II

False Establishment Claims

16. In connection with the manufacturing, advertising, labeling, offering for sale, sale, or distribution of Aromaflage sprays and candles, Respondents have represented, directly or indirectly, expressly or by implication, that:

A. Aromaflage sprays and candles are scientifically proven to effectively repel mosquitoes;

B. Aromaflage sprays and candles are scientifically proven to repel mosquitoes as effectively as 25% DEET;

C. Aromaflage sprays are scientifically proven to repel mosquitoes as effectively as 25% DEET for 2.5 hours.

17. In fact, including for the reasons set forth in Paragraph 12,

A. Aromaflage sprays and candles are not scientifically proven to effectively repel mosquitoes;

B. Aromaflage sprays and candles are not scientifically proven to repel mosquitoes as effectively as 25% DEET; and

C. Aromaflage sprays are not scientifically proven to repel mosquitoes as effectively as 25% DEET for 2.5 hours.

Therefore, the representations set forth in Paragraph 16 are false or misleading.

Count III

Deceptive Endorsement Claim

18. Through the means described in Paragraph 9, including but not necessarily limited to Exhibits E and F, Respondents have represented, directly or indirectly, expressly or by

implication, that the product reviews posted online by Melissa Matarese, Sherri Matarese, Mary Denker, and Stacey Tompkins reflect the experiences and opinions of ordinary impartial users of Aromaflage sprays and candles.

19. In fact, the product reviews posted online by Melissa Matarese, Sheri Matarese, Mary Denker, and Stacey Tompkins do not reflect the experiences and opinions of ordinary impartial users of Aromaflage sprays and candles because Melissa Matarese is Respondent Melissa Matarese Fensterstock, who has a financial interest in the sale of the product, and Sheri Matarese, Mary Denker, and Stacey Tomkins are her mother and aunts. Therefore, the representation set forth in Paragraph 18 is false or misleading.

Count IV

Deceptive Failure to Disclose – Material Connections with Consumer Endorsers

20. In connection with the manufacturing, advertising, labeling, offering for sale, sale, or distribution of Aromaflage sprays and candles, Respondents have represented, directly or indirectly, expressly or by implication, that the reviews of Aromaflage sprays and candles posted by Melissa Matarese, Sheri Matarese, Mary Denker, and Stacey Tompkins on Amazon.com, as set forth in Paragraph 9, reflect the experiences and opinions of users of Aromaflage sprays and candles.

21. In instances in which Respondents have made the representation set forth in Paragraph 20, Respondents have failed to disclose that those individuals had material connections with Respondents. Specifically, Melissa Matarese is Respondent Melissa Matarese Fensterstock, who has a financial interest in the sale of the product, and Sheri Matarese, Mary Denker, and Stacey Tompkins are her mother and aunts. These facts would be material to consumers in evaluating the reviews for Aromaflage sprays and candles in connection with a purchase or use decision.

22. Respondents' failure to disclose the material information described in Paragraph 21, in light of the representation set forth in Paragraph 20, is a deceptive act or practice.

Violations of Section 5

23. 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.

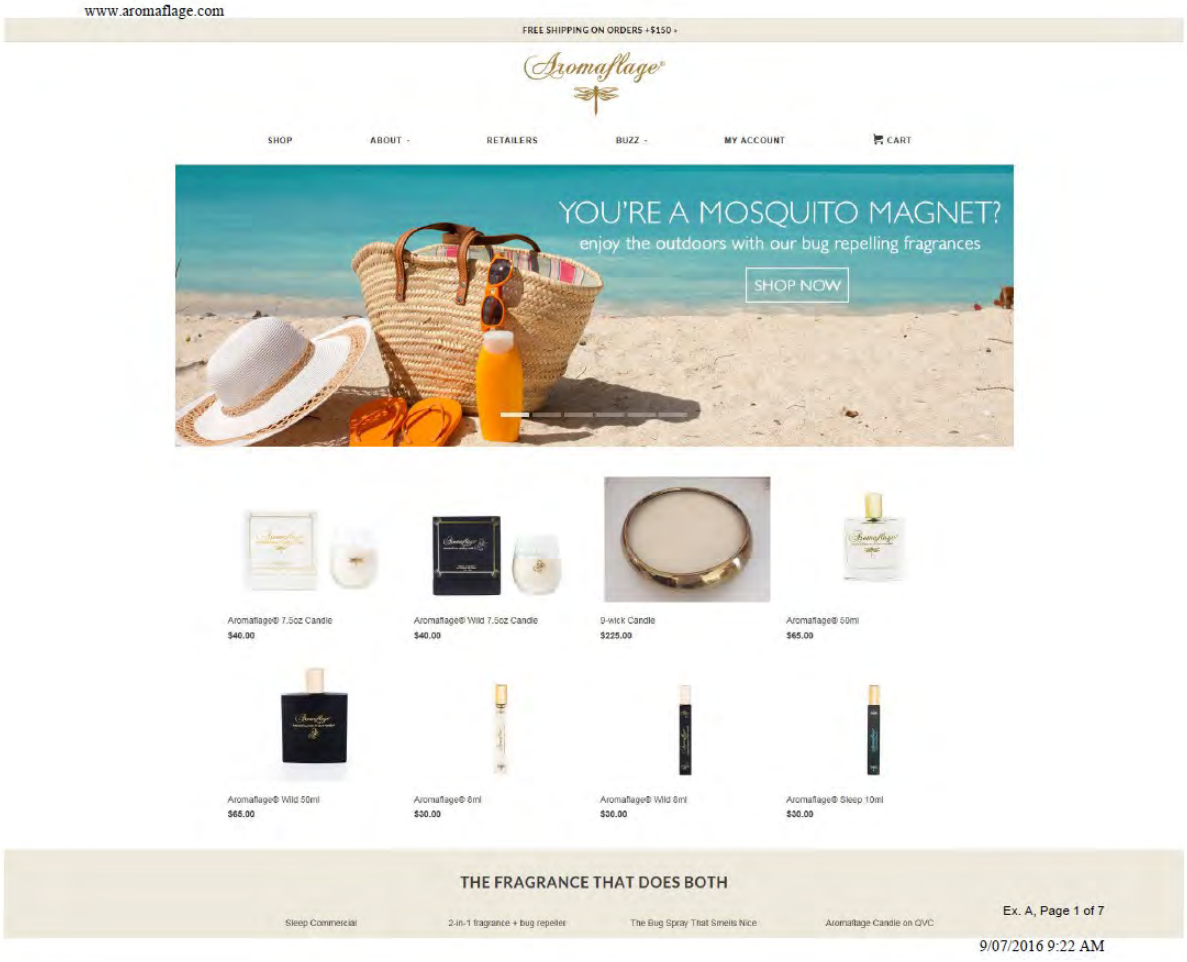
THEREFORE, the Federal Trade Commission, this seventh day of August 2018, has issued this Complaint against Respondents.

By the Commission, with Commissioner Chopra voting "abstain."

Complaint

Exhibit A

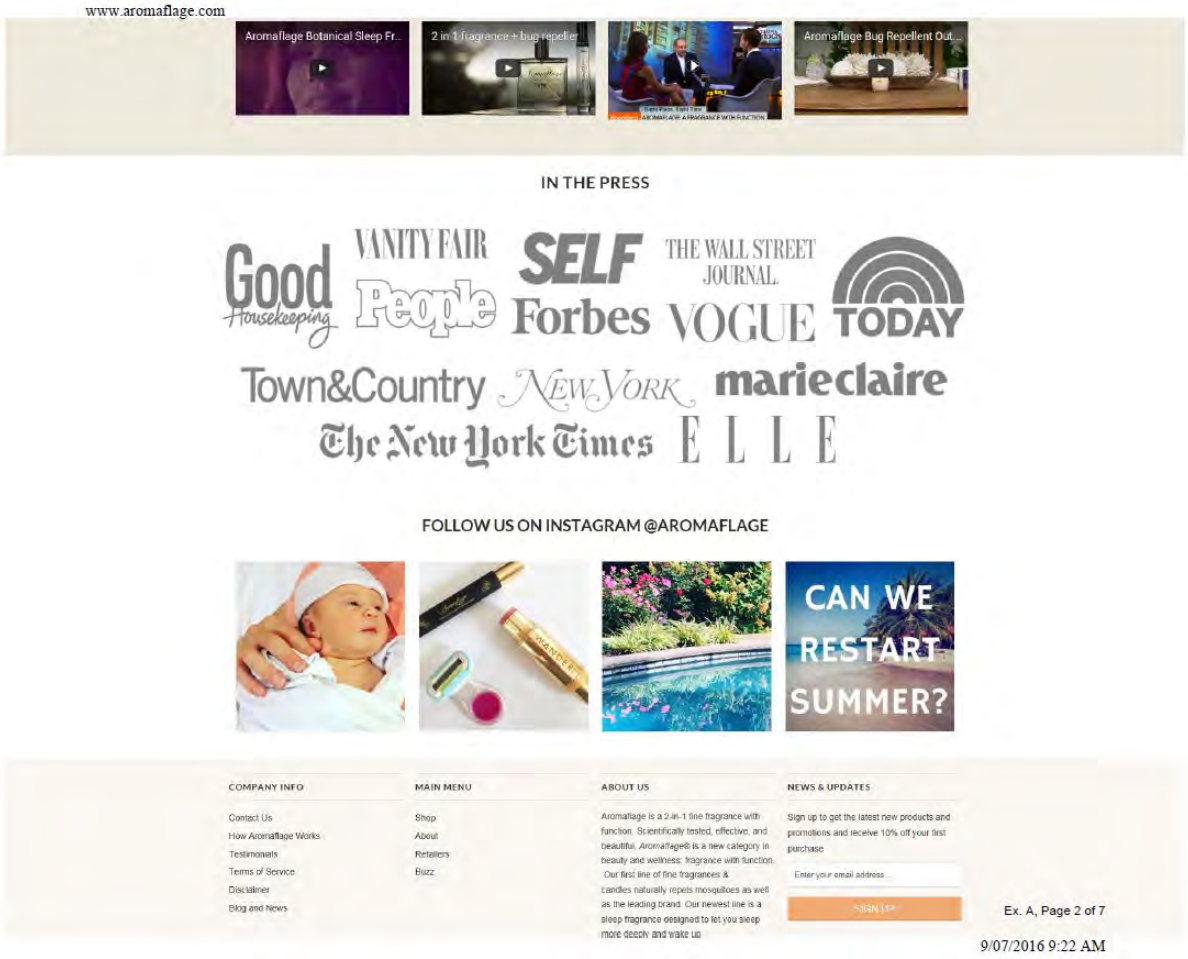
www.aromaflage.com



Ex. A, Page 1 of 7

9/07/2016 9:22 AM

www.aromaflage.com

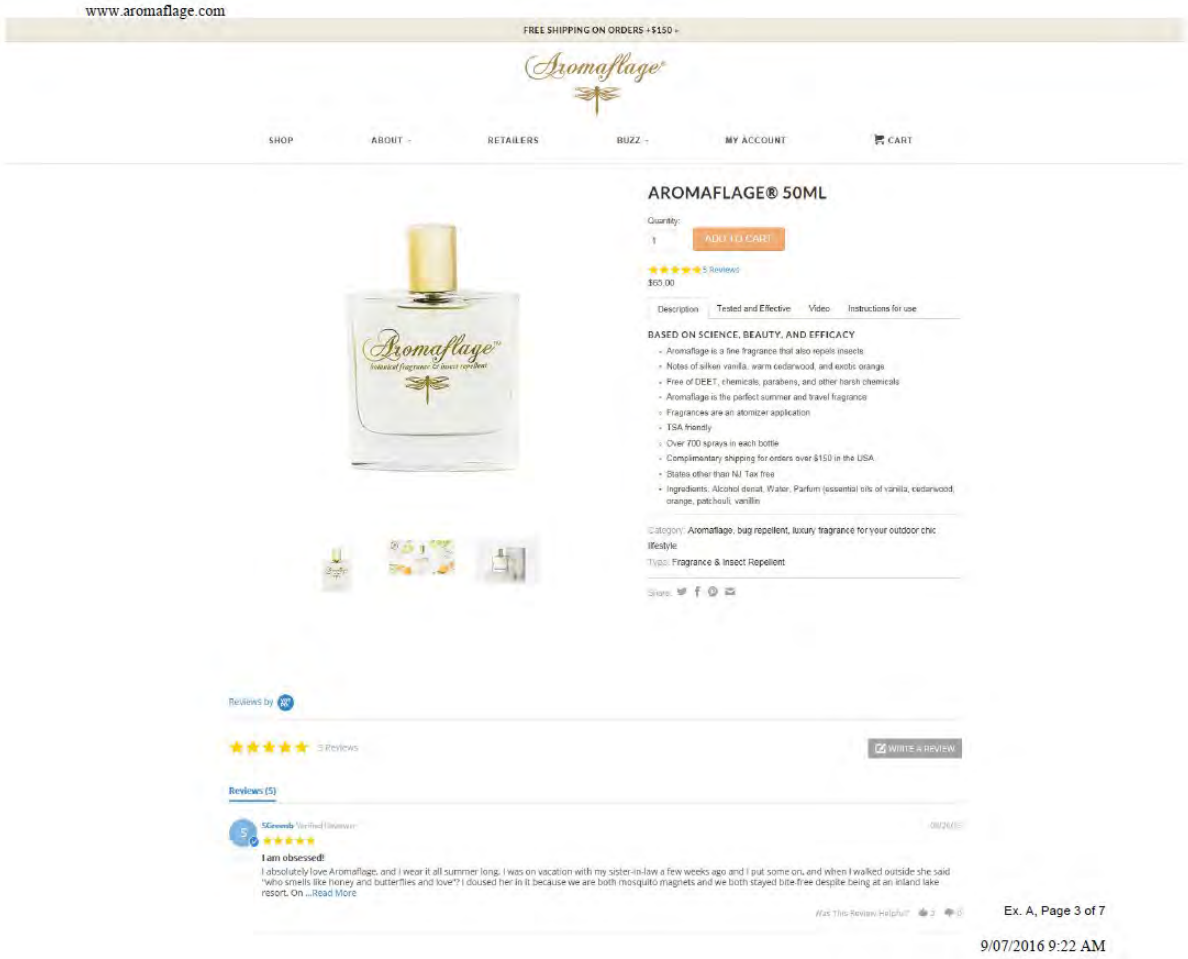


Ex. A, Page 2 of 7

9/07/2016 9:22 AM

Complaint

www.aromaflage.com



Ex. A, Page 3 of 7

9/07/2016 9:22 AM

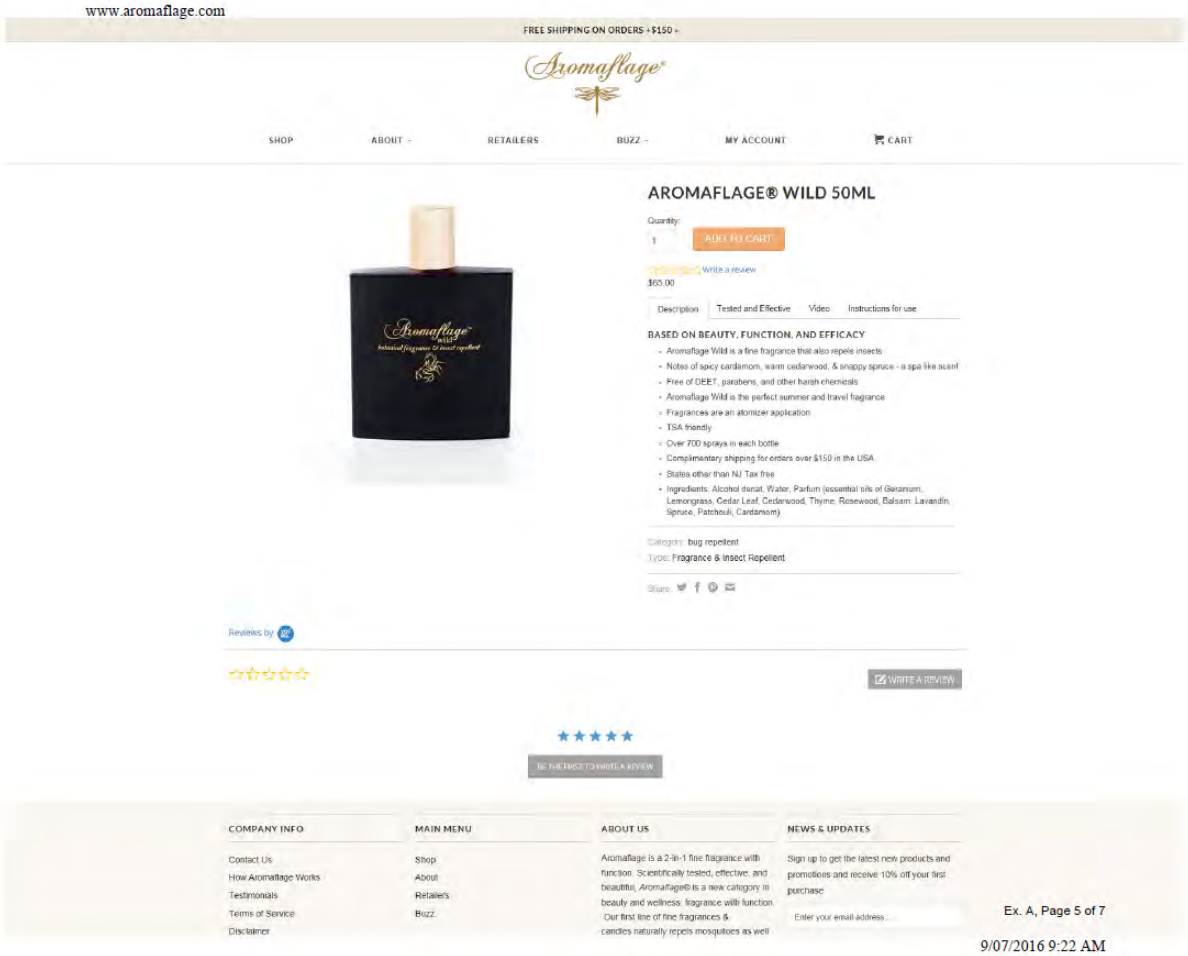
www.aromaflage.com

Ex. A, Page 4 of 7

9/07/2016 9:22 AM

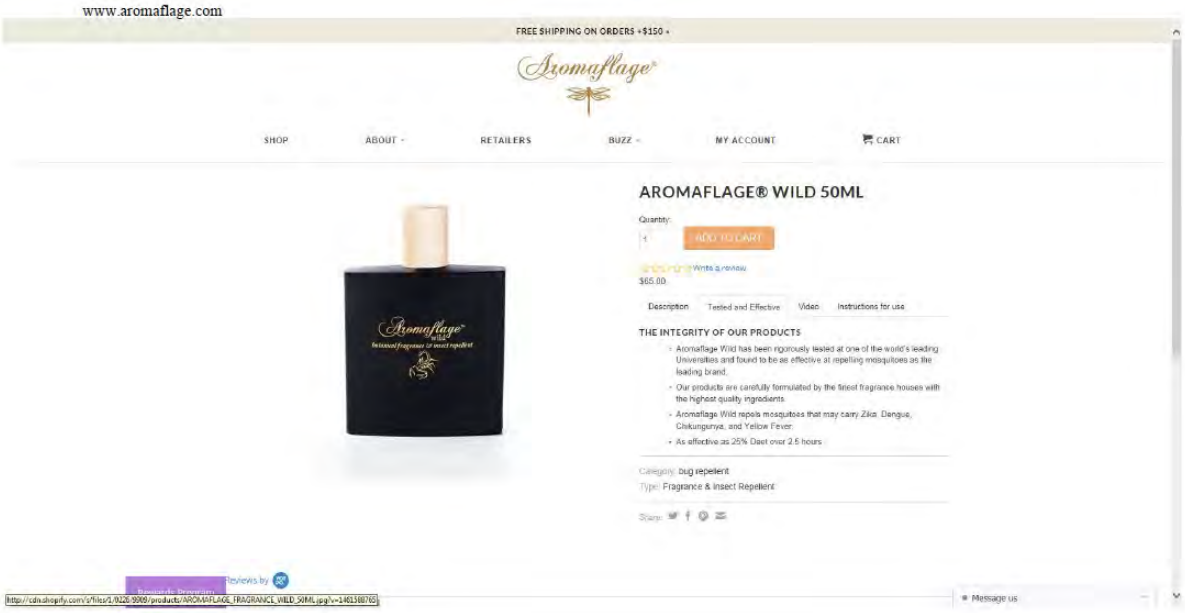
Complaint

www.aromaflage.com



9/07/2016 9:22 AM

www.aromaflage.com



Ex. A, Page 6 of 7

9/07/2016 9:22 AM

Complaint

www.aromaflage.com

FREE SHIPPING ON ORDERS +$150 +

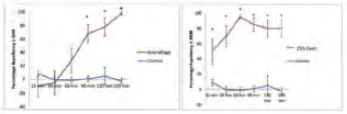
Aromaflage®

SHOP ABOUT - RETAILERS BUZZ - MY ACCOUNT CART

HOW DOES AROMAFLAGE® BOTANICAL FRAGRANCE & INSECT REPELLENT WORK ?

AROMAFLAGE SCIENTIFIC STUDIES

- One of our core principles is efficacy. We develop products that work. We've tested Aromaflage in a world renowned mosquito University laboratory and demonstrated that Aromaflage **outperforms** DEET at 7% as well as Citronella. Aromaflage works as well as 35% DEET over 2.5 hours.
- Testing also showed that Aromaflage repels mosquitoes that may carry Zika, Dengue, Chikungunya, and Yellow Fever



CONTACT VERSUS SPATIAL REPELLENCY

- The volatility in Aromaflage's essential oil + alcohol mixture creates a shield around the skin. This shield discourages mosquitoes from landing on your skin.
- Products containing DEET use contact repellency. This means that mosquitoes may land on your skin and react to the harsh chemicals, then jumping off

SCIENTIFIC STUDIES BASED ON OUR INGREDIENTS

- **Repellency of Plant Based Essential Oils with Vanillin:** The study demonstrated that plant essential oil mixtures combined with vanillin showed strong and durable repellency to the mosquito.
- **Comparative Repellency of Essential Oils:** 38 essential oils were evaluated on mosquito repellency.
- **Essential Oil Effectiveness:** Vanillin extends mosquito protection when added to essential oil repellent.
- **Insecticidal Properties of Extracts of Orange Peels:** Orange peel extracts were shown to repel against mosquitoes in this statistically controlled study.
- **The Efficacy of Some Commercially Available Insect Repellents for *Aedes aegypti* (Diptera: Culicidae) and *Aedes albopictus* (Diptera: Culicidae)**

OTHER RESOURCES

- Are You a Mosquito Magnet?
- Why do Bugs Love Me?
- Mosquitoes Like It...
- Buggiest Cities In America

COMPANY INFO

Contact Us
How Aromaflage Works
Testimonials
Terms of Service
Disclaimer
Blog and News

MAIN MENU

Shop
About
Retailers
Buzz

ABOUT US

Aromaflage is a 2-in-1 fine fragrance with function. Scientifically tested, effective, and beautiful, Aromaflage® is a new category in beauty and wellness: fragrance with function. Our first line of fine fragrances & candles naturally repels mosquitoes as well as the leading brand. Our newest line is a sleep fragrance designed to let you sleep more deeply and wake up feeling rejuvenated.

NEWS & UPDATES

Sign up to get the latest new products and promotions and receive 10% off your first purchase.

Enter your email address...

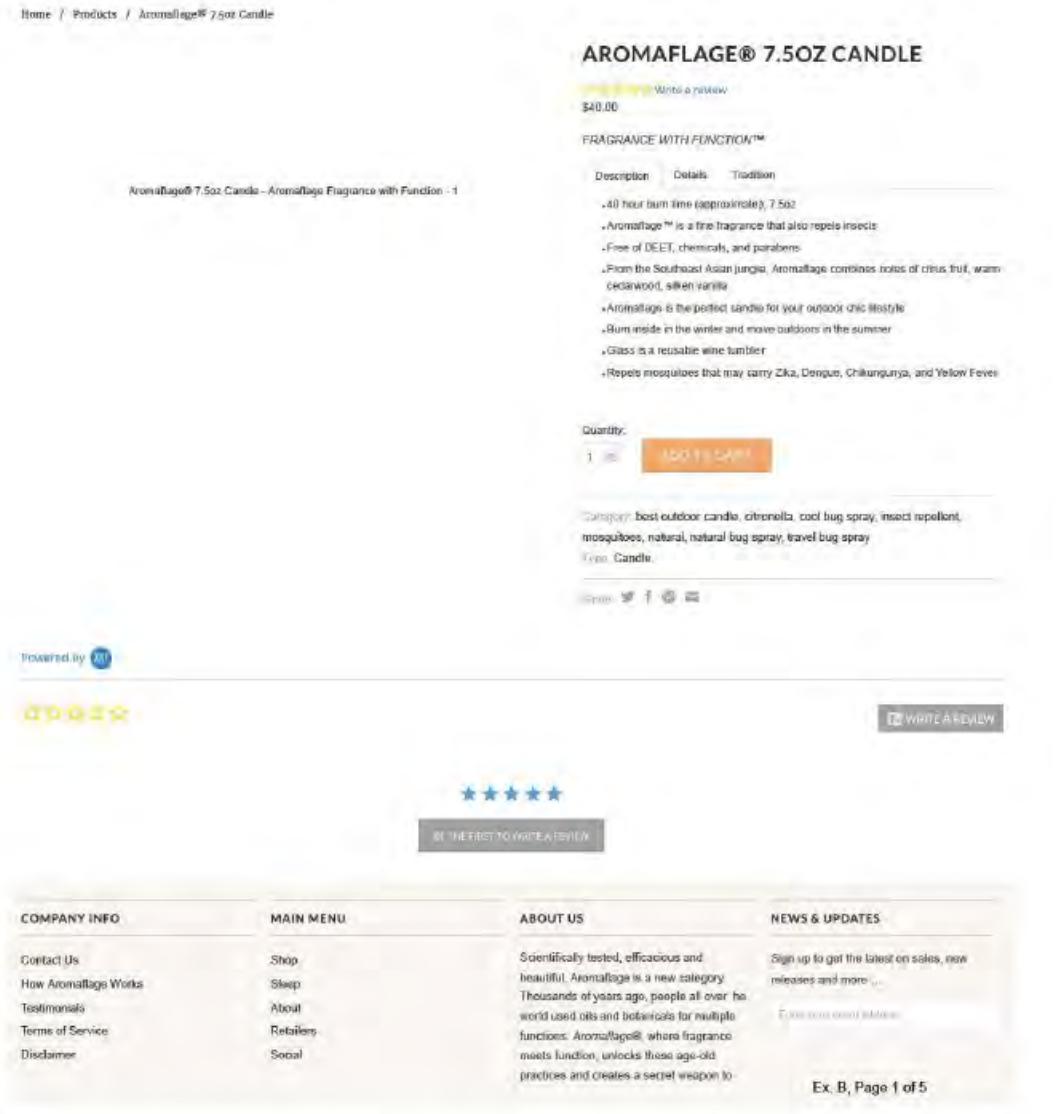
SIGN UP

Ex. A, Page 7 of 7

9/07/2016 9:22 AM

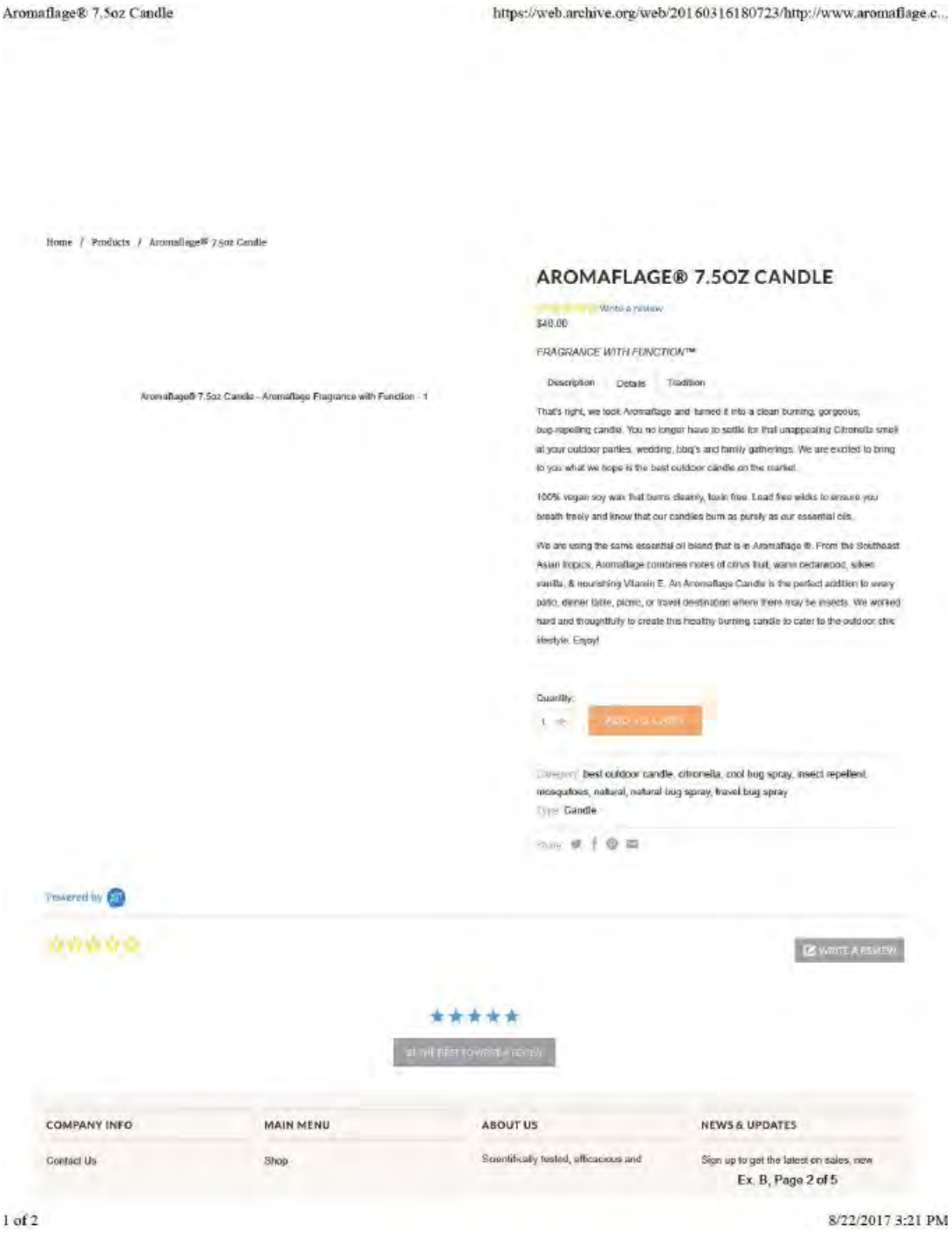
Exhibit B

Aromaflage® 7.5oz Candle https://web.archive.org/web/20160316180723/http://www.aromaflage.c...

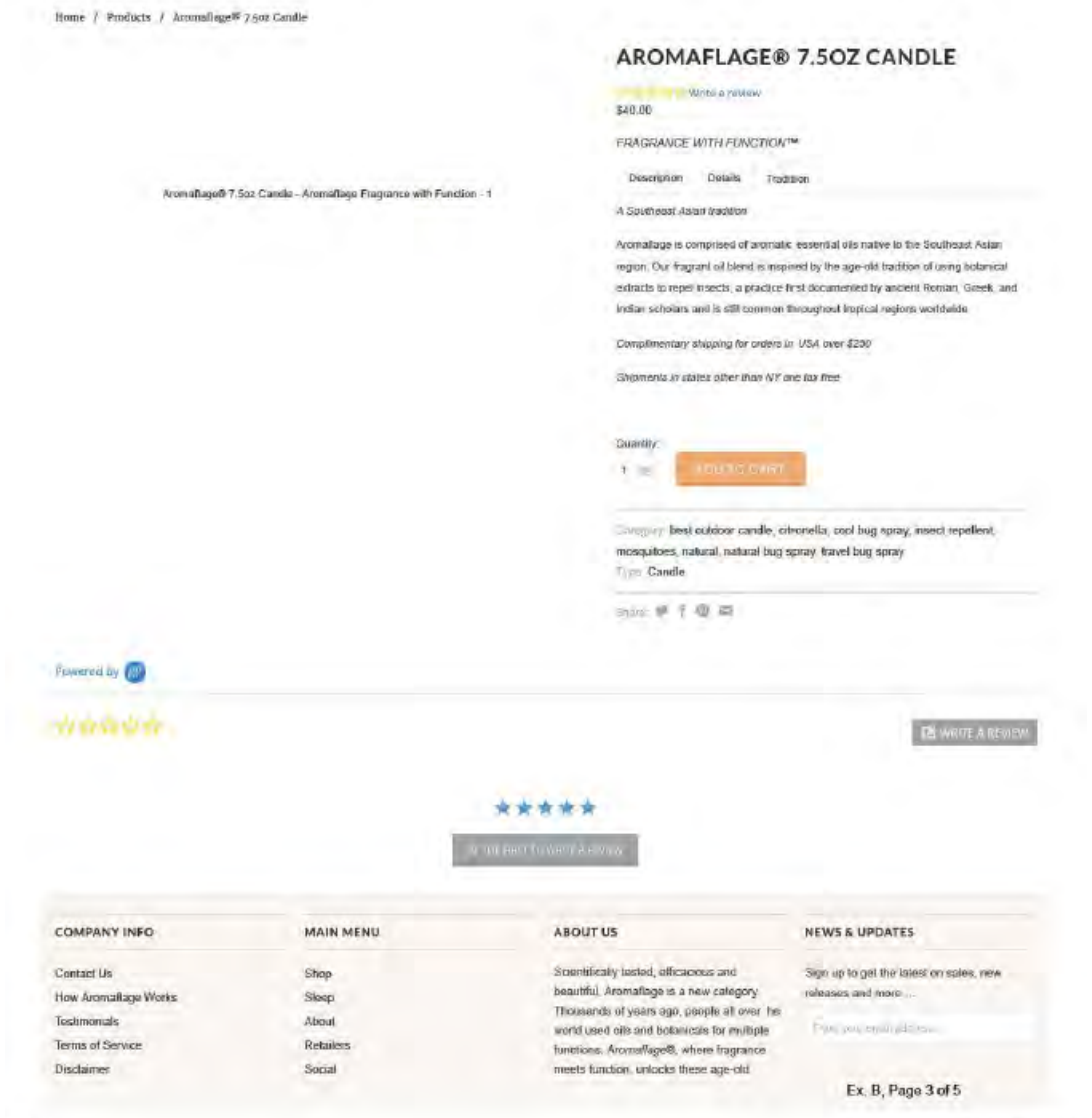


1 of 2 8/22/2017 3:21 PM

Complaint


Aromaflage® 7.5oz Candle
https://web.archive.org/web/20160316180723/http://www.aromaflage.c...
Home / Products / Aromaflage® 7.5oz Candle
Aromaflage® 7.5oz Candle - Aromaflage Fragrance with Function - 1
AROMAFLAGE® 7.5OZ CANDLE
Write a review
$40.00
FRAGRANCE WITH FUNCTION™
Description
Details
Tradition
That's right, we took Aromaflage and turned it into a clean burning, gorgeous, bug-repelling candle. You no longer have to settle for that unappealing Citronella smell at your outdoor parties, wedding, bbq's and family gatherings. We are excited to bring to you what we hope is the best outdoor candle on the market.
100% vegan soy wax that burns cleanly, toxin free. Lead free wicks to ensure you breath freely and know that our candles burn as purely as our essential oils.
We are using the same essential oil blend that is in Aromaflage ®. From the Southeast Asian tropics, Aromaflage combines notes of citrus fruit, warm cedarwood, silken vanilla, & nourishing Vitamin E. An Aromaflage Candle is the perfect addition to every patio, dinner table, picnic, or travel destination where there may be insects. We worked hard and thoughtfully to create this healthy burning candle to cater to the outdoor chic lifestyle. Enjoy!
Quantity:
1
best outdoor candle, citronella, cool bug spray, insect repellent, mosquitoes, natural, natural bug spray, travel bug spray
Candle
Powered by
WRITE A REVIEW
COMPANY INFO
Contact Us
MAIN MENU
Shop
ABOUT US
Scientifically tested, efficacious and
NEWS & UPDATES
Sign up to get the latest on sales, new
Ex. B, Page 2 of 5
1 of 2
8/22/2017 3:21 PM

Aromaflage® 7.5oz Candle https://web.archive.org/web/20160316180723/http://www.aromaflage.c...



Aromaflage® Wild 7.5oz Candle https://web.archive.org/web/20160926212030/https://www.aromaflage.c...

AROMAFLAGE® WILD 7.5OZ CANDLE

Quantity:

1 ADD TO CART

Write a review

$40.00

Description | Tested and Effective | Video

BASED ON BEAUTY, FUNCTION, AND EFFICACY

- Aromaflage Wild is a fine candle that also repels insects
- ~40 hour burn time
- Spicy cardamom, warm cedarwood, & snappy spruce - a spa like scent
- All natural soy wax with lead free cotton wick
- Glass is a reusable wine tumbler
- Makes a great gift
- Free of DEET, parabens, and other harsh chemicals
- Complimentary shipping for orders over $150 in the USA
- States other than NJ Tax free

Category: best outdoor candle, bug repellent, insect repellent, mosquitoes, natural, natural bug repellent, natural bug spray, travel bug spray

Type: Candle

Share:

Powered by

WRITE A REVIEW

BE THE FIRST TO WRITE A REVIEW

COMPANY INFO	MAIN MENU	ABOUT US	NEWS & UPDATES
Contact Us	Shop	Aromaflage is a 2-in-1 fine fragrance with function. Scientifically tested, effective, and beautiful. *Aromaflage®* is a new category in beauty and wellness: fragrance with function. Our first line of fine fragrances & candles naturally repels mosquitoes as well	Sign up to get the latest new products and promotions and receive 10% off your first purchase
How Aromaflage Works	About		
Testimonials	Retailers		
Terms of Service	Buzz		
Disclaimer			

Enter your email address

Ex. B, Page 4 of 5

Aromaflage® Wild 7.5oz Candle https://web.archive.org/web/20160926212030/https://www.aromaflage.c...

AROMAFLAGE® WILD 7.5OZ CANDLE

Quantity:

1 ADD TO CART

Write a review

$40.00

Description Tested and Effective Video

THE INTEGRITY OF OUR PRODUCTS

- Aromaflage Wild has been rigorously tested at one of the world's leading Universities and found to be as effective at repelling mosquitoes as the leading brand.
- Our products are carefully formulated by the finest fragrance houses with the highest quality ingredients.
- Aromaflage Wild repels mosquitoes that may carry Zika, Dengue, Chikungunya, and Yellow Fever

Category: best outdoor candle, bug repellent, insect repellent, mosquitoes, natural, natural bug repellent, natural bug spray, travel bug spray

Type: Candle

Share

Powered by

WRITE A REVIEW

BE THE FIRST TO WRITE A REVIEW

COMPANY INFO	MAIN MENU	ABOUT US	NEWS & UPDATES
Contact Us	Shop	Aromaflage is a 2-in-1 fine fragrance with function. Scientifically tested, effective, and beautiful. *Aromaflage®* is a new category in beauty and wellness: fragrance with function. Our first line of fine fragrances & candles naturally repels mosquitoes as well	Sign up to get the latest new products and promotions and receive 10% off your first purchase
How Aromaflage Works	About		
Testimonials	Retailers		
Terms of Service	Buzz		
Disclaimer			

Ex. B, Page 5 of 5

Complaint

Exhibit C

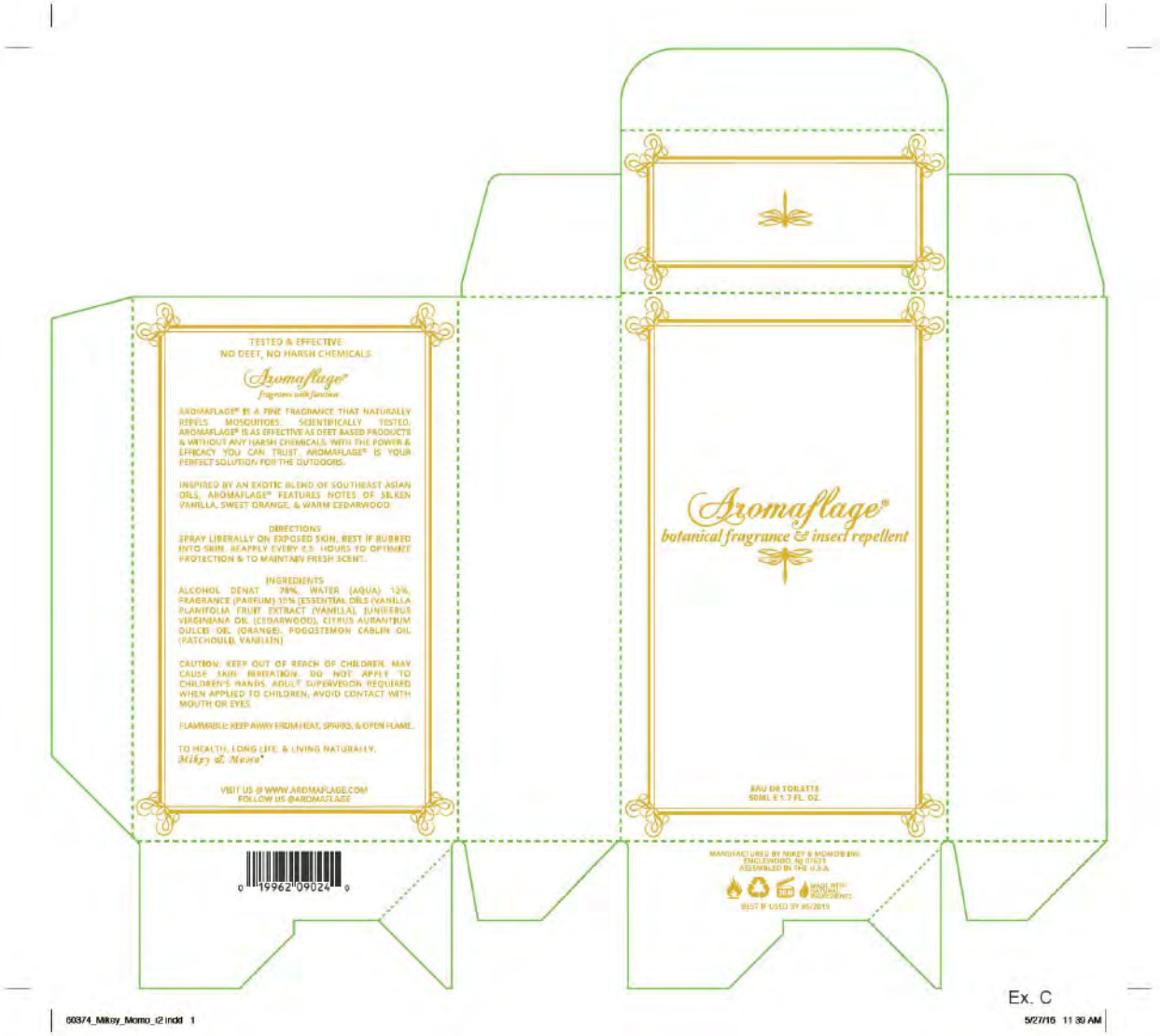


Exhibit D

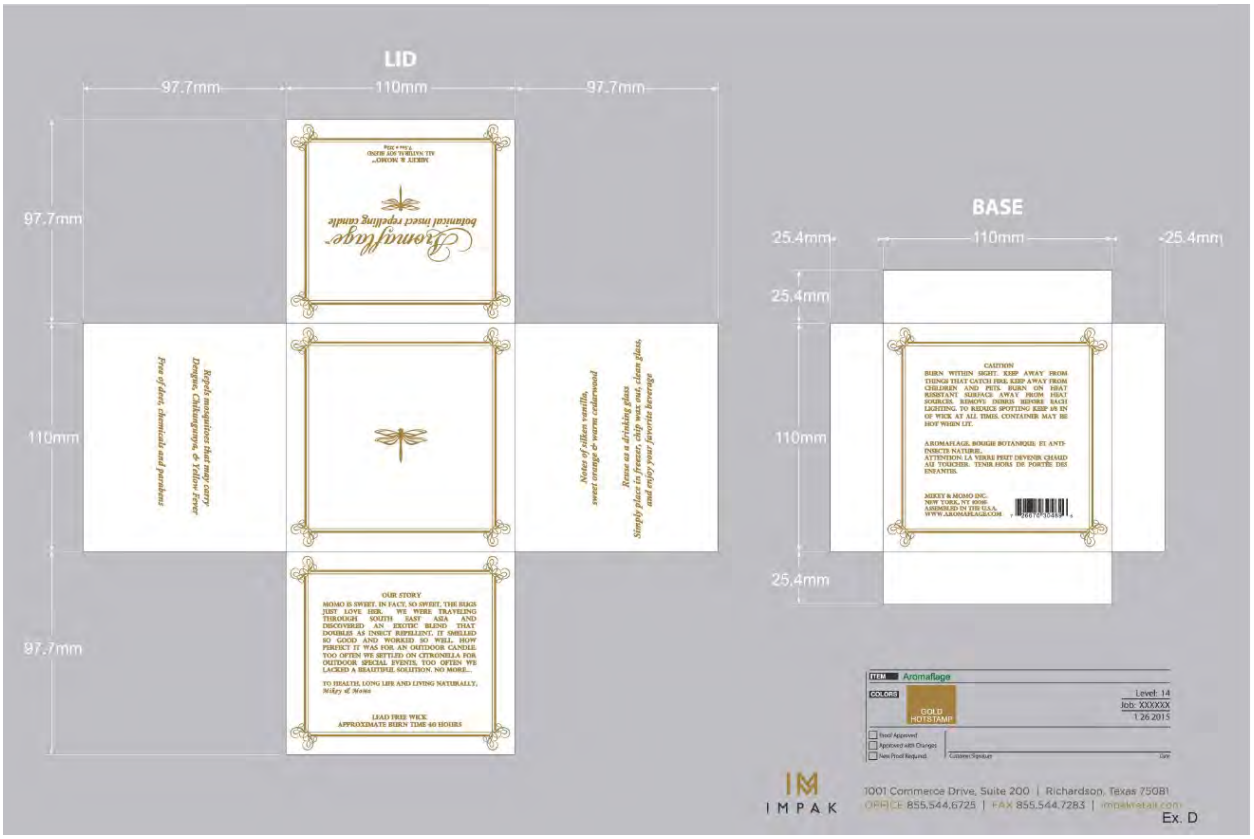
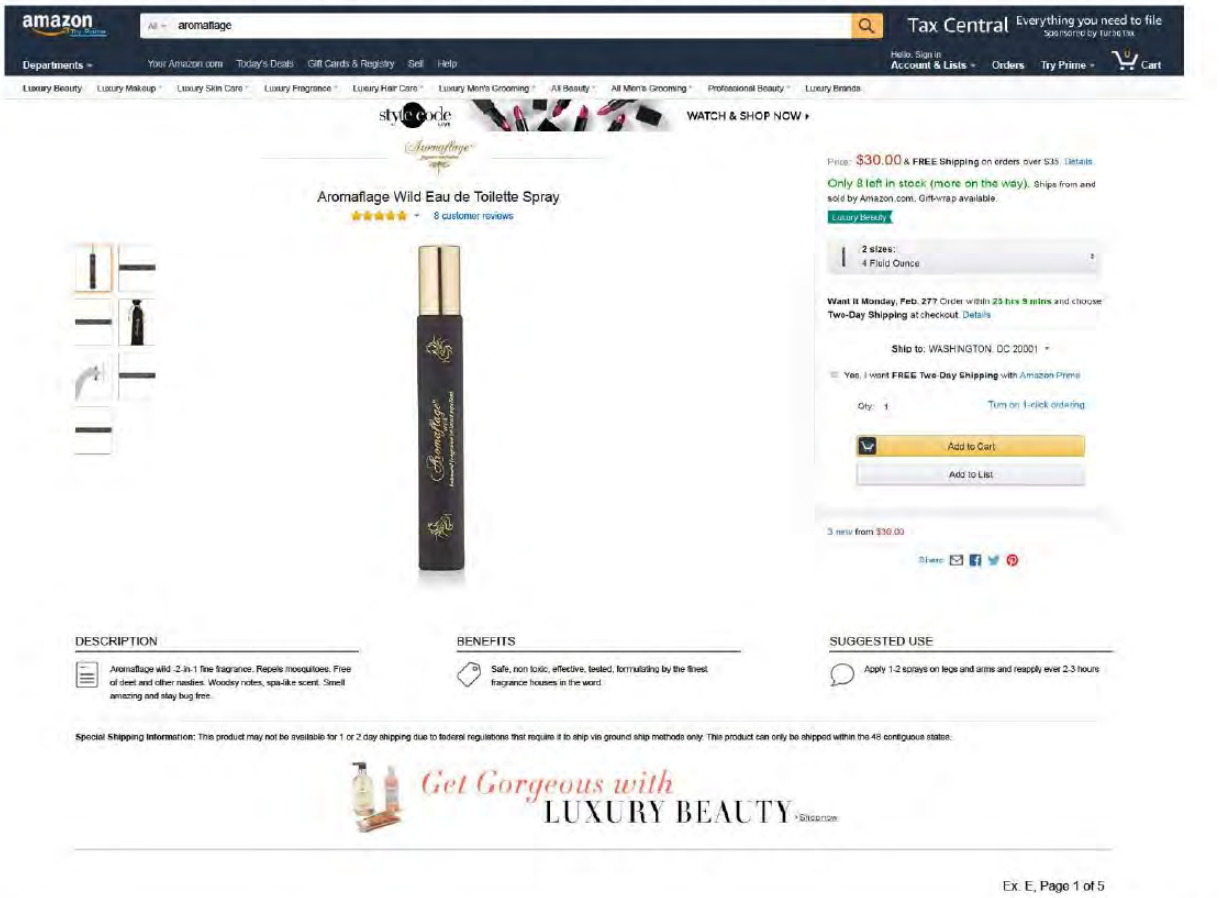

LID
97.7mm
110mm
97.7mm
97.7mm
110mm
97.7mm
Aromaflage
botanical insect repelling candle
Repels mosquitoes that may carry
Dengue, Chikungunya, & Yellow Fever
Free of deet, chemicals and parabens
Notes of silken vanilla,
sweet orange & warm cedarwood
Revive as a drinking glass
Simply place in freezer, chill wax vial, clean glass,
and enjoy your favorite beverage
OUR STORY
MOMO IS SWEET, IN FACT, SO SWEET, THE BUGS
JUST LOVE HER. WE WERE TRAVELING
THROUGH SOUTH EAST ASIA AND
DISCOVERED AN EXOTIC BLEND THAT
DOUBLES AS INSECT REPELLENT. IT SMELLED
SO GOOD AND WORKED SO WELL, HOW
PERFECT IT WAS FOR AN OUTDOOR CANDLE.
TOO OFTEN WE SETTLED ON CITRONELLA FOR
OUTDOOR SPECIAL EVENTS, TOO OFTEN WE
LACKED A BEAUTIFUL SOLUTION. NO MORE...
TO HEALTH, LONG LIFE AND LIVING NATURALLY,
Mikey & Momo
LEAD FREE WICK
APPROXIMATE BURN TIME 40 HOURS
BASE
25.4mm
110mm
25.4mm
25.4mm
110mm
25.4mm
CAUTION
BURN WITHIN SIGHT. KEEP AWAY FROM
THINGS THAT CATCH FIRE. KEEP AWAY FROM
CHILDREN AND PETS. BURN ON HEAT
RESISTANT SURFACE AWAY FROM HEAT
SOURCES. REMOVE DEBRIS BEFORE EACH
LIGHTING. TO REDUCE SPOTTING KEEP 1/8 IN
OF WICK AT ALL TIMES. CONTAINER MAY BE
HOT WHEN LIT.
AROMAFLAGE, BOUGIE BOTANIQUE ET ANTI-
INSECTE NATURE.
ATTENTION: LA VERRE PEUT DEVENIR CHAUD
AU TOUCHER. TENIR HORS DE PORTE DES
ENFANTS.
MIKEY & MOMO INC.
NEW YORK, NY 10016
ASSEMBLED IN THE U.S.A.
WWW.AROMAFLAGE.COM
ITEM Aromaflage
COLORS
GOLD HOTSTAMP
Level: 14
Job: XXXXXX
1.26.2015
Proof Approved
Approved with Changes
New Proof Required
Customer Signature
Date
IMPAK
1001 Commerce Drive, Suite 200 | Richardson, Texas 75081
OFFICE 855.544.6725 | FAX 855.544.7283 | impakretail.com
Ex. D

Exhibit E


amazon
aromaflage
Tax Central
Everything you need to file
Departments
Your Amazon.com
Today's Deals
Gift Cards & Registry
Sell
Help
Account & Lists
Orders
Try Prime
Cart
Luxury Beauty
Luxury Makeup
Luxury Skin Care
Luxury Fragrance
Luxury Hair Care
Luxury Men's Grooming
All Beauty
All Men's Grooming
Professional Beauty
Luxury Brands
WATCH & SHOP NOW
Aromaflage Wild Eau de Toilette Spray
8 customer reviews
Price: $30.00 & FREE Shipping on orders over $35. Details
Only 8 left in stock (more on the way). Ships from and sold by Amazon.com. Gift-wrap available.
Luxury Beauty
2 sizes:
4 Fluid Ounce
Want it Monday, Feb. 27? Order within 23 hrs 9 mins and choose Two-Day Shipping at checkout. Details
Ship to: WASHINGTON, DC 20001
Yes, I want FREE Two-Day Shipping with Amazon Prime
Qty: 1
Turn on 1-click ordering
Add to Cart
Add to List
3 new from $30.00
Share
DESCRIPTION
Aromaflage wild -2-in-1 fine fragrance. Repels mosquitoes. Free of deet and other nasties. Woodsy notes, spa-like scent. Smell amazing and stay bug free.
BENEFITS
Safe, non toxic, effective, tested, formulating by the finest fragrance houses in the word
SUGGESTED USE
Apply 1-2 sprays on legs and arms and reapply ever 2-3 hours
Special Shipping Information: This product may not be available for 1 or 2 day shipping due to federal regulations that require it to ship via ground ship methods only. This product can only be shipped within the 48 contiguous states.
Get Gorgeous with
LUXURY BEAUTY

Special Offers and Product Promotions

Scent: Aromaflage Wild | Size: 4 Fluid Ounce

• **Your cost could be $0.00 instead of $30.00!** Get a **$50 Amazon.com Gift Card** instantly upon approval for the **Amazon Rewards Visa Card** Apply now

Frequently Bought Together

Total price: $90.00

Add all three to Cart

Add all three to List

Some of these items ship sooner than the others. Show details

- This item: Aromaflage Wild Eau de Toilette Spray $30.00
- Aromaflage Eau de Toilette Spray $30.00
- Aromaflage Sleep Eau de Toilette Spray, 0.3 fl. oz. $30.00

Product Description

Scent:Aromaflage Wild | Size: 4 Fluid Ounce

Product Description

Aromaflage wild-fragrance with function. Aromaflage is a fine fragrance that also repels insects. Scientifically tested and effective. In efficacy studies, aromaflage wild was as effective as 25 percent deet over 2.5 hours. Aromaflage repels mosquitoes that may carry zika, dengue, chikungunya, and yellow fever. Free of deet, chemicals, and parabens and other harsh chemicals. Notes of spicy cardamom, warm cedar wood, and snappy spruce-a spa like scent. Fragrances are an atomizer application. Smell amazing and stay bug free. Perfect for weddings, cocktail parties, boating, back yard events, exotic travel, gardening, and enjoying time outdoors aromaflage wild is comprised of aromatic essential oils native to the southeast Asian region. Our fragrance is inspired by the age-old tradition of using botanical extracts to repel insects, a practice first documented by ancient roman, Greek, and Indian scholars and is still common throughout tropical regions worldwide.

Brand Story

Based on science, efficacy and beauty

Product Details

Scent Name: Aromaflage Wild | Size: 4 Fluid Ounce

Product Dimensions: 1 x 1 x 5.7 inches ; 0.3 ounces

Shipping Weight: 8 ounces (View shipping rates and policies)

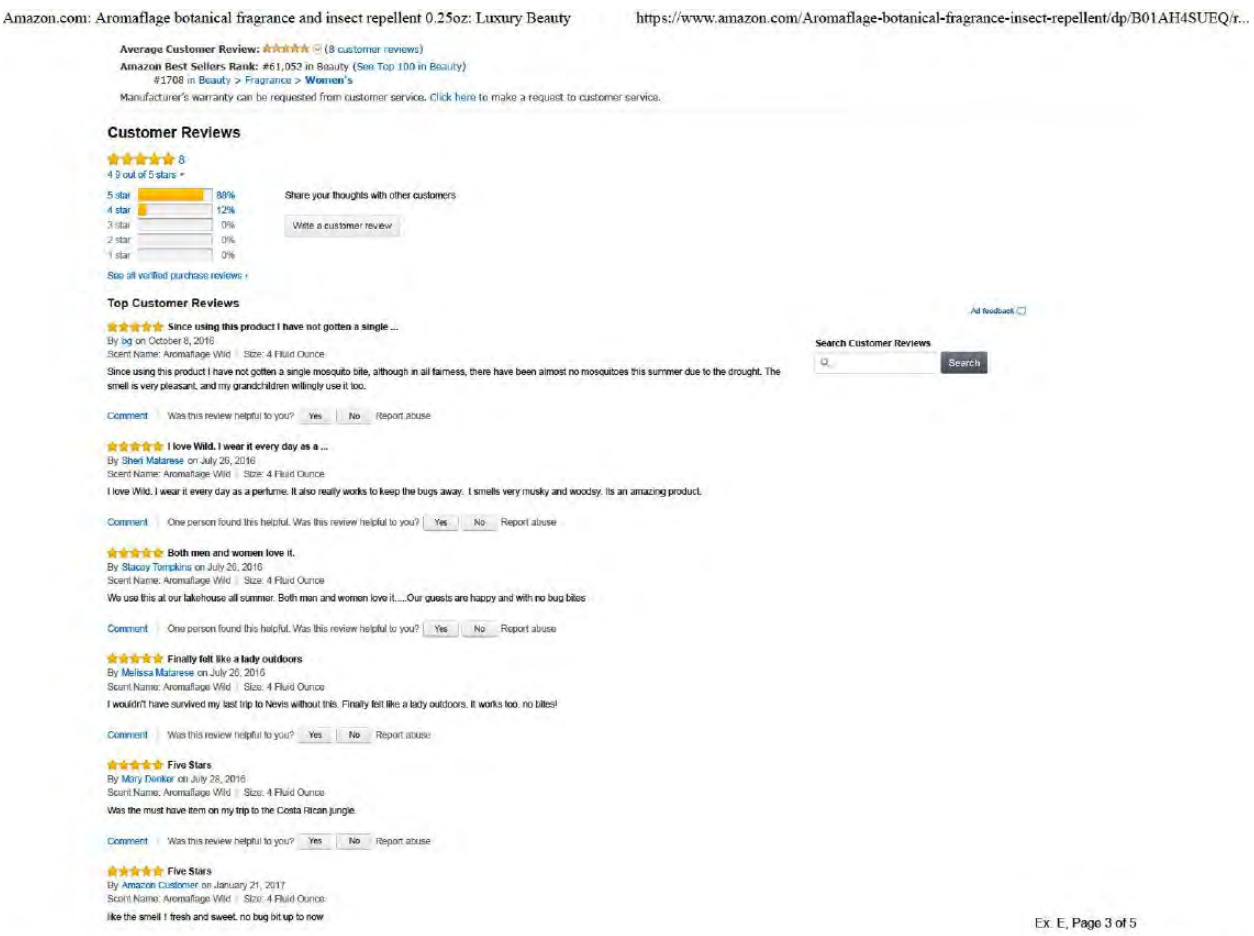
Domestic Shipping: Item can be shipped within U.S.

International Shipping: This item is not eligible for international shipping. Learn More

ASIN: B01AH4SUEQ

Item model number: AF0004

Complaint



Amazon.com: Aromaflage botanical fragrance and insect repellent 0.25oz: Luxury Beauty https://www.amazon.com/Aromaflage-botanical-fragrance-insect-repellent/dp/B01AH4SUEQ/r...

Average Customer Review: (8 customer reviews)
Amazon Best Sellers Rank: #61,053 in Beauty (See Top 100 in Beauty)
#1708 in Beauty > Fragrance > Women's
Manufacturer's warranty can be requested from customer service. Click here to make a request to customer service.

Customer Reviews

8
4.9 out of 5 stars

5 star 88%
4 star 12%
3 star 0%
2 star 0%
1 star 0%

Share your thoughts with other customers
Write a customer review

See all verified purchase reviews

Top Customer Reviews

Since using this product I have not gotten a single ...
By bg on October 8, 2016
Scent Name: Aromaflage Wild | Size: 4 Fluid Ounce
Since using this product I have not gotten a single mosquito bite, although in all fairness, there have been almost no mosquitoes this summer due to the drought. The smell is very pleasant, and my grandchildren willingly use it too.
Comment | Was this review helpful to you? Yes No Report abuse

I love Wild. I wear it every day as a ...
By Sheri Matarese on July 26, 2016
Scent Name: Aromaflage Wild | Size: 4 Fluid Ounce
I love Wild. I wear it every day as a perfume. It also really works to keep the bugs away. I smells very musky and woodsy. Its an amazing product.
Comment | One person found this helpful. Was this review helpful to you? Yes No Report abuse

Both men and women love it.
By Stacey Tompkins on July 26, 2016
Scent Name: Aromaflage Wild | Size: 4 Fluid Ounce
We use this at our lakehouse all summer. Both men and women love it....Our guests are happy and with no bug bites
Comment | One person found this helpful. Was this review helpful to you? Yes No Report abuse

Finally felt like a lady outdoors
By Melissa Matarese on July 26, 2016
Scent Name: Aromaflage Wild | Size: 4 Fluid Ounce
I wouldn't have survived my last trip to Nevis without this. Finally felt like a lady outdoors. It works too. no bites!
Comment | Was this review helpful to you? Yes No Report abuse

Five Stars
By Mary Denker on July 26, 2016
Scent Name: Aromaflage Wild | Size: 4 Fluid Ounce
Was the must have item on my trip to the Costa Rican jungle
Comment | Was this review helpful to you? Yes No Report abuse

Five Stars
By Amazon Customer on January 21, 2017
Scent Name: Aromaflage Wild | Size: 4 Fluid Ounce
like the smell ! fresh and sweet. no bug bit up to now

Search Customer Reviews
Search

Ad feedback

Ex. E, Page 3 of 5

3 of 7 2/22/2017 2:05 PM

Comment | Was this review helpful to you? Yes No Report abuse

Five Stars
By Amazon Customer on July 29, 2016
Scent Name: Aromaflage Wild | Size: 4 Fluid Ounce
This is the real deal!! Love

Comment | Was this review helpful to you? Yes No Report abuse

It doesn't smell like chemicals like some other bug spray which is why ...
By Luvnapo on October 30, 2016
Scent Name: Aromaflage Wild | Size: 4 Fluid Ounce | Verified Purchase
Strong scent to repel mosquitos and others insects. It doesn't smell like chemicals like some other bug spray which is why I chose this perfume.

Comment | Was this review helpful to you? Yes No Report abuse

See all verified purchase reviews (newest first) ›

Write a customer review

Customer Questions & Answers

Have a question? Search for answers.

0 votes

Question: What are the ingredients?

Answer: Our pleasure!!
By Aromaflage SELLER on January 16, 2017

Thank you for your inquiry, Jean. AROMAFLAGE wild has the following ingredients: denatured alcohol, water, essential oils of Geranium, Lemongrass, Cedar Leaf, Cedarwood, Thyme, Rosewood, Balsam, Lavandin, Spruce, Patchouli, Cardamom. Hope that is helpful!
By Aromaflage SELLER on January 15, 2017

The Aromaflage webs to has the full list but it's woodsy essential oils, alcohol and water
By Melissa Matarese on January 15, 2017

Plant compounds that insects don't like but humans find pleasant, all natural.
By sonia k guterman on January 15, 2017

Collapse all answers

Customers Who Bought This Item Also Bought

Amazon.com: Aromaflage botanical fragrance and insect repellent 0.25oz: Luxury Beauty https://www.amazon.com/Aromaflage-botanical-fragrance-insect-repellent/dp/B01AH4SUEQ/r...

Aromaflage Eau de Toilette Spray 33 $30.00 Prime

Aromaflage Sleep Eau de Toilette Spray, 0.3 fl. oz. 4 $30.00 Prime

All Natural Mosquito Repellent Bracelets - Value Pack Twelve (12) Pack (2 Packs of 6) - Deet Free 16 $15.90 Prime

Mosquitaway® All Natural Mosquito Repellent Bracelets - Five (5) Pack - Deet Free - Deters Bugs 66 $9.99 Prime

EO Products Breath Spray, Organic Refresh, 0.33 Ounce 7 $4.51

Aromaflage Wild Candle, 7.5 oz. 6 $40.00 Prime

Natori Women's Hidden Glamour Full-Fit Contour Underwire Bra 164 $24.38 - $133.22

Set up an Amazon Giveaway

Amazon Giveaway allows you to run promotional giveaways in order to create buzz, reward your audience, and attract new followers and customers. Learn more about Amazon Giveaway

This Item: Aromaflage botanical fragrance and insect repellent 0.25oz

Set up a giveaway

Disclaimer: While we work to ensure that product information is correct, on occasion manufacturers may alter their ingredient lists. Actual product packaging and materials may contain more and/or different information than that shown on our Web site. We recommend that you do not solely rely on the information presented and that you always read labels, warnings, and directions before using or consuming a product. For additional information about a product, please contact the manufacturer. Content on this site is for reference purposes and is not intended to substitute for advice given by a physician, pharmacist, or other licensed health-care professional. You should not use this information as self-diagnosis or for treating a health problem or disease. Contact your health-care provider immediately if you suspect that you have a medical problem. Information and statements regarding dietary supplements have not been evaluated by the Food and Drug Administration and are not intended to diagnose, treat, cure, or prevent any disease or health condition. Amazon.com assumes no liability for inaccuracies or misstatements about products.

Exhibit F

Amazon.com: Aromaflage Wild Candle, 7.5 oz.: Luxury Beauty https://www.amazon.com/Aromaflage-Wild-Candle-7-5-oz/dp/B01COOTJ7E/ref=pd_sim_510...

Ex. F, Page 1 of 3

1 of 6 2/22/2017 2:13 PM

Get Gorgeous with LUXURY BEAUTY ›Shop now

Special Offers and Product Promotions

• **Your cost could be $0.00 instead of $40.00**! Get a **$50 Amazon.com Gift Card** instantly upon approval for the **Amazon Rewards Visa Card** Apply now

Product Description

Product Description

Aromaflage wild-fragrance with function. A fine candle that also repels insects. Scientifically tested and effective. In efficacy studies, aromaflage wild was as effective as 25 percent deet.Free of deet, chemicals, and parabens and other harsh chemicals. Notes of spicy cardamom, warm cedar wood, and snappy spruce-a spa like scent. Smell amazing and stay bug free. Perfect for weddings, cocktail parties, boating, back yard events, exotic travel, gardening, and enjoying time outdoors aromaflage is comprised of aromatic essential oils native to the southeast Asian region. Our fragrance is inspired by he age-old tradition of using botanical extracts to repel insects, a practice first documented by ancient roman, Greek, and Indian scholars and is still common throughout tropical regions worldwide.

Brand Story

Based on science, efficacy and beauty

Product Details

Product Dimensions: 4.3 x 4.3 x 4.5 inches ; 1 pounds
Shipping Weight: 1.2 pounds (View shipping rates and policies)
Domestic Shipping: Item can be shipped within U.S.
International Shipping: This item can be shipped to select countries outside of the U.S. Learn More
ASIN: B01COOTJ7E
Item model number: AF0006
Average Customer Review: ★★★★★ (6 customer reviews)
Amazon Best Sellers Rank: #260,898 in Beauty (See Top 100 in Beauty)
#228 in Beauty > Fragrance > **Candles & Home Scents**
#8353 in Beauty > Fragrance > **Women's**
Manufacturer's warranty can be requested from customer service. Click here to make a request to customer service.

Ex. F, Page 2 of 3

Customer Reviews

★★★★★ 6

5.0 out of 5 stars

5 star	100%
4 star	0%
3 star	0%
2 star	0%
1 star	0%

Share your thoughts with other customers

Write a customer review

See all verified purchase reviews ›

Top Customer Reviews

★★★★★ **its also great that you can use as a wine glass when ...**
By Mary Denker on July 28, 2016

Luxurious and effective as far as keeping the bugs away! The scent is really refreshing. Its also great that you can use as a wine glass when finished. Although it took awhile to burn the en ire candle which is great :)

Comment | Was this review helpful to you? Yes No Report abuse

★★★★★ **We burn these all summer long on our patio. ...**
By Sheri Matarese on July 26, 2016

We burn these all summer long on our patio. The scent does not interfere with dinner at all and it really works. I also burn it in the kitchen near our fruit basket where here are often fruit flies

Comment | One person found this helpful. Was this review helpful to you? Yes No Report abuse

★★★★★ **Five Stars**
By Betty Weaver on August 1, 2016
Verified Purchase

great fragrance!!! does a good job keeping bugs away

Comment | One person found this helpful. Was this review helpful to you? Yes No Report abuse

★★★★★ **Five Stars**
By Stacey Tompkins on May 16, 2015

Awesome product!! Love it and works great.

Comment | One person found this helpful. Was this review helpful to you? Yes No Report abuse

★★★★★ **Five Stars**
By Amazon Customer on July 29, 2016

This is a must have for summer bbqs!

Comment | Was this review helpful to you? Yes No Report abuse

★★★★★ **Nice candle!**
By Elizabeth on May 16, 2015
Verified Purchase

I like this Candle. I don't know if it repels mosquito's, but it is nice.

Search Customer Reviews

Search

Customer Questions & Answers

Complaint

Exhibit G

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. 1623234

TITLE AROMAFLAGE

DATE RECORDED: DATE UNKNOWN
TRANSCRIBED: MAY 2, 2017

PAGES 1 THROUGH 5

AROMAFLAGE VIDEO
How to use Aromaflage botanical fragrance and insect repellent - YouTube

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

FEDERAL TRADE COMMISSION

I N D E X

Complaint

FEDERAL TRADE COMMISSION

In the Matter of:)
Aromaflage) Matter No. 1623234
)
---)
Date Unknown

The following transcript was produced from a digital file provided to For The Record, Inc. on April 20, 2017.

P R O C E E D I N G S

- - - - -

HOW TO USE AROMAFLAGE BOTANICAL FRAGRANCE AND INSECT REPELLENT YOUTUBE VIDEO

MELISSA FENSTERSTOCK: People often ask us how to use Aromaflage botanical fragrance and insect repellent. What we suggest is that you spray one to two sprays on your arms and your legs and be sure to rub it in.

Unlike other fragrances, Aromaflage needs to be rubbed in. So make sure you do that. It will be effective for about two and a half hours, and then it needs to be reapplied.

That's why we've included our bottles in a cute little linen bag so you can save it and keep it to protect the bottle. It's something you can just toss in your purse or your beach bag and always have with you. So remember to reapply every two and a half hours and to rub it in.

(The recording was concluded.)

CERTIFICATE OF TRANSCRIPTIONIST

I, George Quade, do hereby certify that the foregoing proceedings and/or conversations were transcribed by me via CD, videotape, audiotape or digital recording, and reduced to typewriting under my supervision; that I had no role in the recording of this material; and that it has been transcribed to the best of my ability given the quality and clarity of the recording media.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

DATE: 5/2/2017

GEORGE QUADE, CERT

Complaint

Exhibit H

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. 1623234

TITLE AROMAFLAGE

DATE RECORDED: DATE UNKNOWN
TRANSCRIBED: MAY 2, 2017

PAGES 1 THROUGH 13

AROMAFLAGE VIDEO

Aromaflage Bug Repellent Outdoor 7.5oz. Candle on QVC - YouTube

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

FEDERAL TRADE COMMISSION

I N D E X

FEDERAL TRADE COMMISSION

In the Matter of:)
Aromaflage) Matter No. 1623234
)
----------)
Date Unknown

The following transcript was produced from a digital file provided to For The Record, Inc. on April 20, 2017.

Complaint

P R O C E E D I N G S

- - - - -

AROMAFLAGE BUG REPELLENT OUTDOOR 7.5oz. CANDLE ON QVC YOUTUBE VIDEO

QVC PERSONALITY: And do it in a pleasant way. Well, that's what Aromaflage is all about. It's a bug repellent candle, but this supersedes any old school citronella candle that you've ever used. And the woman that discovered it joins me this morning. It's Melissa Fensterstock.

MELISSA FENSTERSTOCK: Yes, nice to meet you.

QVC PERSONALITY: Welcome, Melissa.

MELISSA FENSTERSTOCK: Thanks for having us.

QVC PERSONALITY: All right. So how did you come about to discover the Aromaflage candle?

MELISSA FENSTERSTOCK: Yeah. So my husband and I were traveling in Southeast Asia as newlyweds and discovered this exotic blend that the locals were using as a natural insect repellent. And we just totally fell in love with it. I'm a mosquito magnet. I get eaten alive by bugs and was just so surprised to find something that really worked and smelled amazing.

And it had been earlier that year as well that my husband had open heart surgery, which was

really scary, but after all of that and after our trip we decided that we wanted to build a brand around health and wellness.

QVC PERSONALITY: And so this is created using essential oils?

MELISSA FENSTERSTOCK: Yep.

QVC PERSONALITY: All right. So what will we smell? Because this is very lovely.

MELISSA FENSTERSTOCK: Yes. So you'll smell notes of silk and vanilla, warm cedar wood, exotic oranges. It's just really juicy, really smells very tropical.

QVC PERSONALITY: And so this is actually going to repel the bugs?

MELISSA FENSTERSTOCK: Mm-hmm, mm-hmm.

QVC PERSONALITY: And you've done some testing?

MELISSA FENSTERSTOCK: We have. We've done university testing and the product works as well as a number of the leading brands out there.

QVC PERSONALITY: Without having to have that stinky kind of --

MELISSA FENSTERSTOCK: Exactly.

QVC PERSONALITY: -- citronella smell. This is really like a special blend, but also it's quite

attractive as well.

MELISSA FENSTERSTOCK: Mm-hmm.

QVC PERSONALITY: This is a good looking candle. I would never think that this is a bug repellent candle. They come in tins and they're not really pretty.

MELISSA FENSTERSTOCK: Exactly, exactly. It's actually a reusable wine tumbler as well. So it's a great excuse to buy four or six of them and save them as -- save them for a set when you're done.

QVC PERSONALITY: And so really you're paying $24.48. How much time -- burn time will we get off of one candle?

MELISSA FENSTERSTOCK: You'll get approximately 35 hours of burn time

QVC PERSONALITY: Okay.

MELISSA FENSTERSTOCK: I suggest you light it a few minutes before you want to sit outside to build up a nice plume.

QVC PERSONALITY: And where should we place it?

MELISSA FENSTERSTOCK: I think the center of the table is definitely where it should be.

QVC PERSONALITY: Mm-hmm.

MELISSA FENSTERSTOCK: It's good for about a

table of six.

QVC PERSONALITY: Okay, very good. So then once you burn it all the way out, you have this actual glass wine tumbler.

MELISSA FENSTERSTOCK: Mm-hmm.

QVC PERSONALITY: So, as you said, buy a set. And this is how it comes packaged, Melissa?

MELISSA FENSTERSTOCK: It does. It comes packaged in that box.

QVC PERSONALITY: Nice. So this would make, like, a nice hostess gift, especially during cookout season. Instead of bringing the bottle of wine --

MELISSA FENSTERSTOCK: Exactly.

QVC PERSONALITY: -- you bring an Aromaflage candle. But when they open it up, you might have to remind them that it's actually a bug repellent candle. Like, light it right now, put it out here to protect your guests.

MELISSA FENSTERSTOCK: Totally. And I love using it, you know, not too much these days because I'm pregnant, but back in the day when I was drinking wine, opening a bottle of wine with my husband on the patio, and at that time in the evening when the sun is setting, you know, the bugs always come out and start bothering you. So this is something that you

definitely want to have for that romantic moment.

QVC PERSONALITY: But it smells so good. Like, it's such a lovely, soothing scent. Like, I could see wanting to burn this even if there weren't bugs. This is something that just smells that pretty.

MELISSA FENSTERSTOCK: Absolutely. And it's interesting you mention that because we have a lot of people that will burn these inside because they just love the way they smell.

QVC PERSONALITY: Mm-hmm.

MELISSA FENSTERSTOCK: Or if you have like a fruit bowl, you know, with those little gnats, a lot of people put them in their kitchen. So you can use it indoors as well just because it smells great.

QVC PERSONALITY: And I love the aesthetic of it, Melissa. I mean, that looks just very upscale, chic, nobody is going, oh, there's the bug candle. That's just a pretty looking, pretty smelling candle. That tumbler is reusable. And you've actually been featured on the Today Show.

MELISSA FENSTERSTOCK: Mm-hmm. Yeah, last year for July 4th we were featured. So this is a great thing for that time of year.

QVC PERSONALITY: Well, it is the perfect timing, and many of you are picking up more than one.

You're thinking, okay, yeah, we like to spend time out on our deck, by the pool, this is a way to help repel the bugs. This is that bug repellent candle, but this was something that we didn't really know about here in the States. You actually had to travel halfway across the world to discover it.

MELISSA FENSTERSTOCK: Exactly. And I'm so happy we did. Bringing it back here to people in the States.

QVC PERSONALITY: And, also, the candle itself, it's made -- what is it made from?

MELISSA FENSTERSTOCK: So it's made from a soy wax, made in the midwest, and the essential oils come from all over the world. But they are the active ingredients in the candle as well.

QVC PERSONALITY: And what are kind of the benefits to a soy candle?

MELISSA FENSTERSTOCK: So it burns really clean. It's a lead-free cotton wick as well. So you won't see black soot, you won't see black smoke. It just -- as you can see here, it just burns nice and clean and fresh.

QVC PERSONALITY: Mm-hmm. And so that way if you are burning it indoors, it's not going to, like you said, leave a plume of black --

MELISSA FENSTERSTOCK: Exactly.

QVC PERSONALITY: This is very popular, many of you picking up more than one, because keep in mind once the candle is burned away, you're left with an actual useable wine tumbler.

MELISSA FENSTERSTOCK: Exactly.

QVC PERSONALITY: So at least with two you have a set, one for you, maybe one for the husband --

MELISSA FENSTERSTOCK: Exactly.

QVC PERSONALITY: -- after the baby comes.

MELISSA FENSTERSTOCK: Exactly.

QVC PERSONALITY: And this is brand new today. You're actually getting the first opportunity to order an Aromaflage candle. Love the packaging, so a great gift idea if you're going to the barbecue, you're a guest at the cookout. One of our old neighbors, she always had a summer cookout at her home and it was like, okay, what do you bring that somebody else isn't going to already -- they already have 20 pounds of chicken and --

MELISSA FENSTERSTOCK: Exactly.

QVC PERSONALITY: And this is something that the entire party will benefit from.

MELISSA FENSTERSTOCK: Exactly. There's so many times where I show up with a candle and the host

just opens it up, puts it on the patio and everyone can smell it, enjoy it and have a great time with it.

QVC PERSONALITY: All right. So one more time, remind me, what are the oils? What are the scents? What are we smelling in this candle?

MELISSA FENSTERSTOCK: Sure. So you're smelling silk and vanilla, warm cedar wood, Valencia orange. It's very exotic. You know, it transports you to that tropical place.

QVC PERSONALITY: Mm-hmm.

MELISSA FENSTERSTOCK: If you love vanilla, if you love orange, these are -- these are just beautiful notes.

QVC PERSONALITY: Well, it has like a warmth to it, but that hint of the citrus as well. So it's like a little sweet --

MELISSA FENSTERSTOCK: Yes.

QVC PERSONALITY: -- with that little bit of citrus. I think you'll find that the scent is delicious. It's not overpowering.

MELISSA FENSTERSTOCK: No.

QVC PERSONALITY: But it's effective enough to keep the insects away.

MELISSA FENSTERSTOCK: Exactly.

QVC PERSONALITY: It's one of the most

beautiful insect, bug repellent candles I've ever seen. It's brand new here at QVC. And, Melissa, she discovered it and brought it all the way to us. So thank you.

MELISSA FENSTERSTOCK: Yep, of course. Thank you.

QVC PERSONALITY: F-12309 is your item number. And I'm going to let you know, about 10 minutes away from an FDA cleared device to temporarily relieve pain.

(The recording was concluded.)

CERTIFICATE OF TRANSCRIPTIONIST

I, George Quade, do hereby certify that the foregoing proceedings and/or conversations were transcribed by me via CD, videotape, audiotape or digital recording, and reduced to typewriting under my supervision; that I had no role in the recording of this material; and that it has been transcribed to the best of my ability given the quality and clarity of the recording media.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

DATE: 5/2/2017

GEORGE QUADE, CERT

DECISION AND ORDER

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 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. The Respondents are:

    a. Respondent Mikey & Momo, Inc., formerly doing business as Mikey & Momo LLC, also doing business as Aromaflage, is a Delaware corporation with its principal office or place of business in Englewood, New Jersey.

    b. Respondent Michael Fensterstock is an officer of the Corporate Respondent, Mikey & Momo, Inc. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the Corporate Respondent. His principal office or place of business is the same as that of the Corporate Respondent.

    c. Respondent Melissa Matarese Fensterstock is an officer or member of the Corporate Respondent, Mikey & Momo, Inc. Individually or in concert with others, she formulates, directs, or controls the policies, acts, or practices of the Corporate Respondent. Her principal office or place of business is the same as that of the Corporate Respondent.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

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

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

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

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

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

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

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

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

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

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

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

C. "Cosmetic" means (1) 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 (2) articles intended for use as a component of any such article; except that such term shall not include soap.

D. "Covered product" means any product purported, designed, or intended to repel insects, including Aromaflage botanical fragrance & insect repellent spray, Aromaflage botanical insect repelling candle, Aromaflage Wild botanical fragrance & insect repellent spray, and Aromaflage Wild botanical insect repelling candle.

E. "Device" means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, which is:

1. recognized in the official National Formulary, or the United States Pharmacopeia, 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 humans or other animals, or

3. intended to affect the structure or any function of the body of humans or other animals, and

which does not achieve any of its principal intended purposes through chemical action within or on the body of humans or other animals and which is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

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.

G. "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.

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

I. "Respondents" means the Corporate Respondent and the Individual Respondents, individually, collectively, or in any combination.

1. "Corporate Respondent" means Mikey & Momo, Inc., formerly doing business as Mikey & Momo LLC, also doing business as Aromaflage, a corporation, and its successors and assigns.

2. "Individual Respondents" means Michael Fensterstock and Melissa Matarese Fensterstock.

I.

Prohibited Misleading and Unsubstantiated Representations About Insect Repellency

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

A. That such product is an effective mosquito or insect repellent;

B. That such product repels mosquitoes or other insects that may be carrying Zika virus, dengue, chikungunya, yellow fever, or any other disease;

C. That such product repels mosquitoes or other insects for a specified period of time;

D. That such product repels mosquitoes or other insects better than or as well as DEET or any other product or ingredient; or

E. 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 field of

insect repellency, 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 (1) have been conducted and evaluated in an objective manner by experts in the field of insect repellency; (2) are generally accepted by such experts to yield accurate and reliable results; and (3) are human clinical testing of the covered 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 testing, all underlying or supporting data and documents generally accepted by such experts as relevant to an assessment of such testing as set forth 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.

II.

Prohibited Misrepresentations Regarding Tests, Studies, or Other Research

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 manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product must not make any misrepresentation, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration:

A. About the existence, contents, validity, results, conclusions, or interpretations of any test, study, or other research, including that the product is proven to effectively repel mosquitoes or other insects, to effectively repel mosquitoes or other insects that carry disease or a specified disease, to effectively repel mosquitoes or other insects for a specified period of time, or to repel mosquitoes or insects as well as or better than DEET or any other product or ingredient; or

B. That the performance or benefits of the product are scientifically or clinically proven or otherwise established.

III.

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;

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.

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.

IV.

Prohibited Representations Regarding Endorsements

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 manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, or any food, drug, device, or cosmetic for which health-related benefit, efficacy, performance, or safety claims are made, 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.

V.

Required Disclosures of Material Connections

IT IS FURTHER ORDERED that Respondents, and Respondents' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, or any food, drug, device, or cosmetic for which health-related benefit, efficacy, performance, or safety claims are made, must not make any representation, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about any consumer or other 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.

VI.

Acknowledgments of the Order

IT IS FURTHER ORDERED that 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.

VII.

Compliance Reports and Notices

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

A. One hundred and eighty 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 Respondents must describe if they know or should know due to their own involvement); (d) describe in detail whether and how that Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

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

B. For 3 years after the issuance date of this Order, each Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

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

subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, each Individual Respondent must submit notice of any change in: (a) name, including alias or fictitious name, or residence address; or (b) title or role in any business activity, including (i) any business for which such Respondent performs services whether as an employee or otherwise and (ii) any entity in which such Respondent has any ownership interest and over which such Respondent has direct or indirect control. For each such business activity, also identify its name, physical address, and any Internet address.

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

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

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: *In re Mikey & Momo, Inc.*, C-4655.

VIII.

Recordkeeping

IT IS FURTHER ORDERED that Respondents must create certain records and retain each such record for 5 years. Specifically, Corporate Respondent and each Individual Respondent for any business that such Respondent, individually or collectively with any other Respondents, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

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

C. Records of all consumer complaints and refund requests 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;

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

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

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

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

IX.

Compliance Monitoring

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

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

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

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

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning Individual Respondents, pursuant to Section 604(2) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(2).

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 August 7, 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, with Commissioner Chopra voting "abstain."

STATEMENT OF
COMMISSIONER ROHIT CHOPRA

In the Matter of Aromaflage Commission File Number 1623234

Today, the Federal Trade Commission is approving a settlement with Melissa and Michael Fensterstock to address their conduct that exploited the recent Zika epidemic. The

settlement includes no restitution for consumers, no disgorgement of their ill-gotten gains, and no admission of facts or liability.

The Fensterstocks claimed that their fragrance would protect customers from Zika and other insect- borne diseases as effectively as traditional repellants. Based on facts uncovered in our staff's thorough investigation, the Fensterstocks had reason to know this claim was not only baseless, but actually contradicted by the research *they commissioned*. The Fensterstocks grew their business by exposing their customers to health risks related to the Zika virus, including serious birth defects.

The Fensterstocks were extremely successful at promoting this ploy, doubling down on their deception at every turn. In the *New York Times*, Melissa Fensterstock spoke about how the company fielded daily calls from customers about Zika. In an interview with the *Guardian*, she noted that Aromaflage was "selling very well, especially given the scare." In a television interview on Bloomberg, she claimed her "scientific background" helped her "really understand what we can and cannot say about our product . . . ." (She studied neuroscience at Johns Hopkins, bioscience enterprise at the University of Cambridge, and holds an MBA from Harvard Business School.) Aromaflage was featured by the style editor of the *Today* show, and was even listed as one of Oprah's Favorite Things.

I don't believe the Fensterstocks purposely sought to expose their customers to serious health risks. Instead, it seems the thrill and allure of attention and financial success got the best of them. At the same time, their misconduct was extremely serious.

Given all these factors, I believe our settlement is too lenient and does not do enough to fence in the Fensterstocks. In other cases involving egregious misconduct,[1] the FTC has sought permanent injunctions[2] and significant relief for consumers in federal court. While I respect the ongoing concerns within the Commission about our extremely scant resources, I worry that this is not a just outcome. As the Fensterstocks pursue new business ventures, their investors and customers will need to keep a watchful eye over them.

Thousands of entrepreneurs and business owners work hard and play by the rules, including in the health and beauty products sectors. These honest businesses are harmed when they have to compete with companies that cheat their customers. The Federal Trade Commission must protect these honest business owners and operators from unfair business practices by ensuring that those who break the law are fully held to account.

---

1 The investigation suggests that the Fensterstocks actually misrepresented the results of a study they commissioned, thereby placing the health of their customers at risk. *See* Compl. ¶ 12. In my view, this makes the Fensterstocks' conduct more egregious than what is found in typical substantiation cases.

2 The order finalized today is valid only for twenty years. In my view, a court-ordered permanent injunction against false and misleading claims about health and safety would have been more appropriate given the particular facts and circumstances in this matter.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order as to Mikey & Momo, Inc., Michael Fensterstock, and Melissa Matarese Fensterstock ("respondents").

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

This matter involves the respondents' advertising for Aromaflage and Aromaflage Wild sprays and candles. The complaint alleges that the respondents violated Section 5(a) of the FTC Act by deceptively representing that their sprays and candles effectively repelled mosquitoes, including mosquitoes that carry Zika virus and other diseases, worked as well as products containing 25% DEET, were effective for 2.5 hours, and that their efficacy was scientifically proven. The complaint also alleges that the respondents violated Section 5(a) by disseminating 5-star reviews by purported ordinary consumers and by deceptively failing to disclose that certain endorsers had material connections with the respondents and their products, namely that several were close relatives and, in one instance, one of the respondents herself.

The order includes injunctive relief that prohibits these alleged violations and fences in similar and related conduct. The provisions related to efficacy claims apply to any "covered product," which is defined as any product purported, designed, or intended to repel insects. The provisions related to endorsements apply to covered products as well as any food, drug, device, or cosmetic for which health-related benefit, efficacy, performance, or safety claims are made.

Part I prohibits any representation that a covered product repels insects, or about its health benefits, performance, efficacy, safety, or side effects, unless it is non-misleading and supported by competent and reliable scientific evidence. Such evidence must consist of tests or studies that (1) have been conducted and evaluated in an objective manner by experts in the field of insect repellency; (2) are generally accepted by such experts to yield accurate and reliable results; and (3) are human clinical testing of the covered product, when such experts would generally require such human clinical testing to substantiate that the representation is true.

Part II prohibits, in connection with the sale of a covered product, any misrepresentation about any test or study, or that the performance or benefits of such product are scientifically or clinically proven or otherwise established.

Part III, triggered when the human clinical testing requirement in Part I applies, requires the respondents to secure and preserve all underlying or supporting data and documents generally accepted by experts in the relevant field as relevant to an assessment of the test, such as protocols, instructions, participant-specific data, statistical analyses, and contracts with the test's researchers. There is an exception for a "Reliably Reported" test, defined as a test that is published in a peer-reviewed journal and that was not conducted, controlled, or sponsored by any respondent or by any supplier of the respondents. Also, the published report must provide

sufficient information about the test for experts in the relevant field to assess the reliability of the results.

Part IV prohibits, in connection with the sale of a covered product or any food, drug, device, or cosmetic for which health-related benefit, efficacy, performance, or safety claims are made, any misrepresentation about the status of any endorser or person providing a review of the product, including that he or she is an independent or ordinary user of the product.

Part V prohibits, in connection with the sale of a covered product or any food, drug, device, or cosmetic for which health-related benefit, efficacy, performance, or safety claims are made, any representation about any consumer or other endorser of such product without disclosing, clearly and conspicuously, and in close proximity to that representation, any unexpected material connection between such endorser and any respondent, or other individual or entity affiliated with the product. The order defines the terms "clearly and conspicuously" and "unexpected material connection."

Part VI requires the respondents to submit signed acknowledgments that they received the order.

Part VII requires the respondents to file compliance reports with the Commission; and to notify the Commission of bankruptcy filings or changes in corporate structure that might affect compliance obligations.

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

Part IX contains other requirements related to the Commission's monitoring of the respondents' order compliance.

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

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

Complaint

IN THE MATTER OF

NECTAR BRAND LLC
D/B/A
NECTAR SLEEP; DREAMCLOUD, LLC; AND DREAMCLOUD BRAND LLC

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

Docket No. C-4656; File No. 182 3038
Complaint, August 28, 2018 – Decision, August 28, 2018

This consent order addresses Nectar Brand LLC's marketing, sale, and distribution of mattresses with claims that the products are assembled in the United States. The complaint alleges that respondent represented that its products are "assembled in the USA," when. in fact, the respondent's mattresses are wholly imported. The consent order prohibits respondent from making any country-of-origin claim about a product or service unless the claim is true, not misleading, and respondent has a reasonable basis substantiating the representation.

Participants

For the *Commission*: *Julia Solomon Ensor*.

For the *Respondents*: *Tyler Newby* and *Idan Netser, Fenwick & West LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Nectar Brand LLC, a limited liability company, also doing business as Nectar Sleep; DreamCloud, LLC; and DreamCloud Brand LLC ("Respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Nectar Brand LLC, also doing business as Nectar Sleep; DreamCloud, LLC; and DreamCloud Brand LLC ("Respondent") is a California limited liability company with its principal office or place of business at 2000 University Drive, Palo Alto, California 94303.

2. Respondent has advertised, labeled, offered for sale, sold, and distributed products to consumers, including but not limited to mattresses. Respondent advertises these products online, including, but not limited to, on its website, nectarsleep.com.

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

4. Respondent has disseminated or caused to be disseminated advertisements, packaging, and promotional materials for its products, including but not necessarily limited to the attached Exhibit A. This exhibit contains the following statement: "Designed and Assembled in the USA."

5. In numerous instances, including, but not limited to, the promotional materials shown in Exhibit A, Respondent has represented, expressly or by implication, that its mattresses are assembled in the United States.

6. In fact, Respondent's mattresses are wholly imported from China, and Respondent performs no assembly operations in the United States.

7. Therefore, Respondent's express or implied representations that its mattresses are assembled in the United States are false.

COUNT I

(False or Unsubstantiated Representation – Assembled in USA)

8. In connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of its products, Respondent has represented, directly or indirectly, expressly or by implication, that its products, including, but not limited to, mattresses, are assembled in the United States.

9. In fact, certain of Respondent's products are wholly imported. Therefore, the representation set forth in Paragraph 8 is false or misleading, or was not substantiated at the time the representation was made.

Violations of Section 5

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

THEREFORE, the Federal Trade Commission this twenty-eighth day of August, 2018, has issued this Complaint against Respondent.

By the Commission, Commissioner Chopra dissenting.

Decision and Order

Exhibit A

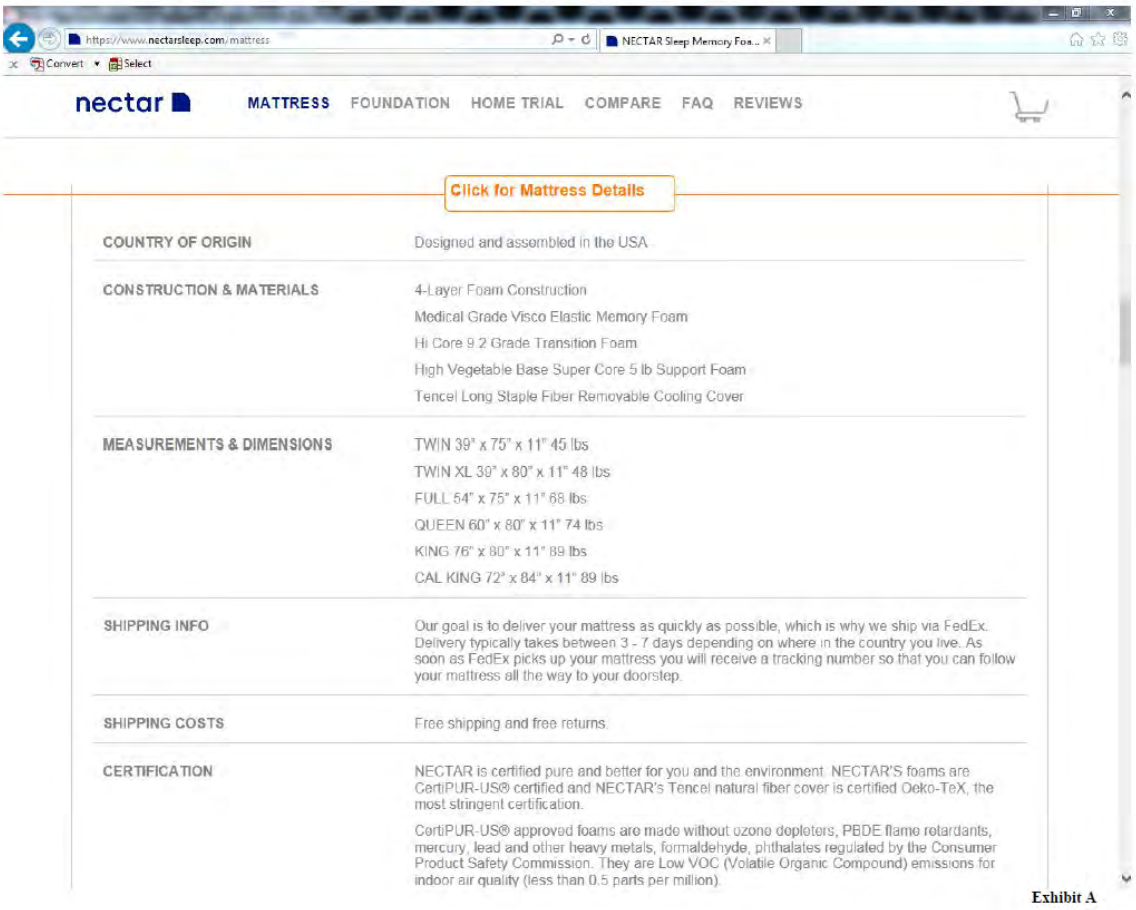


Exhibit A

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.

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

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

Findings

1. The Respondent is Nectar Brand LLC, also doing business as Nectar Sleep; DreamCloud, LLC; and DreamCloud Brand LLC, a California limited liability company, with its principal office or place of business at 2000 University Dr., Palo Alto, CA 94303.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

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

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying

text or other visual elements so that it is easily noticed, read, and understood.

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

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

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

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

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

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

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

B. "Made in the United States" 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.

C. "Respondent" means Nectar Brand LLC, also doing business as Nectar Sleep; DreamCloud, LLC; and DreamCloud Brand, LLC, and its successors and assigns.

Provisions

I.

PROHIBITED MISREPRESENTATIONS REGARDING U.S. ORIGIN CLAIMS

IT IS ORDERED that Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any

mattress, mattress foundation, 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; or

C. For a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product's principal assembly takes place in the United States, and United States assembly operations are substantial.

II.

SUBSTANTIATION

IT IS FURTHER ORDERED that Respondent, Respondent's officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any product or service, shall not make any representation, in any manner, expressly or by implication, regarding the country of origin of any product or service unless the representation is true, not misleading, and at the time it is made, Respondent possesses and relies upon a reasonable basis for the representation.

III.

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 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 (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.

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 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. 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 Nectar Brand LLC.

IV.

RECORDKEEPING

IT IS FURTHER ORDERED that Respondent must create certain records for 20 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Respondent must create and retain the following records:

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

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

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

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

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

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.

V.

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.

VI.

ORDER EFFECTIVE DATES

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on August 28, 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, Commissioner Chopra dissenting.

Concurring Statement of Commissioner Rebecca Kelly Slaughter, In Which Chairman Joe Simons Joins

When companies falsely claim that their products are made in the U.S.A., they take advantage of consumers who choose to spend their dollars supporting domestic products and the companies who expend resources in order to make the claim proudly and truthfully. Today, the Commission is announcing three enforcement actions[1] targeting companies and an individual

1 To date, the Commission has initiated 25 enforcement actions arising from misleading U.S.-origin claims, targeting entities that engage in intentional deception or refuse to come into prompt compliance. FTC staff also works extensively with companies to achieve compliance in this area, issuing more than 130 closing letters addressing potential U.S.-origin claims. These letters highlight that where companies make errors or potentially deceptive claims to consumers, Commission staff works with them to quickly come into compliance. In addition to enforcement actions and compliance counseling, the Commission's program to protect consumers from deceptive U.S.-origin claims involves significant business education efforts. In 1997, the Commission issued an Enforcement Policy Statement on U.S. Origin Claims that explains the types of U.S.-origin claims that can be made and the

who we allege falsely claimed their products were made in the U.S.A. in violation of Section 5 of the FTC Act. In *Patriot Puck*, respondent George Statler III and his companies marketed hockey pucks imported from China as "Made in America" and "The only American Made Hockey Puck!" The *Nectar Sleep* respondents included the statement "Designed and Assembled in the USA" in product descriptions for mattresses wholly imported from China. And in Sandpiper/PiperGear, respondents marketed imported backpacks and wallets on websites claiming "Featuring American Made Products" and shipped imported wallets with cards labeled "American Made." The Commission's complaints allege that these claims were plainly false and the respondents have all agreed to strong administrative consent orders.

Each of the administrative consent orders prohibits the respondents from making these types of claims in the future[2] and requires the respondents to engage in recordkeeping and reporting that will assist the FTC in monitoring compliance.[3] Any violation of these orders can result in a civil penalty of over $40,000 *per violation*.[4] There is evidence that these potential penalties have served as powerful deterrents: to date the FTC has only had cause to initiate one contempt proceeding[5] against the more than twenty prior respondents in cases involving U.S.-origin claims.

In this area, administrative consent orders securing permanent injunctive relief buttressed by the threat of significant civil penalties have been largely successful in keeping former violators on the straight and narrow and have no doubt served as a warning to others that false claims will be identified and pursued. Therefore, we are voting in support of the relief set forth in the final and proposed administrative orders announced today.

We write separately to highlight the possibility that the FTC can further maximize its enforcement reach, in all areas, through strategic use of additional remedies. For example, in the

---

substantiation needed to support them. Commission staff has also issued comprehensive guidance, press releases and blogs in this area to promote compliance.

2 Specifically, the orders prohibit respondents from making deceptive unqualified U.S.-origin claims about their products and lay out the type of substantiation required to make truthful claims. The orders also govern the manner and type of qualification needed to make a lawful qualified claim regarding U.S.-origin. The orders further prohibit 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.

3 Each of the orders requires the respondents to file a compliance report within one year after the order becomes final and to notify the Commission within 14 days of certain changes that would affect compliance with the order. Respondents are also required to maintain certain records, including records necessary to demonstrate compliance with the order. The orders also require respondents to submit additional compliance reports when requested by the Commission and to permit the Commission or its representatives to interview respondents' personnel. The orders remain in effect for 20 years.

4 Outside of specific rules, the FTC does not have authority to seek civil penalties for violations of Section 5 of the FTC Act. The FTC does have authority to seek civil penalties for any violations of its administrative orders. *See* 15 U.S.C. § 45(l) and 16 C.F.R. § 1.98(d) (2018).

5 *See* https://www.ftc.gov/news-events/press-releases/2006/06/ftc-alleges-stanley-made-false-made-usa-claims-about-its-tools (announcing settlement with Stanley Works that imposed a $205,000 civil penalty for violating prior order regarding U.S.-origin claims).

U.S.-origin claim context, there may be cases in which consumers paid a clear premium for a product marketed as "Made in the U.S.A." or made their purchasing decision in part based on perceived quality, safety, health or environmental benefits tied to a U.S.-origin claim.[6] In such instances, additional remedies such as monetary relief or notice to consumers may be warranted. Requiring law violators to provide notice to consumers identifying the deceptive claim can help mitigate individual consumer injury—an informed consumer would have the option to seek a refund, or, at the very least, stop using the product.

The Commission has already begun a broad review of whether we are using every available remedy as effectively as possible to fairly and efficiently pursue vigorous enforcement of our consumer protection and competition laws. If we find that there are new or infrequently applied remedies that we should be seeking more often, the Commission will act accordingly—and, where appropriate, signal to the public how we intend to approach enforcement. In our view, a thoughtful review and forward-looking plan is a more effective and efficient use of Commission resources than re-opening and re-litigating the cases before us today.[7]

6 Of the three cases the FTC is announcing today, we note that consideration of additional remedies such as notice could have been of particular value in the *Nectar Sleep* matter, which involved U.S.-origin claims about mattresses. The fact that purchasers of Nectar Sleep mattresses can seek a refund for any reason for 365 days after their original purchase, https://www.nectarsleep.com/p/returns/, and that purchasers received mattresses with accurate country-of-origin labels, contributed to our decision to vote in favor of the final *Nectar Sleep* order.

7 It is worth noting that all of the cases announced today began well before the current complement of Commissioners were instated, and therefore before staff could reasonably have been expected to anticipate our particular priorities and views on enforcement. To renegotiate these settlements at this point, after litigation strategy was developed and executed, would require substantial investment of staff time and effort and diversion of resources from other important cases. A forward-looking set of remedy priorities will help staff develop litigation strategy in an efficient way.

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Question Presented

Are no-money, no-fault settlements adequate to remedy serious violations of the FTC's "Made in USA" standard?

Summary

- Sellers gain a competitive advantage when they falsely market a product as Made in USA, especially when this claim is closely tied to the development of the product's brand.
- Third-party analysis suggests that Americans are often willing to pay significantly more for American-made goods compared to those made in China. Several of the matters under consideration by the Commission involve Made-in-USA fraud relating to products made in China.
- The Commission should modify its approach to resolving serious Made-in-USA fraud by seeking more tailored remedies that could include restitution, disgorgement, notice, and admissions of wrongdoing, based on the facts and circumstances of each matter.

Analysis and Discussion

The Power of Branding and Made in USA

While brand identity has historically been a major focus in markets for luxury goods, today it plays a key role in all segments of our economy. As advanced manufacturing and global supply chains challenge firms to find new ways to lower operating costs, consumer goods industries (including everything from apparel to packaged goods) have focused intensely on building and cultivating their brands as a way to drive up margins through price and volume enhancements.

Branding is distinct from marketing and advertising. A successful brand is one that creates a clear identity that goes beyond specific product attributes. A brand identity connects with a consumer's values, aspirations, and sense of self.

A Made-in-USA claim can serve as a key element of a product's brand that communicates quality, durability, authenticity, and safety, among other attributes. Not only can it be a signal about specific product attributes but it can also contribute to the development of a brand identity that connotes a set of values, such as fair labor practices, to consumers.

Made-in-USA branding can also be used to fraudulently conceal countries of origin that may cause concerns for consumers. For example, in recent years, regulators have

investigated serious health and safety problems with pet food[1] and drywall[2] imported from China, and the OECD estimates that China is the source of the vast majority of counterfeit goods imported to the US.[3] Against this backdrop, slapping a "Made-in-USA" label on a good made abroad can be its own form of counterfeiting, replacing an unpopular attribute with one connoting quality, safety, and authenticity.

In many cases, Americans are actually willing to pay a premium for goods that are made in our country, especially compared to those made in China. A 2012 survey by the Boston Consulting Group shows that more than 80% of Americans express a willingness to pay more for made-in- USA products,[4] which is consistent with other surveys.[5]

Importantly, however, price premium does not always accurately capture the harm caused by Made-in-USA fraud. Especially in markets for commodity goods where consumers may be particularly price-sensitive, firms may make false claims to distinguish their brand or conceal unpopular countries of origin.

Whatever its purpose, cheating distorts markets in fundamental ways. It rips off Americans who prefer buying domestic goods. It also punishes firms that may bear higher costs to produce goods here, yet must compete on price or branding with firms that cheat. Finally, widespread deception sows doubt[6] about the veracity of Made-in-USA claims, which may reduce the claim's value and discourage domestic manufacturing.

---

1 Food & Drug Admin., Melanine Pet Food Recall of 2007 (May 2007), https://www.fda.gov/animalveterinary/ safetyhealth/recallswithdrawals/ucm129575.htm

2 Fed. Trade Comm'n, Tests for Defective Drywall (Dec. 2009), https://www.consumer.ftc.gov/articles/O124-tests-defective-drywall

3 *Global trade in fake goods worth nearly half a trillion dollars a year*, Org. for Econ. Co-Operation and Dev. (Apr. 18, 2016), http://www.oecd.org/industry/global-trade-in-fake-goods-worth-nearly-half-a-trillion-doliars-a-year.htm

4 *Made in America, Again: Understanding the value of 'Made in the USA'*, The Boston Consulting Group (Nov. 2012) [Hereinafter *Made in America, Again).*

5 *See, e.g. Made in America: Most Americans love the idea of buying a US.-made product instead of an import. But sometimes it's hard to tell what's real and what's not*, CONSUMER REPORTS (May 21, 2015), https://www .consumerreports.org/cro/magazine/2015/05/made-in-america/index.htm [hereinafter *Made in America]* (reporting on a national survey finding that 60%+ of Americans would pay a 10% premium for Made-in-USA goods); *Price of patriotism: How much extra are you willing to pay for a product that's made in America?*, REUTERS (July 18, 2017), http://fingfx.thomsonreuters.com/gfx/mgs/USA-BUYAMERICAN-POLL/ 01005017035/index.html (reporting on a national survey finding that 60%+ of Americans would pay a premium of 5% or more). Of course, surveys reveal only Americans' *stated* willingness to pay a premium, not their actual buying behavior. But assuming Americans will pay *no* premium runs contrary to the available evidence, and firms' aggressive Made-in-USA branding shows they clearly see it as advantageous.

6 *See Made in America*, supra note 5 (reporting on a national survey finding that 23% of Americans lack trust in "Made in America" labels).

Backpacks, Hockey Pucks, and Mattresses

Today, the Commission is voting on three cases involving Made-in-USA fraud.[7] The conduct of each of these companies was brazen and deceitful. In my view, each respondent firm harmed both consumers and honest competitors.

In the Sandpiper and Patriot Puck matters, the evidence suggests that the Made-in-USA claim was a critical component of the companies' brand identities. In the Nectar Sleep matter, the false Made-in-USA claim may have been asserted to convey health or safety benefits.

Sandpiper/PiperGear USA: Sandpiper/PiperGear USA ("Sandpiper") built its brand of military- themed backpacks and gear on patriotism. As detailed in the FTC's complaint, the company boasted in its promotional materials about its "US manufacturing," inserted "American Made" labels into products, and included the hashtag "#madeinusa" alongside social media posts.[8] The company sold thousands of backpacks on American military bases overseas.

In reality, Sandpiper imported the vast majority[9] of its products from China or Mexico, a fact the firm actively sought to hide through its aggressive Made-in-USA branding.

Patriot Puck: Hockey pucks typically are manufactured to meet certain weight, thickness, and diameter specifications. These are commodity goods. Purchasers largely see competing pucks that boast similar specifications, so brand positioning can be especially salient.

Patriot Puck positioned its brand as the all-American alternative to imported pucks. The company literally wrapped its pucks in the flag, embossing each one with an image of an American flag. To drive home the point, the firm claimed its pucks were "Proudly Made in the USA," "MADE IN AMERICA," "100% Made in the USA!," and "100% American Made!" The firm even claimed it made "The Only American Made Hockey Puck!"[10]

In reality, Patriot Puck imported all of its pucks from China.[11]

That Patriot Puck priced its pucks similarly to other firms illustrates why sticker price premium alone is a poor proxy for the harm caused by Made-in-USA fraud, especially in markets for commodity goods. Hockey is closely associated with international competition, and Patriot Puck's claim to offer the "only" puck made in America was a clear effort to create a brand identity that would distinguish its pucks from the competition. Moreover, by pricing its pucks

7 Claiming falsely that a product is Made in USA violates Section 5 of the FTC Act. Although the FTC brought a Made-in-USA case as early as 1940, Congress amended the FTC Act in 1994 to state explicitly that Made-in-USA labeling must be consistent with FTC decisions and orders. *See* 15 U.S.C. § 45a.
8 Compl. at 116-7.
9 According to the Complaint, more than 95% of Sandpiper's products are imported as finished goods, while approximately 80% of PiperGear's products are either imported as finished goods or contain significant imported c0mponents. *Id.* at 17.
10 Compl. at 19.
11 The Commission has wisely named George Statler III, who operated the company, in its Complaint.

similarly to its competitors, Patriot Puck led consumers to believe they were getting a great deal on American-made hockey pucks, when in fact they were overpaying for pucks made in China.[12]

Nectar·Sleep: Nectar Sleep is a direct-to-consumer online mattress firm founded by Silicon Valley entrepreneurs. According to a CNBC profile of the company, Nectar competes with more than 200 firms to capture a slice of the $15 billion mattress market.

Nectar mattresses are made in China, which may be a negative attribute for consumers who have health or safety concerns about Chinese-made mattresses.[13] Perhaps for this reason, the company falsely represented to consumers that its mattresses were assembled in the US.

Nectar's conduct had clear consequences. Competitors who actually made mattresses domestically were undercut, and consumers looking for US-made mattresses - possibly for health or safety reasons - got ripped off. Further, Nectar may continue to profit from the lingering misperception that its mattresses are made in the US.

Addressing Made-in-USA Fraud Going Forward

Most FTC resolutions of Made-in-USA violations have resulted in voluntary compliance measures[14] or cease-and-desist orders. Indeed, none of the three settlements approved today includes monetary relief, notice to consumers, or any admission of wrongdoing.

Going forward, in cases involving egregious and undisputed Made-in-USA fraud, I believe there should be a strong presumption against simple cease-and-desist orders. Instead, the Commission should consider remedies tailored to the individual circumstances- of the fraud, including redress and notice for consumers, disgorgement of ill-gotten gains, opt-in return programs, or admissions of wrongdoing.

Some general principles can inform our approach to tailoring remedies. For firms that built their core brand identity on a lie, full redress or the opportunity for opt-in refunds may be appropriate, given the centrality of the false claim and its widespread dissemination.[15] When

12 Surveys show that Americans will pay a premium for US-made sporting goods relative to those made in China, meaning they effectively discount goods made in China. *Made in America, Again* at 1. And Americans may be particularly averse to buying patriotic-themed goods made in China. *See, e.g.,* Matt Brooks, *US Olympic uniforms spark fury in Congress*, WASH. POST (July 13, 2012), https://www.washingtonpost.com/blogs/2012-heaw-medal-london/post/us-olympic-uniforms-spark-fury-in-congress/2012/07/13/gJQABvJmhWblog.html?utmtenn=.3d96e39lfldd

13 Such concerns may be tied to recent recalls of Chinese-made mattresses and bedding, and may be partially reflected in the premium Americans are willing to pay for US-made furniture over furniture made in China. *See Made in America, Again* at 6. In fact, numerous consumer reviews specifically focus on comparing US-made mattresses.

14 Of course, when the violation. is unintentional or technical in nature, less formal actions can be helpful, especially if the misstatement is quickly corrected. My comments are limited to matters where the violation was egregious.

15 Particularly for misbranded products, the FTC could likely show that a firm's Made-in-USA misrepresentations were widely disseminated, that they were of the kind usually relied on by reasonable persons, and that consumers purchased the product, thus making gross sales an appropriate starting point for calculating restitution. *See* FTC v.

refunds are difficult to administer or the firm lacks ability to pay, the Commission should at least seek notification to consumers or corrective advertising[16] - especially in markets where country of origin bears on health or safety. Finally, if firms' misrepresentations are undisputed and clear, the Commission should strongly consider seeking admissions - a form of accountability that is explicitly contemplated by our rules of practice.[17]

Admissions may have particular value in cases involving Made-in-USA fraud. In these cases, clear and undisputed facts may give the agency a strong basis to demand an admission from a firm. And if that firm lacks funds or records for consumer redress or disgorgement, admissions can be a powerful tool to give consumers, competitors, and counterparties tools to remedy harm, even when we cannot.[18] Moreover, because the Commission is generally limited to seeking equitable rather than punitive remedies for first-time offenses, seeking admissions is among the most effective ways we can deter lawbreaking and change the cost-benefit calculus of deception.

I hope that the Commission will reexamine its approach to tackling Made-in-USA fraud. I believe we should seek more tailored remedies that vindicate the important goals of the program and send the message that Made-in-USA fraud will not be tolerated.

Conclusion

Nectar Sleep, Sandpiper, and Patriot Puck clearly violated the law, allowing them to enrich themselves and harm their customers and competitors. Especially given widespread interest in buying American products, we should do more to protect the authenticity of Made-in-USA claims. I am concerned that no-money, no-fault settlements send an ambiguous message about our commitment to protecting consumers and domestic manufacturers from Made-in-USA fraud.

Going forward, I hope the Commission can better protect against harms to competition and consumers by seeking monetary relief, notice, admissions, and other tailored remedies. Every firm needs to understand that products labeled "Made in USA" should be made in the USA, and that fake branding will come with real consequences.

Kuykendall, 371 F.3d 745, 764 (10th Cir. 2004) (holding, in a contempt action, that after the Commission establishes a presumption of reliance, "the district court may use the Defendants' gross receipts as a starting point"). Importantly, if there was deception in the sale, defendants generally do not receive credit for the value of the product sold. *See* FTC v. Figgie Int'!, Inc., 994 F.2d 595, 606-07 (9th Cir. 1993) ("The fraud in the selling, not the value of the thing sold, is what entitles consumers" to full redress.).

16 Corrective advertising can be important to preventing firms from continuing to profit from deception. As explained by then-Chairman Pitofsky after a corrective advertising order was upheld by the D.C. Circuit, "It is important for advertisers to know that it is not enough just to discontinue a deceptive ad, and that they can be held responsible for the lingering misimpressions created by deceptive advertising." *See* Press Release, Fed. Trade Comm'n, Appeals Court UpholJ.s FTC Ruling; Doan's Must Include Corrective Message in Future Advertising and Labeling (Aug. 21, 2000), https://www.ftc.gov/news-events/press-releases/2000/08/appeals-court-upholds-ftc- ruling-doans-must-include-corrective.

17 *See* 16 C.F.R. § 2.32.

18 For example, a factual admission may have a preclusive effect in a Lanham Act claim by a competitor.

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 Nectar Brand LLC, also d/b/a Nectar Sleep; Dreamcloud, LLC; and Dreamcloud Brand LLC ("respondent").

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

This matter involves respondent's marketing, sale, and distribution of mattresses with claims that the products are assembled in the United States.

According to the FTC's complaint, respondent represented that its products are "assembled in the USA." In fact, the respondent's mattresses are wholly imported. Therefore, this representation was false or misleading. Based on the foregoing, the complaint alleges that respondent engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future. Consistent with the FTC's Enforcement Policy Statement on U.S. Origin Claims, Part I prohibits respondent 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; (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; or (3) for a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product's principal assembly takes place in the United States, and United States assembly operations are substantial.

Part II prohibits respondent from making any country-of-origin claim about a product or service unless the claim is true, not misleading, and respondent has a reasonable basis substantiating the representation.

Parts III through V are reporting and compliance provisions. Part III 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 IV requires respondent to maintain certain records, including records necessary to demonstrate compliance with the order. Part V requires respondent to submit additional compliance reports when requested by the Commission and to permit the Commission or its representatives to interview respondent's personnel.

Finally, Part VI is a "sunset" provision, terminating the order after twenty (20) years, with certain exceptions.

Analysis to Aid Public Comment

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

BLU PRODUCTS, INC.
AND
SAMUEL OHEV-ZION

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

Docket No. C-4657; File No. 172 3025
Complaint, September 6, 2018 – Decision, September 6, 2018

This consent order addresses BLU Products, Inc.'s representations regarding consumer privacy and data security. The complaint alleges that Respondents privacy policy represented that they limit the disclosure of users' information to third-party service providers only to the extent necessary to perform their services or functions on behalf of BLU while, contrary to the privacy policy, personal information from BLU devices sold by Respondents was transmitted to ADUPS that was not needed to perform its services or functions on behalf of BLU. The complaint further alleges that Respondents did not implement appropriate physical, electronic and managerial security procedures. The consent order prohibits Respondents from misrepresenting: (1) the extent to which they collect, use, share, or disclose any personal information; (2) the extent to which consumers may exercise control over the collection, use, or disclosure of personal information; and (3) the extent to which the implement physical, electronic, and managerial security procedures to protect personal information.

Participants

For the *Commission*: *Jah-Juin "Jared" Ho* and *Ryan Mehm.*

For the *Respondents*: *Bernard Egozi, Egozi & Bennett, P.A.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that BLU Products, Inc., a corporation, and Samuel Ohev-Zion, individually and as an owner and President of BLU Products, Inc. (collectively "Respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent BLU Products, Inc. ("BLU") is a Florida corporation with its principal office or place of business at 10814 NW 33rd St., Building 100, Doral, Florida 33172.

2. Respondent Samuel Ohev-Zion is a co-owner and the President and CEO of BLU. Individually or in concert with others, Mr. Ohev-Zion controlled or had authority to control, or participated in the acts and practices alleged in this complaint. His principal office or place of business is the same as that of BLU.

3. BLU sells mobile devices to consumers through a number of retailers such as Amazon, Walmart, and Best Buy. To date, Respondents claim to have sold over 50 million

devices to consumers around the world. Respondents market BLU as the "fastest growing mobile manufacturer."

4. The acts or 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 PRACTICES

5. While BLU describes itself as a "mobile manufacturer," it actually outsources the manufacturing process for the devices it sells to consumers to a number of original device manufacturers ("ODMs").

6. These ODMs manufacture mobile devices branded with the BLU name according to Respondents' instructions and purchase orders. For example, Respondents are responsible for selecting certain software that comes preinstalled on devices, the default settings that consumers first see, and certain security features that are applied to consumers' devices.

7. BLU then sells its customized and branded mobile devices to consumers through a number of retailers, such as Amazon, Best Buy and Walmart.

8. As part of the this process, since at least 2015, in order to provide firmware updating services, BLU licensed software from ADUPS Technology Co., LTD ("ADUPS") and directed ODMs to preinstall this software on Respondents' mobile devices.

9. As a result of BLU directing its ODMs to preinstall ADUPS software on its devices, ADUPS obtained full administrative access and control of Respondents' devices.

10. ADUPS is a China-based company that offers advertising, data mining, and firmware over-the-air ("FOTA") update services to mobile and Internet of Things connected devices. FOTA updates allow device manufacturers to issue security patches or operating system upgrades to devices over wireless and cellular networks.

11. BLU entered into a contract with ADUPS to have the China-based company perform FOTA update services on their devices. Respondents did not ask ADUPS to perform any other services.

RESPONDENTS' DISCLOSURE OF CONSUMERS' PERSONAL INFORMATION

12. Until at least November 2016, the ADUPS software on BLU devices transmitted personal information about consumers to ADUPS servers without consumers' knowledge and consent, including:

- full contents of text messages;
- real-time cellular tower location data;

- call and text message logs with full telephone numbers;
- contact lists; and
- lists of applications used and installed on each device.

13. ADUPS software collected and transmitted consumers' text messages to its servers every 72 hours. ADUPS software also collected consumers' location data in real-time and transmitted this data back to its servers every 24 hours.

14. Reports about this unexpected collection and sharing became public on or about November 15, 2016.

15. After these reports emerged, some consumers concerned about their privacy and security ceased using Respondents' devices entirely. Others expended time and effort disabling the ADUPS software from their devices. In doing so, they have been left with a device unable to receive critical security updates.

16. In order to reassure consumers about the privacy and security of their devices, BLU posted a security notice on its website informing consumers that ADUPS had updated its software to cease its unexpected data collection practices.

17. However, BLU continued to allow ADUPS to operate on its older devices without adequate oversight.

RESPONDENTS' PRIVACY POLICY

18. In its privacy policy, BLU has stated that it limits the disclosure of consumers' information to third parties, as follows:

> We limit the disclosure of your information to only the third parties (e.g. service providers) we use to fulfil[l] our obligations to you. Examples include operating and maintaining our Products, taking orders, delivering packages, sending postal mail and email, removing repetitive information from customer lists, analyzing data, providing marketing consultation and assistance, distributing customer surveys, processing credit card payments, and providing customer service. ***These companies have access to personal information needed to perform their services or functions, but may not use it for other purposes***. (emphasis added)

19. Contrary to the privacy policy, as described in paragraphs 11-17, ADUPS had access to personal information that was not needed to perform FOTA updates, the only service or function BLU contracted with ADUPS to perform. For example, to process FOTA updates, ADUPS did not need to receive contacts or the contents of text messages.

20. BLU's privacy policy has further stated that the company implements:

appropriate physical, electronic, and managerial security procedures to help protect the personal information that you provide us.

21. In fact, Respondents did not implement appropriate physical, electronic, and managerial security procedures. For example, Respondents failed to implement appropriate security procedures to oversee the security practices of their service providers, such as by:

a. failing to perform adequate due diligence in the selection and retention of service providers; for example, Respondents failed to assess or evaluate the privacy or security practices of ADUPS prior to entering into an agreement with that company;

b. failing to adopt and implement written data security standards, policies, procedures or practices that apply to the oversight of their service providers, including ADUPS;

c. failing to contractually require their service providers to adopt and implement data security standards, policies, procedures or practices; and

d. failing to adequately assess the privacy and security risks of third-party software, such as ADUPS.

22. These failures resulted in the following:

a. ADUPS collected sensitive personal information via BLU devices, without users' knowledge or consent, that ADUPS did not need to perform its functions, as described in paragraphs 11-17.

b. Preinstalled software on BLU devices contained commonly known security vulnerabilities that, for example, made them susceptible to "command injection" attacks, which an unknown third party could exploit to gain full access to users' devices and, among other things, factory reset a device, take screenshots and video recordings of a device's screen, and install malicious applications.

VIOLATIONS OF THE FTC ACT

Deceptive Representation Regarding Disclosure of Personal Information

(Count I)

23. Through the means described in Paragraph 18, Respondents have represented, directly or indirectly, expressly or by implication, that they limit the disclosure of users' information to their third-party service providers only to the extent necessary to perform their services or functions on behalf of BLU and not for other purposes.

24. In fact, as described in Paragraph 19, personal information from BLU devices sold by Respondents was transmitted to ADUPS that was not needed to perform their services or functions on behalf of BLU, including FOTA updates. Therefore, the representation set forth in Paragraph 23 is false or misleading.

Deceptive Representation Regarding Data Security Practices

(Count II)

25. Through the means described in Paragraph 20, Respondents have represented, directly or indirectly, expressly or by implication, that they implement appropriate physical, electronic, and managerial security procedures to protect the personal information provided by consumers.

26. In fact, as described in Paragraphs 21-22, Respondents failed to implement appropriate physical, electronic, and managerial security procedures to protect the information provided by consumers. Therefore, the representation set forth in Paragraph 25 is false or misleading.

THEREFORE, the Federal Trade Commission, this sixth day of September 2018, has issued this Complaint against Respondents.

By the Commission.

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 Respondents with violation of the Federal Trade Commission Act.

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

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in 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 BLU Products, Inc. ("BLU") is a Delaware corporation with its principal office or place of business at 10814 NW 33rd St., Building 100, Doral, Florida 33172.

    b. Respondent Samuel Ohev-Zion is an owner and President of BLU Products, Inc. Individually or in concert with others, Mr. Samuel Ohev-Zion formulates, directs, or controls the policies, acts, or practices of BLU Products, Inc. His principal office or place of business is the same as that of BLU.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

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

    1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

    2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying

text or other visual elements so that it is easily noticed, read, and understood.

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

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

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

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

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

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

B. "Covered Device" means (a) any computing device sold by any Respondent that operates using an operating system, including smartphone, tablet, wearable, sensor, or any periphery of any portable computing device; and (b) the software used to access, operate, manage, or configure a device subject to part (a) of this definition, including, but not limited to, the firmware, web or mobile applications, and any related online services, that are advertised, developed, branded, or sold by any Respondent, directly or indirectly.

C. "Covered Information" means the following information from or about a consumer or their device: (a) Geolocation Information; or (b) content of text messages, audio conversations, photographs, or video communications.

D. "Geolocation Information" means precise location data of an individual or mobile device, including but not limited to GPS-based, WiFi-based, or cellular-based location information.

E. "Personal Information" means information from or about an individual consumer or Covered Device, including but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social

Security number; (f) a driver's license or other government-issued identification number; (g) a financial institution account number; (h) credit or debit card information; (i) a persistent identifier, such as a customer number held in a "cookie," a mobile device ID, or processor serial number; (j) Geolocation Information; (k) an authentication credential, such as a username and password; or (l) any other communications or content that is input into, stored on, captured with, accessed or transmitted through a Covered Device, including but not limited to network traffic or call log files, contacts, emails, text messages, photos, videos, and audio recordings.

F. "Respondents" means Corporate Respondent and Individual Respondent, individually, collectively, or in any combination.

1. "Corporate Respondent" means BLU, and its successors and assigns.

2. "Individual Respondent" means Samuel Ohev-Zion.

Provisions

I. Prohibition against Misrepresentations about Security and Privacy

IT IS ORDERED that Respondents and Respondents' officers, agents, representatives, employees, and all persons in active concert or participation with any of them, who receive notice of this order, whether acting, directly or indirectly, in connection with any product or service, must not misrepresent in any manner, expressly or by implication the extent to which they protect the privacy, confidentiality, security, or integrity of any Personal Information, including:

A. the extent to which they collect, use, share, or disclose any Personal Information;

B. the extent to which consumers may exercise control over the collection, use, or disclosure of Personal Information; and

C. the extent to which they implement physical, electronic, and managerial security procedures to protect Personal Information.

II. Mandated Data Security Program

IT IS FURTHER ORDERED that Corporate Respondent, and any business that Individual Respondent controls, directly or indirectly, and that collects, maintains, or stores Personal Information, must, no later than the effective date of this order, establish and implement, and thereafter maintain, a comprehensive security program ("Information Security Program") that is reasonably designed to (1) address security risks related to the development and management of new and existing Covered Devices, and (2) protect the security, confidentiality, and integrity of Personal Information. Such program, the content and implementation of which must be fully documented in writing, 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 Covered Device's function or the Personal Information, including:

A. The designation of an employee or employees to coordinate and be responsible for the Information Security Program;

B. The identification of material internal and external risks to the security of Covered Devices that could result in unauthorized access to or unauthorized modification of a Covered Device, and assessment of the sufficiency of any safeguards in place to control these risks;

C. The identification of material internal and external risks to the security, confidentiality, and integrity of Personal Information that could result in the unintentional exposure of such information or the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks;

D. The design and implementation of reasonable safeguards to control the risks identified through risk assessment, including through reasonable and appropriate software security techniques;

E. Regular monitoring of the effectiveness of the safeguards' key controls, systems, and procedures;

F. The development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding Personal Information they receive from Respondents, and requiring such service providers, by contract, to implement and maintain appropriate safeguards; and

G. The evaluation and adjustment of the Information Security Program in light of sub-provisions E-F, any changes to Respondents' operations or business arrangements, or any other circumstances that Respondents know or have reason to know may have an impact on the effectiveness of the Information Security Program.

III. Data Security Assessments by a Third Party

IT IS FURTHER ORDERED that, in connection with compliance with the Provision of this Order titled Mandated Data Security Program, Respondents must obtain initial and biennial assessments ("Assessments"):

A. The Assessments must be obtained from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. A professional qualified to prepare such Assessments must be: a person qualified as a Certified Secure Software Lifecycle Professional (CSSLP)

with experience programming secure Internet-accessible consumer-grade devices; or as a Certified Information System Security Professional (CISSP) with professional experience in the Software Development Security domain and in programming secure Internet-accessible consumer-grade devices; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection.

B. The reporting period for the Assessments must cover: (1) the first 180 days after the issuance date of the Order for the initial Assessment, and (2) each 2-year period thereafter for 20 years after issuance of the Order for the biennial Assessments.

C. Each Assessment must:

1. Set forth the administrative, technical, and physical safeguards that Respondents have implemented and maintained during the reporting period;

2. Explain how such safeguards are appropriate to Respondents' size and complexity, the nature and scope of Respondents' activities, and the sensitivity of the Covered Device's function or the Personal Information;

3. Explain how the safeguards that have been implemented meet or exceed the protections required by the Provision of this Order titled Mandated Data Security Program; and

4. Certify that Respondents' security program is operating with sufficient effectiveness to provide reasonable assurance that the security of Covered Devices and the privacy, security, confidentiality, and integrity of Personal Information is protected and has so operated throughout the reporting period.

D. Each Assessment must be completed within 60 days after the end of the reporting period to which the Assessment applies. Respondents must submit the initial Assessment to the Commission within 10 days after the Assessment has been completed. Respondents must retain all subsequent biennial Assessments, at least until the Order terminates. Respondents must submit any biennial Assessments to the Commission within 10 days of a request from a representative of the Commission.

IV. Notice and Affirmative Express Consent

IT IS FURTHER ORDERED that Respondents and Respondents' officers, agents, representatives, employees, and all persons in active concert or participation with any of them who receive notice of this order, whether acting directly or indirectly, in connection with any product or service, prior to collecting or disclosing any Covered Information, must:

A. clearly and conspicuously disclose to the consumer, separate and apart from any "privacy policy," "terms of use" page, or similar document: (1) the categories of Covered Information that Respondents collect, use, or share; (2) the identity of any third parties that receive any Covered Information; and (3) all purposes for Respondents' collection, use, or sharing of the Covered Information; and

B. obtain the consumer's affirmative express consent.

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

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

VI. Compliance Report and Notices

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

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

1. Corporate 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, and 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 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 activity, including title, role, responsibilities, participation, authority, control, and any ownership.

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

1. Each Respondent must submit notice of any change in: (a) any designated point of contact; or (b) the structure of any 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 Respondent has direct or indirect control. For each such business activity, also identify its name, physical address, and any Internet address.

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

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746,

such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

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

VII. 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, Corporate Respondent and Individual Respondent for any business that such Respondent, individually or collectively with any other Respondents, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

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

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

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

E. A copy of each widely disseminated representation by Respondents that describes the extent to which it uses or maintains any Personal Information, or protects the privacy, confidentiality, security, or integrity of any Personal Information and the extent to which consumers may exercise control over the collection, use, or disclosure of Personal Information; and

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

G. For 5 years 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 Respondents, including all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials concerning Respondents' compliance with related Provisions of this Order, for the compliance period covered by such Assessment.

VIII. Compliance Monitoring

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

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

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

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

IX. Order Effective Dates

IT IS FURTHER ORDERED that this Order will be final and effective date upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on September 6, 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.

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 BLU Products, Inc. ("BLU") and individual Respondent Samuel Ohev-Zion (collectively, "Respondents").

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

BLU is a mobile device manufacturer that sells smartphone and other mobile devices to consumers through retailers such as Amazon, Walmart, and Best Buy. Samuel Ohev-Zion is an owner and the President and CEO of BLU. Individually or in concert with others, Mr. Ohev-Zion controlled or had authority to control, or participated in the acts and practices alleged in the proposed complaint.

Respondents purchase the smartphones they sell to consumers from Original Device Manufacturers ("ODMs"). ODMs manufacture and customize mobile devices branded with the BLU name based on instructions provided by Respondents. As part of this process, since at least 2015, in order to provide firmware updating services, BLU has licensed software from ADUPS Technology Co., LTD ("ADUPS") and directed ODMs to preinstall this software on Respondents' mobile devices.

ADUPS is a China-based company that offers advertising, data mining, and firmware over-the-air ("FOTA") update services to mobile and Internet of Things connected devices. FOTA updates allow device manufacturers to issue security patches or operating system upgrades to devices over wireless and cellular networks.

Until at least November 2016 the ADUPS software on BLU devices transmitted personal information about consumers to ADUPS' servers without consumers' knowledge and consent, including the full contents of text messages, real-time cellular tower location data, call and text message logs with full telephone numbers, contact lists, and a list of applications used and installed on each device. ADUPS software collected and transmitted consumers' text messages to its servers every 72 hours. ADUPS software also collected consumers' location data in real-time and transmitted this data back to its servers every 24 hours.

The Commission's proposed two-count complaint alleges that Respondents violated Section 5(a) of the Federal Trade Commission Act. The first count alleges that Respondents deceived consumers about BLU's data collection and sharing practices by falsely representing in BLU's privacy policy that they limit the disclosure of users' information to third-party service providers only to the extent necessary to perform their services or functions on behalf of BLU and not for other purposes. Contrary to the privacy policy, personal information from BLU devices sold by Respondents was transmitted to ADUPS that was not needed to perform its services or functions on behalf of BLU, including FOTA updates.

The second count alleges that Respondents deceived consumers about BLU's data security practices by falsely representing that they implemented appropriate physical, electronic, and managerial security procedures to protect the personal information provided by consumers. The proposed complaint alleges that Respondents did not implement appropriate physical, electronic and managerial security procedures. For example, the proposed complaint alleges that Respondents failed to implement appropriate security procedures to oversee the security practices of their service providers, such as by: (1) failing to perform adequate due diligence in the selection and retention of service providers; (2) failing to adopt and implement written data security standards, policies, procedures or practices that apply to the oversight of their service providers; (3) failing to contractually require their service providers to adopt and implement data security standards, policies, procedures or practices; and (4) failing to adequately assess the privacy and security risks of third-party software, such as ADUPS.

The proposed order contains provisions designed to prevent Respondents from engaging in the same or similar acts or practices in the future.

Part I of the proposed order prohibits Respondents from misrepresenting: (1) the extent to which they collect, use, share, or disclose any personal information; (2) the extent to which consumers may exercise control over the collection, use, or disclosure of personal information; and (3) the extent to which the implement physical, electronic, and managerial security procedures to protect personal information.

Part II of the proposed order requires Respondents to establish and implement, and thereafter maintain, a comprehensive security program that is reasonably designed to: (1) address security risks related to the development and management of new and existing covered devices, and (2) protect the security, confidentiality, and integrity of personal information. The program must be fully 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 covered device's function or the personal information.

Part III of the proposed order requires Respondents to obtain an assessment and report from a qualified, objective, independent third-party professional covering the first one hundred eighty (180) days after issuance of the order and each 2-year period thereafter for 20 years after issuance of the order. Each assessment must, among other things: (1) set forth the administrative, technical, and physical safeguards that Respondents have implemented during the reporting period; (2) explain how such safeguards are appropriate to Respondents' size and complexity, the nature and scope of Respondents' activities, and the sensitivity of the covered device's function or the personal information; (3) explain how the safeguards implemented meet or exceed the protections required by Part II of the proposed order; and (4) certify that Respondents' security program is operating with sufficient effectiveness to provide reasonable assurance that the security of covered devices and the privacy, security, confidentiality, and integrity of personal information is protected.

Part IV of the proposed order requires Respondents, prior to collecting or disclosing any covered information, to: (A) clearly and conspicuously disclose to the consumer, separate and apart from "privacy policy," "terms of use" page, or similar document, (1) the categories of covered information that Respondents collect, use, or share, (2) the identity of any third parties that receive any covered information, and (3) all purposes for Respondents' collection, use, or sharing of covered information; and (B) obtain the consumer's affirmative express consent.

Parts V through IX of the proposed order are reporting and compliance provisions. Part V requires acknowledgment of the order and dissemination of the order now and in the future to persons with supervisory responsibilities and all employees, agents, and representatives who participate in conducted relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status and mandates that Respondents submit an initial compliance report to the FTC. Part VII requires Respondents to retain documents relating to its compliance with the order for a five (5) year period. Part VIII mandates that Respondents make available to the FTC information or subsequent compliance reports, as requested. Part IX is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

IN THE MATTER OF

GRIFOLS, S.A.,
AND
GRIFOLS SHARED SERVICES NORTH AMERICA, 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-4654; File No. 181 0081
Complaint, July 31, 2018 – Decision, September 17, 2018

This consent order addresses the $324 million acquisition by Grifols S.A. of Biotest US Corporation. 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 (1) eliminating actual, direct, and substantial competition between Grifols and Biotest US in three local markets for the collection of human source plasma; (2) increasing the ability of the merged entity unilaterally to decrease donation fees for the collection of human source plasma in each local market; (3) reducing incentives to improve service or quality in each local market for the collection of human source plasma; and (4) increasing the likelihood that Grifols would unilaterally exercise market power in the U.S. market for hepatitis B immune globulin ("HBIG"). The consent order requires Grifols to divest plasma collection centers in three local geographic markets in the United States to Kedplasma LLC, a subsidiary of Kedrion Biopharma Inc. The Order also prohibits Grifols from acquiring any ownership interest in ADMA Biologics, which had been partially owned by Biotest US, without prior notification.

Participants

For the *Commission*: *Jean McNeil, Christina Perez* and *David von Nirschl.*

For the *Respondents*: *John Ingrassia* and *Colin Kass, Proskauer Rose 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 Grifols, S.A. ("Grifols"), a corporation subject to the jurisdiction of the Commission, has entered into an acquisition with Biotest US Corporation ("Biotest US"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Grifols, is a corporation organized, existing, and doing business under and by virtue of the laws of the Kingdom of Spain with its executive offices and principal place of business located at Avinguda de la Generalitat, 152-158, Parc de Negocis Can Sant Joan, Barcelona, Spain 08174. Its United States address for service of process and the

Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: General Counsel, c/o Grifols Shared Services North America, Inc., 2410 Lillyvale Avenue, Los Angeles, California 90032. In 2016, Grifols had net revenues of approximately $4.3 billion, of which 66 percent was generated from its North American operations.

2. Respondent Grifols Shared Services North America, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia with its executive offices and principal place of business located at 2410 Lillyvale Avenue, Los Angeles, California 90032.

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.

II. PARTIES

4. Biotest US, 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 901 Yamato Road, Suite 101, Boca Raton, Florida 33431. Through its subsidiary, Biotest Pharmaceutical Corporation, Biotest US owns a network of 22 U.S. plasma collection centers. Prior to July 20, 2018 it also owned 41 percent of the stock of ADMA Biologics, Inc. ("ADMA"). ADMA develops, manufactures and sells human blood plasma-derived products in the United States. In 2017, Biotest US generated approximately $187 million in revenues.

5. The Biotest Divestiture Trust, is a statutory trust organized under the laws of the State of Maryland and pursuant to the terms of a declaration of trust, dated January 17, 2018, and an Amended and Restated Declaration of Trust, dated July 8, 2018, by and among Biotest AG (an Aktiengesellschaft organized under the laws of the Federal Republic of Germany), as grantor, and Eric Rosenbach, a U.S. citizen. The mailing address of The Biotest Divestiture Trust is c/o Eric Rosenbach, Trustee, 402 Norfolk Street, Cambridge, Massachusetts 02139.

III. THE PROPOSED ACQUISITION

6. Pursuant to agreements dated December 22, 2017, Grifols agreed to acquire all of the outstanding voting securities of Biotest US from The Biotest Divestiture Trust, which included the outstanding securities of ADMA owned by Biotest US ("acquisition agreement"). Grifols and Biotest US subsequently modified the acquisition agreement ("modified acquisition") to exclude the outstanding securities of ADMA and revalued the acquisition. The acquisition agreement and the modified acquisition (collectively, "the Acquisition") are subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

IV. THE RELEVANT MARKETS

7. The relevant lines of commerce in which to analyze the effects of the Acquisition are:

a. the development, license, manufacture, marketing, distribution, and sale of hepatitis B immune globulin; and

b. the collection of human source plasma.

8. Hepatitis B immune globulin is a plasma-derived injectable medicine used to provide patients with hepatitis B antibodies to prevent hepatitis B infections.

9. Human source plasma is a critical input for a variety of medical products that are used to treat diseases and conditions in a variety of therapeutic areas, including pulmonology, hematology, immunology, infectious disease and trauma. Human source plasma is collected from donors at plasma collection centers.

10. The relevant geographic area in which to assess the competitive effects of the Acquisition on the hepatitis B immune globulin market is the United States.

11. The relevant geographic areas in which to assess the competitive effects of the Acquisition on the collection of human plasma market are Lincoln, Nebraska; Augusta, Georgia; and Youngstown, Ohio.

V. THE STRUCTURE OF THE MARKETS

12. Only three companies—Grifols, ADMA and Saol—sell hepatitis B immune globulin in the United States. ADMA has the largest share, followed by Saol and then Grifols. Biotest US owned 41 percent of the outstanding shares of ADMA. Without the modification of the acquisition agreement, the Acquisition would have resulted in Respondent Grifols owning 41 percent of the stock of its most significant competitor.

13. Respondent Grifols and Biotest US are the only two participants in the human source plasma collection market in the three geographic areas identified in Paragraph 11. The Acquisition would give Respondent Grifols a monopoly in each of the relevant markets.

VI. ENTRY CONDITIONS

14. Entry into the hepatitis B immune globulin relevant market would not be timely, likely, or sufficient in magnitude, character, and scope to have deterred or counteracted the anticompetitive effects of the acquisition agreement. Entry would not be timely because of lengthy drug development and FDA approval timelines. In addition, entry sufficient to deter or counteract the likely competitive harm of the acquisition agreement was unlikely to occur.

15. Entry into the collection of human source plasma markets is unlikely to be timely and sufficient to deter or counteract the competitive harm likely to result from the Acquisition.

Entry is impeded by the scarcity of qualified donors in the geographic areas identified in Paragraph 11, such that these areas are unlikely to support a new human source plasma collection center.

VII. EFFECTS OF THE ACQUISITION

16. The effects of the Acquisition, if consummated, may be to substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. by increasing the likelihood that Respondent Grifols would unilaterally exercise market power in the market for hepatitis B immune globulin;

b. by eliminating actual, direct, and substantial competition between Grifols and Biotest US in the market for the collection human source plasma;

c. by increasing the ability of the merged entity unilaterally to decrease donation fees in the market for the collection of human source plasma; and

d. by reducing incentives to improve service or quality in the market for the collection of human source plasma.

VIII. VIOLATIONS CHARGED

17. The Acquisition described in Paragraph 6 constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

18. The Acquisition described in Paragraph 6, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirty-first day of July, 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 Grifols Shared Services North America, Inc., a wholly owned subsidiary of Respondent Grifols S.A. (collectively "Grifols" or "Respondents") of all of

the outstanding voting securities of Biotest US Corporation ("Biotest US"). The Biotest Divestiture Trust is the ultimate parent entity of Biotest US. At the time of the announcement of the proposed acquisition, Biotest Pharmaceutical Corporation, a subsidiary of Biotest US, owned a portion of the outstanding voting securities of ADMA Biologics, Inc. ("ADMA"). Prior to Respondents' proposed acquisition of Biotest US, Biotest US transferred or will have transferred all of the aforementioned voting securities of ADMA to either The Biotest Divestiture Trust or to ADMA. Accordingly, ADMA's voting securities will not be acquired or held by Respondents. The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint reflecting the foregoing transactions, 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 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 Grifols, S.A., is a corporation organized, existing, and doing business under and by virtue of the laws of the Kingdom of Spain with its executive offices and principal place of business located at Avinguda de la Generalitat, 152-158, Parc de Negocis Can Sant Joan, Barcelona, Spain 08174. Its United States address for service of process and the Complaint, the Decision and Order, and the Order to Maintain Assets, is as follows: General Counsel, c/o Grifols Shared Services North America, Inc., 2410 Lillyvale Avenue, Los Angeles, California 90032.

2. Respondent Grifols Shared Services North America, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia with its executive offices and principal place of business located at 2410 Lillyvale Avenue, Los Angeles, California 90032.

3. Biotest US, 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 901 Yamato Road, Suite 101, Boca Raton, Florida 33431.

4. The Biotest Divestiture Trust, is a statutory trust organized under the laws of the State of Maryland and pursuant to the terms of a Declaration of Trust, dated January 17, 2018, and an Amended and Restated Declaration of Trust, dated July 8, 2018, by and among Biotest AG (an Aktiengesellschaft organized under the laws of the Federal Republic of Germany), as grantor, and Eric Rosenbach, a U.S. citizen. The mailing address of The Biotest Divestiture Trust is c/o Eric Rosenbach, Trustee, 402 Norfolk St., Cambridge, Massachusetts 02139.

5. 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 HEREBY 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. "Respondents" means, individually and collectively: Grifols, S.A. and Grifols Shared Services North America, Inc.; their directors, officers, employees, agents, representatives, successors, and assigns; and their joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Grifols, S.A. or Grifols Shared Services North America, Inc. (including, without limitation, Biomat USA), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Respondents will include Biotest US.

B. "Biotest US" means Biotest US Corporation; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Biotest US Corporation (including, without limitation, Biotest Pharmaceuticals Corporation), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Decision and Order" means the:

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

2. Final Decision and Order following its issuance and service by the Commission in this matter.

E. "Plasma Donor Center Divestiture Business(es)" means the Business of the Respondents related to each of the Plasma Donor Center Divestiture Facilities to the extent that such Business is owned, controlled, or managed by the Respondents and the assets related to such Business to the extent such assets are owned by, controlled by, managed by, or licensed to, the Respondents.

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

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

II.

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

A. Until Respondents fully transfer and deliver each of the respective Plasma Donor Center Divestiture 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 Plasma Donor Center Divestiture Businesses, to minimize any risk of loss of competitive potential for such Plasma Donor Center Divestiture Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Plasma Donor Center Divestiture Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Plasma Donor Center Divestiture 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 Plasma Donor Center Divestiture Businesses.

B. Until Respondents fully transfer and deliver each of the respective Plasma Donor Center Divestiture Assets to an Acquirer, Respondents shall maintain the operations of the related Plasma Donor Center Divestiture Businesses in the regular and ordinary course of business and in accordance with past practice (including, without limitation, regular repair and maintenance of the assets of such business and as consistent with standard operating procedures to ensure professionalism, safety, and quality of each facility and the associated donors and employees, and to maintain any licenses with the FDA for the facility) and/or as may be necessary to preserve the full economic viability, marketability, and competitiveness of such Plasma Donor Center Divestiture Businesses and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; donors; customers; Agencies; employees; and others having business relations with each of the respective Plasma Donor Center

Divestiture Businesses. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing each of the respective Plasma Donor Center Divestiture 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 Plasma Donor Center Divestiture Business;

2. continuing, at least at their scheduled pace, any expenditures for each of the respective Plasma Donor Center Divestiture Businesses authorized prior to the date the Consent Agreement was signed by the Respondents, including, but not limited to, all collecting, processing, and testing of human blood or blood components (*e.g.*, plasma), evaluating and screening of donors, programing and marketing related to the recruitment of new donors and retention of donors (including, without limitation, any remuneration programs and the expenses related thereto and other donor services), and other marketing, and purchasing expenditures;

3. providing such resources as may be necessary to respond to competition against each of the Plasma Donor Center Divestiture Facilities and/or to prevent any diminution in the collection of human blood or blood components (*e.g.*, plasma) at each of the Plasma Donor Center Divestiture Facilities during and after the Acquisition process and prior to the complete transfer and delivery of the related Plasma Donor Center Divestiture Assets to an Acquirer;

4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Plasma Donor Center Divestiture Facilities;

5. making available for use by each of the respective Plasma Donor Center Divestiture 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 Plasma Donor Center Divestiture Business; and

6. providing such support services to each of the respective Plasma Donor Center Divestiture Businesses as were being provided to such Plasma Donor Center Divestiture Business by Respondents as of the date the Consent Agreement was signed by Respondents, including, without limitation, use of the Blood Establishment Computer System.

C. Until Respondents fully transfer and deliver each of the respective Plasma Donor Center Divestiture 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 Plasma Donor Center Divestiture Facility for the relevant Plasma Donor Center Divestiture Facility's last fiscal year, including, without limitation, phlebotomists, licensed medical personnel, and personnel trained in the use of the Blood Establishment Computer System.

D. Respondents shall:

1. for a period of twelve (12) months after the Closing Date, provide the Acquirer with the opportunity to enter into employment contracts with the employees that work in the locations of each of the Plasma Donor Center Divestiture Facilities; and

2. until the Closing Date, provide all of the above-described employees with reasonable financial incentives to continue in their positions consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Business related to each of the Plasma Donor Center Divestiture Facility. Such incentives shall include a continuation of all employee compensation and benefits offered by a Respondent until the Closing Date(s).

E. Pending divestiture of the Plasma Donor Center Divestiture Assets, Respondents shall:

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

   a. the requirements of this Order;

   b. Respondents' obligations to the Acquirer under the terms of any related Remedial Agreement; or

   c. applicable Law;

2. not disclose or convey any such Plasma Donor Center Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer, (ii) other Persons specifically authorized by the Acquirer or staff of the Commission to receive such information (*e.g.*, employees of the Respondents responsible for providing transitional services to the 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 Plasma Donor Center Confidential Business Information to the

employees associated with the Plasma Donor Centers that are beingretained by the Respondents; and

4. institute procedures and requirements to ensure that the above-described employees:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any Plasma Donor Center Confidential Business Information in contravention of this Order to Maintain Assets; and

   b. do not solicit, access or use any Plasma Donor Center Confidential Business Information that they are prohibited from receiving for any reason or purpose.

F. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Plasma Donor Center Divestiture Businesses through their full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for the Plasma Donor Center Divestiture Businesses; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Plasma Donor Center Divestiture Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Monitor") to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.

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

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

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

1. The Monitor shall have the power and authority to monitor each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

2. The Monitor shall act in 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 Respondents complete each of the divestitures required by this Order and complete any transitional services required to be provided to an Acquirer under this Order or related Remedial Agreement(s), *provided, however,* that the Monitor's service shall not extend more than two (2) 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 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.

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

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

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

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

M. The Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as the Monitor pursuant to the Decision and Order.

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

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every sixty (60) days thereafter until Respondents have fully complied with this Order to Maintain Assets, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Orders.

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, and (ii) transitional services being provided by the Respondents to the Acquirer; and a detailed description of the timing for the completion of such obligations.

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 and to the Compliance Division at 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: Grifols, S.A.; Grifols Shared Services North America, Inc.; Biotest US Corporation; or The Biotest Divestiture Trust;

B. any proposed acquisition, merger, or consolidation of: ; Grifols, S.A.; Grifols Shared Services North America, Inc.; Biotest US Corporation; or The Biotest Divestiture Trust; 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 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

B. the day after the divestiture of all of the Plasma Donor Center Divestiture Assets, as required by and described in the Decision and Order, has been completed; or

C. 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 Grifols Shared Services North America, Inc., a wholly owned subsidiary of Respondent Grifols S.A. (collectively "Grifols" or "Respondents") of all of the outstanding voting securities of Biotest US Corporation ("Biotest US"). The Biotest Divestiture Trust is the ultimate parent entity of Biotest US. At the time of the announcement of the proposed acquisition, Biotest Pharmaceutical Corporation, a subsidiary of Biotest US, owned a portion of the outstanding voting securities of ADMA Biologics, Inc. ("ADMA"). Prior to

Respondents' proposed acquisition of Biotest US, Biotest US transferred or will have transferred all of the aforementioned voting securities of ADMA to either The Biotest Divestiture Trust or to ADMA. Accordingly, ADMA's voting securities will not be acquired or held by Respondents. The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint reflecting the foregoing transactions, 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 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. 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 described in Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Grifols, S.A., is a corporation organized, existing, and doing business under and by virtue of the laws of the Kingdom of Spain with its executive offices and principal place of business located at Avinguda de la Generalitat, 152-158, Parc de Negocis Can Sant Joan, Barcelona, Spain 08174. Its United States address for service of process and the Complaint, the Decision and Order, and the Order to Maintain Assets, is as follows: General Counsel, c/o Grifols Shared Services North America, Inc., 2410 Lillyvale Avenue, Los Angeles, California 90032.

2. Respondent Grifols Shared Services North America, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia with its executive offices and principal place of business located at 2410 Lillyvale Avenue, Los Angeles, California 90032.

3. Biotest US, 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 901 Yamato Road, Suite 101, Boca Raton, Florida 33431.

4. The Biotest Divestiture Trust, is a statutory trust organized under the laws of Maryland and pursuant to the terms of a Declaration of Trust, dated January 17, 2018, and an Amended and Restated Declaration of Trust, dated July 8, 2018, by and among Biotest AG (an Aktiengesellschaft organized under the laws of the Federal Republic of Germany), as grantor, and Eric Rosenbach, a U.S. citizen. The mailing address of The Biotest Divestiture Trust is c/o Eric Rosenbach, Trustee, 402 Norfolk St., Cambridge, Massachusetts 02139. The Trust Agreement for the Biotest Divestiture Trust is contained in Non-Public Appendix I of the Order.

5. 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 HEREBY ORDERED that, as used in the Order, the following definitions shall apply:

A. "Respondents" means, individually and collectively: Grifols, S.A. and Grifols Shared Services North America, Inc.; their directors, officers, employees, agents, representatives, successors, and assigns; and their joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Grifols, S.A. or Grifols Shared Services North America, Inc. (including, without limitation, Biomat USA), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Respondents will include Biotest US.

B. "Biotest US" means Biotest US Corporation; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Biotest US Corporation (including, without limitation, Biotest Pharmaceuticals Corporation), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

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

1. a Person specified by name in this Order to acquire particular assets or rights that 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.

E. "Acquisition" means Respondents' acquisition of Biotest US pursuant to the Acquisition Agreement.

F. "Acquisition Agreement" means the *Stock Purchase Agreement* by and between Grifols Shared Services North America, Inc., Biotest US Corporation, Biotest AG, and, solely for the purposes of Section 7.13 of the *Stock Purchase Agreement*, as guarantor, Grifols, S.A. dated December 22, 2017, and the *Amendment* [amendment insert] dated [insert]that were submitted by the Respondents to the Commission in this matter. The Acquisition Agreement is contained in Non-Public Appendix I.

G. "Acquisition Date" means the date on which Respondents acquire fifty percent (50%) or more of the outstanding voting securities of Biotest US.

H. "ADMA" means ADMA Biologics, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 465 State Route 17, Ramsey, New Jersey 07446.

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 operation of the Business of a Plasma Donor Center. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA").

J. "Applicant Plasma" means human plasma collected from any of the Plasma Donor Center Divestiture Facilities that has not been fully tested and cleared within the Respondents' donor management system (*i.e.*, Blood Establishment Computer System) for subsequent use or distribution.

K. "Blood Establishment Computer System" means the computer hardware, computer software, peripheral devices, networks, and documentation (*e.g.*, users manuals and standard operating procedures) as required by the FDA pursuant to 21 CFR 211.68, 606.100(b), and 606.160 that apply to blood establishment validation systems, and any other components of such a system as required by the FDA in order to (i) ensure the proper diagnosis of disease or other conditions in donors of human blood or blood components, or (ii) to prevent disease by preventing the release of unsuitable blood and blood components.

L. "Business" means the activities related to the collection and processing of human blood and blood components (*e.g.*, plasma) conducted at Plasma Donor Centers.

M. "Closing Date" means, as to each Plasma Donor Center Divestiture Facility, 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 Plasma Donor Center Divestiture Facility to an Acquirer pursuant to this Order.

N. "Collection Materials" means materials used under the standard operation procedures for blood collection, handling, and processing at each of the Plasma Donor Center Divestiture Facilities (*e.g.*, plasma collection tubes).

O. "Current Operating Condition" means that, as of the date of delivery to the Acquirer, the machine meets or exceeds all current operational, functional, and productive capabilities required to perform plasmapheresis.

P. "Disposable Medical Supplies" means general medical products regularly used in the conduct of the Business of a Plasma Donor Center that are intended for one-time or temporary use (*e.g.*, gloves, needles, bandages, paper products, syringes, and wipes).

Q. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph V of this Order.

R. "Domain Name" means the domain name(s) (uniform resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration; *provided, however*, "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

S. "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.

T. "Fixtures and Equipment" means all furniture, fixtures, furnishings, machinery, equipment, supplies and other tangible personal property used or held for use in the operation of the Business of each of the Plasma Donor Center Divestiture Facilities respectively, or if leased, the Respondents' leasehold interest therein.

U. "Kedplasma" means (i) Kedplasma LLC, wholly-owned subsidiary of Kedrion S.p.a. and 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 Parker Plaza, 400 Kelby Street, Fort Lee, New Jersey 07024; or (ii) Kedrion S.p.a, a corporation organized, existing, and doing business under and by virtue of the laws of the Italian Republic with its registered office located at Località Ai Conti – 55051 Barga (Lucca) - frazione Castelvecchio Pascoli, Italy and any other subsidiary of Kedrion S.p.a.

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

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

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

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

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

AA. "Ownership Interest" means any voting or non-voting stock, share capital, equity, notes convertible into any voting or non-voting stock, or other interest in an entity.

BB. "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.

CC. "Plasma Donor Center(s)" means a facility used for the collection of whole blood or plasma from human donors that operates in accordance with FDA rules related to the evaluation of the eligibility of potential donors and to the storing, processing, tracking, testing, and shipping of human blood or blood components for further manufacturing and use in blood or plasma-based therapies.

DD. "Plasma Donor Center 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 operation of the Business of a Plasma Donor Center.

EE. "Plasma Donor Center 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 of the Plasma Donor Center Divestiture Facilities. The term "Plasma Donor Center 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 Business of a particular Plasma Donor Center Divestiture Facility;

2. information specifically excluded from the Plasma Donor Center Divestiture Assets conveyed to the Acquirer;

3. information that is contained in documents, records, or books of a Respondent that is provided to an Acquirer by a Respondent that is unrelated to the Plasma Donor Center Divestiture Facilities acquired by that Acquirer or that is exclusively related to Plasma Donor Centers retained by the Respondents; and

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

FF. "Plasma Donor Center Contracts" means all contracts or agreements:

1. pursuant to which a Third Party provides any specialized services necessary to the operation of the Business of the specified Plasma Donor Center Divestiture Facility to a Respondent including, but not limited to, consultation arrangements; and/or

2. pursuant to which a Third Party provides any equipment necessary to the operation of the Business of the specified Plasma Donor Center Divestiture Facility to a Respondent; and

3. pursuant to which a Third Party provides any software necessary to the operation of the Business of the specified Plasma Donor Center Divestiture Facility to a Respondent.

provided, however, that where any such contract or agreement also relates to a Plasma Donor Center(s) that is being retained by the Respondents, 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 Plasma Donor Center Divestiture Facility, but concurrently may retain similar rights for the Plasma Donor Centers retained by the Respondents.

GG. "Plasma Donor Center Divestiture Agreement(s)" means the following:

1. *Plasma Center Purchase Agreement* by and between Kedplasma LLC and Biomat USA, Inc., dated June 18, 2018;

2. *Transition Services Agreement* by and between Kedplasma LLC and Biomat USA, Inc., dated June 18, 2018; and

3. all amendments, exhibits, attachments, agreements, and schedules attached to and submitted to the Commission with the foregoing listed agreement(s).

The Plasma Donor Center Divestiture Agreements are contained in Non-Public Appendix II.A. The Plasma Donor Center 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.

HH. "Plasma Donor Center Divestiture Assets" means all rights, title, and interest in and to the Business of Respondents related to each of the Plasma Donor Center Divestiture Facilities, to the extent legally transferable and as such assets and rights are in existence as of the date the Respondents sign 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, including, without limitation, the following:

1. all rights to all of the leasehold interests in the real property at which the Plasma Donor Center Divestiture Facility is located and the building and improvements thereon;

2. all rights to all of the Plasma Donor Center Contracts;

3. all Fixtures and Equipment;

4. all Plasma Donor Center Approvals;

5. at the Acquirer's option, all Applicant Plasma in inventory as of Closing Date;

6. at the Acquirer's option, either (i) all plasmapheresis machines used or held for use in the operation of the Business at each respective Plasma Donor Center Divestiture Facility (which machines shall be delivered to the Acquirer in Current Operating Condition), or (ii) a license for an interim period to use all plasmapheresis machines used or held for use in the operation of the Business at each respective Plasma Donor Center Divestiture Facility (which machines shall be provided to the Acquirer in Current Operating Condition) for a time sufficient to allow the Acquirer to transition to the Acquirer's own plasmapheresis machines;

7. at least two (2) weeks supply (in the ordinary course of business) of Collection Materials at each Plasma Donor Center Divestiture Facility;

8. at least two (2) weeks supply (in the ordinary course of business) of Disposable Medical Supplies at each Plasma Donor Center Divestiture Facility;

9. at least two (2) weeks supply (in the ordinary course of business) of janitorial supplies, including such supplies as are required to prevent exposure to potentially infectious materials;

10. all donor records and registries related to the blood or blood component (*e.g.*, plasma) donations made at the particular Plasma Donor Center Divestiture Facility, including any records made by personnel at that Plasma Donor Center Divestiture Facility relating to the collection of plasma from a donor;

11. all computers and computer equipment, printers, software and databases, routers, servers, switches and timeclocks and documentation related to any of the foregoing used or held for use in the operation of the Business of each Plasma Donor Center Divestiture Facility (all cabling within each center shall remain in place), which shall also include access to any computer databases or donor information connected or related to each Plasma Donor Center Divestiture Facility at the corporate level held outside the respective Plasma Donor Center Divestiture Facility;

12. at the Acquirer's option, a license for an interim period to the Blood Establishment Computer System that was in use in connection with the operation of each Plasma Donor Center Divestiture Facility prior to the Acquisition for a time sufficient to allow the Acquirer to transition to the Acquirer's own Blood Establishment Computer System for that facility;

13. all Website(s) related exclusively to the specified Plasma Donor Center Divestiture Facility;

14. the content related exclusively to the specified Plasma Donor Center Divestiture Facility that is displayed on any Website that is not dedicated exclusively to the specified Plasma Donor Center Divestiture Facility;

15. at the option of the Acquirer, all Plasma Donor Center Contracts related to the specified Plasma Donor Center Divestiture Facility; and

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

provided, *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 Plasma Donor Center Divestiture Facility and a Plasma Donor Center retained by the Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the specified Plasma Donor Center Divestiture Facility; or (ii) for which any Respondent has a legal obligation to retain the original copies, that Respondent shall be required to provide only copies or relevant excerpts of the documents and materials

containing this information. In instances where such copies are provided to the Acquirer, the Respondents shall provide the Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the Respondents provide the Acquirer with the above-described information without requiring a Respondent completely to divest itself of information that, in content, also relates to Plasma Donor Centers retained by the Respondents.

II. "Plasma Donor Center Divestiture Facility(ies)" means the Plasma Donor Centers located at the following addresses, individually and collectively:

1. 3160 Wrightsboro Road, Augusta, Georgia 30909;

2. 2002 N Street, Lincoln, Nebraska 68510; and

3. 444 Martin Luther King Jr. Boulevard, Youngstown, Ohio 44502.

JJ. "Plasma Donor Center Employee Information" means the following, for each employee of a Plasma Donor Center Divestiture Facility, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each employee of a Plasma Donor Center Divestiture Facility (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 Plasma Donor Center Divestiture Facility; *provided, however*, in lieu of this description, a Respondent may provide the employee's most recent performance appraisal;

   e. the base salary or current wages;

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

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

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

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

KK. "Relevant Geographic Markets" means the following:

1. City of Lincoln, Nebraska;

2. City of Augusta, Georgia; and

3. City of Youngstown, Ohio.

LL. "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) or services, 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 Plasma Donor Center Divestiture Facility(ies) or other Order requirement 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) or services, and that has been approved by the Commission to accomplish the requirements of this Order; and/or

4. any agreement between a Respondent and a Third Party to effect the assignment of assets or rights of that Respondent related to a Plasma Donor Center Divestiture Facility(ies) or other Order requirement 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.

MM. "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.

NN. "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 Plasma Donor Center Divestiture Facilities.

II.

IT IS FURTHER ORDERED that:

A. Not later than thirty (30) days after the Order Date, Respondents shall divest the Plasma Donor Center Divestiture Assets, absolutely and in good faith, to Kedplasma pursuant to, and in accordance with, the Plasma Donor Center 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 Kedplasma or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Plasma Donor Center Divestiture Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Plasma Donor Center Divestiture Assets to Kedplasma 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 Kedplasma is not an acceptable purchaser of any of the Plasma Donor Center Divestiture Assets, then Respondents shall immediately rescind the transaction with Kedplasma, in whole or in part, as directed by the Commission, and shall divest the Plasma Donor Center Divestiture Assets within one hundred eighty (180) days after the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the

Commission, and only in a manner that receives the prior approval of the Commission;

provided further, that if Respondents have divested the Plasma Donor Center Divestiture Assets to Kedplasma 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 Plasma Donor Center Divestiture Assets to Kedplasma (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Prior to the Closing Date, Respondents shall provide the Acquirer with the opportunity to review all contracts or agreements that are Plasma Donor Center Contracts for the purposes of the Acquirer's determination whether to assume such contracts or agreements.

C. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the Plasma Donor Center Divestiture Assets to an Acquirer, and to permit the Acquirer to continue the Business of the Plasma Donor Center Divestiture Facility;

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

D. Respondents shall:

1. submit to the Acquirer, at Respondents' expense, all Plasma Donor Center Confidential Business Information;

2. deliver all Plasma Donor Center Confidential Business Information:

   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 Plasma Donor Center Confidential Business Information to the Acquirer, provide that Acquirer and the Monitor (if any has been appointed) with access to all such Plasma Donor Center Confidential Business Information and employees who possess or

are able to locate such information for the purposes of identifying the books, records, and files that contain such Plasma Donor Center Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

4. not use, directly or indirectly, any such Plasma Donor Center Confidential Business Information other than as necessary to comply with the following:

   a. the requirements of this Order;

   b. Respondents' obligations to the Acquirer under the terms of any related Remedial Agreement; or

   c. applicable Law;

5. not disclose or convey any Plasma Donor Center Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer, (ii) other Persons specifically authorized by that Acquirer or staff of the Commission to receive such information, (iii) the Commission, or (iv) the Monitor (if any has been appointed) and *except* to the extent necessary to comply with applicable Law;

6. not provide, disclose or otherwise make available, directly or indirectly, any Plasma Donor Center Confidential Business Information to the employees associated with the Plasma Donor Centers that are being retained by the Respondents; and

7. institute procedures and requirements to ensure that the above-described employees:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any Plasma Donor Center Confidential Business Information in contravention of this Order to Maintain Assets; and

   b. do not solicit, access or use any Plasma Donor Center Confidential Business Information that they are prohibited from receiving for any reason or purpose.

E. Respondents shall:

1. not later than ten (10) days after a request from the Acquirer, provide the Acquirer with the Plasma Donor Center Employee Information;

2. for a period of twelve (12) months after the Closing Date, provide the Acquirer with the opportunity to enter into employment contracts with the

employees that work in the locations of each of the Plasma Donor Center Divestiture;

3. until the Closing Date, provide all of the above-described employees with reasonable financial incentives to continue in their positions consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Business related to each of the Plasma Donor Center Divestiture Facility. Such incentives shall include a continuation of all employee compensation and benefits offered by a Respondent until the Closing Date(s).

F. Until Respondents complete the divestiture of the Plasma Donor Center Divestiture Assets to the Acquirer:

1. Respondents shall take actions as are necessary to:

a. maintain the full economic viability and marketability of the Business associated with each Plasma Donor Center Divestiture Facility;

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 Plasma Donor Center Divestiture Assets;

d. ensure the assets related to each Plasma Donor Center Divestiture Facility are provided to the Acquirer without disruption, delay, or impairment of any regulatory approval processes related to the Business associated with each Plasma Donor Center Divestiture Facility; and

2. Respondents shall not sell, transfer, encumber, or otherwise impair the Plasma Donor Center Divestiture Assets (other than in the manner prescribed in this Order).

G. For a period of ten (10) years beginning on the Order Date, Respondents shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing prior written notification to the Commission:

1. acquire any ownership or leasehold interest in any facility that has operated as a Plasma Donor Center within (6) months prior to the date of such proposed acquisition within any of the Relevant Geographic Markets; or

2. acquire any Ownership Interest in any entity that owns any interest in or operates a Plasma Donor Center, or owned any interest in or operated any Plasma Donor Center within six (6) months prior to such proposed acquisition in any of the Relevant Geographic Markets;

provided however, that advance written notification shall not apply to the construction of new facilities by Respondents or the acquisition of or leasing of a facility that has not operated as a Plasma Donor Center within six (6) months prior to Respondents' offer to purchase or lease.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (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 Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition; *provided, however*, that the advanced written notification provisions of this Paragraph shall not apply to any 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.

H. The purpose of the divestiture of the Plasma Donor Center Divestiture Assets and the related obligations imposed on the Respondents by this Order is:

1. to ensure the continued use of such assets for the purposes of the Business associated with each Plasma Donor Center Divestiture Facility;

2. to create a viable and effective competitor that is independent of Respondents in the Business of each Plasma Donor Center Divestiture Facility; and

3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

A. In connection with, or as a result of Respondents' acquisition of the voting securities of Biotest US or pursuant to the Acquisition Agreement, Respondents shall not, directly or indirectly, acquire or hold:

1. any Ownership Interest in ADMA;

2. any rights to nominate or obtain representation on the Board of Directors of ADMA;

3. any rights to exercise dominion or control over ADMA; or

4. any rights to direct, supervise, or manage the business of ADMA (including any rights to participate in the formulation, determination, or direction of any business decisions of ADMA).

B. For a period of ten (10) years beginning on the Order Date, Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advanced written notification to the Commission:

1. acquire any Ownership Interest in ADMA;

2. acquire any rights to nominate or obtain representation on the Board of Directors of ADMA; or

3. acquire any assets or rights owned or controlled by ADMA exclusively used in the research, development, manufacture, distribution, marketing, or sale of hepatitis B immune globulin (*e.g.*, Nabi-HB®), including, without limitation, any FDA applications or approvals (*e.g.*, biological license) related to hepatitis B immune globulin.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (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 Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R.

§ 803.20), Respondents shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition; *provided, however*, that the advanced written notification provisions of this Paragraph shall not apply to any 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.

The purpose of the requirements of Paragraph III is to ensure that the Respondents will not hold the voting securities of ADMA and will not seek to exert, or exert influence over the business operations of ADMA.

IV.

IT IS FURTHER ORDERED that:

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

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

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

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

1. The Monitor shall have the power and authority to monitor each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission;

2. The Monitor shall act in 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 Respondents complete each of the divestitures required by this Order and complete any transitional services required to be provided to an Acquirer under this Order or related Remedial Agreement(s), *provided, however,* that the Monitor's service shall not extend more than two (2) 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. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

H. Respondents shall report to the Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by 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.

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

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

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

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

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

V.

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 Plasma Donation Center Divestiture Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by a Respondent to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and

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

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

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

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

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by a Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

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

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

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

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the

relevant provisions of this Order or the Order to Maintain Assets in this matter.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

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

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

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

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

VI.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

A. to assure such Respondent's compliance with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or

B. to defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena, or other proceeding relating to the

divestiture or any other aspect of the Divestiture Products or the assets and Businesses associated with those Divestiture Products;

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

provided further, *however*, that pursuant to this Paragraph, 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.

VII.

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. No Respondent shall seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

E. No Respondent shall modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

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 Date occurred, including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at 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 the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

C. Within thirty (30) days after the Order Date, and every thirty (30) days thereafter until Respondents have completed the divestitures required by this Order, 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, and (ii) transitional services being provided by Respondents to the Acquirer; and

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

D. One (1) year after the Order Date, annually for the next nine (9) 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.

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 and to the Compliance Division at 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.

IX.

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

A. any proposed dissolution of Grifols, S.A. or Grifols Shared Services North America, Inc.;

B. any proposed acquisition, merger, or consolidation of Grifols, S.A. or Grifols Shared Services North America, Inc.; 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.

X.

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.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on September 17, 2028.

By the Commission.

Analysis to Aid Public Comment

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

PLASMA DONOR CENTER DIVESTITURE ASSETS

[Cover Page]

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

INTRODUCTION

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Grifols S.A. and its subsidiary Grifols Shared Services North America, Inc. (collectively "Grifols"). The purpose of the Consent Agreement is to remedy the anticompetitive effects resulting from Grifols' proposed acquisition of Biotest US Corporation ("Biotest US") from The Biotest Divestiture Trust. The proposed Decision and Order ("Order") contained in the Consent Agreement requires Grifols to divest plasma collection centers in three local geographic markets in the United States to Kedplasma LLC ("KedPlasma"), a subsidiary of Kedrion Biopharma Inc. ("Kedrion"). Grifols is also prohibited from acquiring any ownership interest in ADMA Biologics ("ADMA"), which had been partially owned by Biotest US, without prior notification.

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

THE ACQUISITION

Pursuant to an agreement dated December 22, 2017, Grifols proposed to acquire all of the outstanding voting securities of Biotest US from The Biotest Divestiture Trust, which included the outstanding securities of ADMA owned by Biotest US. Grifols and Biotest US subsequently modified the acquisition agreement to exclude the outstanding securities of ADMA and revalued the acquisition. The acquisition and the modified acquisition (collectively, "the Acquisition") are subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

The Commission's Complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by (1) eliminating actual, direct, and substantial competition between Grifols and Biotest US in three local markets for the collection of human source plasma; (2) increasing the ability of the merged entity unilaterally to decrease donation fees for the collection of human source plasma in each local market; (3) reducing incentives to improve service or quality in each local market for the collection of human source plasma; and (4) increasing the likelihood that Grifols would unilaterally exercise market power in the U.S. market for hepatitis B immune globulin ("HBIG"). The proposed Consent Agreement would remedy the alleged violations by preserving the competition that would otherwise be eliminated as a result of the proposed Acquisition.

THE PARTIES

Headquartered in Barcelona, Spain, Grifols is a vertically integrated global healthcare company. Grifols specializes in the collection of plasma, and the development and production of several plasma-derived products. Grifols operates or manages approximately 192 plasma collection centers throughout the United States and sells a wide variety of plasma-derived blood products, including HBIG. In 2016, Grifols had net revenues of approximately $4.3 billion.

Biotest US is a wholly owned subsidiary of The Biotest Divestiture Trust headquartered in Boca Raton, Florida. Through its subsidiary, Biotest Pharmaceutical Corporation, Biotest US owns a network of 22 U.S. plasma collection centers. Prior to the signing of the Consent Agreement, it also owned 41 percent of the stock of ADMA. ADMA develops, manufactures and sells human blood plasma-derived products in the United States, including HBIG. In 2017, Biotest US generated approximately $187 million in revenues.

Analysis to Aid Public Comment

RELEVANT MARKETS AND STRUCTURE OF THE MARKETS

Plasma Collection Centers

Grifols and Biotest are the only two companies with plasma collection centers in three geographic areas in the United States: (1) Lincoln, Nebraska; (2) Augusta, Georgia; and (3) Youngstown, Ohio. Donated plasma is a critical input for a variety of medical products that are used to treat diseases or conditions in multiple therapeutic areas, including pulmonology, hematology, immunology, infectious disease, and trauma. Plasma collection centers are often located near universities, military installations, and other areas with a sufficient number of potential donors. Centers typically compensate donors by paying them a per-donation fee. Donors choose their donation center based on proximity, convenience, quality of the facility, and the donor fee. Plasma centers typically compete on these dimensions to attract individuals interested in selling their blood.

The relevant geographic markets for the provision of plasma collection services are local due to the limited distance individuals are willing or able to travel to donate plasma. Donors typically will not travel more than 25 minutes, or 15 to 20 miles, to donate plasma, though each plasma collection center's draw area may differ based on the ease of travel and transportation and the density of population. In each of the geographic areas of concern, Grifols and Biotest operate plasma collection centers very close to each other, and the next-closest alternative is quite distant. In Lincoln, Nebraska, Grifols and Biotest are less than a mile apart and the closest alternative plasma collection centers are an hour away in Omaha. Likewise, in Augusta, Georgia, they are approximately six miles apart and in Youngstown, Ohio, they are approximately nine miles apart, and for each market the alternatives are located over an hour away.

Hepatitis B Immune Globulin

HBIG is a plasma-derived product used as a prophylaxis to treat healthcare professionals or patients exposed or potentially exposed to hepatitis B, and to prevent recurrence of hepatitis B in hepatitis B-positive liver transplant patients. There are no viable substitutes for HBIG. The market for HBIG is highly concentrated. There are three HBIG products sold in the United States: ADMA's Nabi HB, Saol Therapeutics' ("Saol") HepGam B, and Grifols' HyperHep. ADMA's Nabi HB is the market leader, while Saol's HepGam B and Grifols' HyperHep are the second and third leading product lines, respectively.

The relevant geographic market in which to analyze the proposed Acquisition's effects in the HBIG market is the United States. Plasma-derived products, such as HBIG, must be approved by the U.S. Food and Drug Administration ("FDA") for sale in the United States. The FDA further requires that these products be made solely from plasma collected in the United States in FDA-approved collection centers and manufactured in FDA-approved plants. Plasma-derived products not approved for sale in the United States are not viable alternatives for U.S. consumers.

COMPETITIVE EFFECTS OF THE ACQUISITION

Plasma Collection Centers

In the three geographic areas at issue—Lincoln, Nebraska; Augusta, Georgia; and Youngstown, Ohio—the proposed Acquisition raises competitive concerns because, post-Acquisition, Grifols would own all of the plasma collection centers in each area, which would affect its incentives to offer competitive donor fees and/or quality of service. Thus, the proposed Acquisition would likely result in diminished service, quality, and longer wait times for donors in each market. In addition, Grifols likely would be able to exercise market power by unilaterally decreasing donor fees at one or both of the plasma donor centers in each geographic area.

Hepatitis B Immune Globulin

The proposed Acquisition would significantly increase market concentration and eliminate substantial competition between the first- and third-largest suppliers of HBIG in the United States. Prior to the parties' restructuring the transaction, Grifols would have acquired an approximately 41 percent ownership stake in ADMA, one of its two rivals in the United States HBIG market. This ownership stake would have given Grifols the incentive to increase significantly the price of its HBIG product because it would recapture sufficient revenues through its stake in ADMA to offset any sales lost due to Grifols' price increases.

ENTRY

Plasma Collection Centers

Entry into the plasma collection service markets in Lincoln, Nebraska; Augusta, Georgia; and Youngstown, Ohio is not likely to occur in a timely and sufficient manner to deter or counteract the likely anticompetitive effects of the Acquisition. New entry is unlikely due to the scarcity of qualified donors necessary to justify opening a new plasma collection center in each of these geographic areas.

Hepatitis B Immune Globulin

Entry into the HBIG market would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed Acquisition. New entry would require significant investment of time and money for product research and development, regulatory approval by the FDA, and establishment of a U.S. sales and service infrastructure. Such development efforts are difficult, time-consuming, and expensive, and often fail to result in a competitive product reaching the market. These obstacles make entry in the HBIG more challenging and less likely to avert the anticompetitive effects of the proposed Acquisition.

Analysis to Aid Public Comment

THE CONSENT AGREEMENT

The proposed Consent Agreement eliminates the competitive concerns raised by the proposed Acquisition by: (1) requiring Grifols to divest its plasma collection centers in Lincoln, Nebraska; Augusta, Georgia; and Youngstown, Ohio to Kedplasma; (2) prohibiting Grifols from obtaining ownership or control of any ADMA stock; and (3) requiring Grifols to provide prior notice to the Commission if it seeks to repurchase any of the divested plasma collection centers or any ownership interest in ADMA.

Kedplasma is a well-qualified acquirer of Grifols' plasma collection centers. Kedplasma is a subsidiary of Kedrion, a leading manufacturer of protein products and the fifth-largest producer of plasma proteins worldwide. Kedrion currently operates plasma collection centers in the United States, Germany, and Hungary. In the United States, Kedplasma operates 15 plasma collection centers and it anticipates opening two additional centers in 2018 (none of which currently competes or will compete with the to-be-divested Grifols' plasma collection centers).

The proposed Consent Agreement contains several provisions designed to ensure the successful divestiture of the plasma collection centers to Kedplasma. Grifols is required to obtain the consents of all third parties that are necessary to permit Grifols to divest the plasma collection centers to the buyer. This provision ensures that the buyer will have the assets necessary to continue operating the business of the divested centers in a competitive manner. In addition, the Consent Agreement requires Grifols to provide Kedplasma with the opportunity to interview and hire employees affiliated with the divested centers, as well as with information about each employee. Next, the Consent Agreement requires Grifols to provide all employees with reasonable financial incentives to remain in their positions until the buyer assumes control of each divested center. This will ensure that the buyer has access to personnel who are familiar with the centers' donors and their donation schedules, and donation policies necessary to preserve the marketability, viability, and competitiveness of each center. Finally, the Consent Agreement requires Grifols to maintain the centers and prevent the destruction, deterioration, or impairment of the equipment and assets of the centers until they are divested to ensure that they remain competitive.

Before entering the Consent Agreement, and in consultation with Commission staff, Biotest US transferred ownership of all ADMA stock to its parent, The Biotest Divestiture Trust. Because Grifols is not acquiring The Biotest Divestiture Trust, it will neither acquire the ADMA stock previously held by Biotest US nor any other ownership interest in ADMA. To prevent Grifols from reacquiring the interest in ADMA, the proposed Consent Agreement explicitly prohibits Grifols from directly or indirectly acquiring any ownership interest in ADMA or obtaining any rights to nominate or obtain representation on the Board of Directors of ADMA. It also requires Grifols to provide notification prior to any future acquisition of ownership interest in ADMA or any of the other divested plasma collection center assets.

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

IN THE MATTER OF

READYTECH CORPORATION

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

Docket No. C-4659; File No. 182 3100
Complaint, October 17, 2018 – Decision, October 17, 2018

This consent order addresses ReadyTech Corporation's representations concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union. The complaint alleges that ReadyTech represented that it was actively in the process of certifying compliance with the EU-U.S. Privacy Shield framework when, in fact, ReadyTech never completed the necessary steps to finalize its application, and was not certified to participate in the EU-U.S. Privacy Shield framework. The consent order prohibits ReadyTech from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Participants

For the *Commission*: *Monique F. Einhorn.*

For the *Respondents*: *Jeffrey Pietsch, Weintraub Tobin.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that ReadyTech Corporation, a corporation, has violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent ReadyTech Corporation is a California corporation with its principal office or place of business at 2201 Broadway, Suite 725, Oakland, CA 94612.

2. Respondent provides online and instructor-led training.

3. The acts and practices of Respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, https://www.readytech.com/policies/privacy-policy/, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

Privacy Shield

5. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a

mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield Principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

9. Respondent has disseminated or caused to be disseminated privacy policies and statements on the https://www.readytech.com/policies/privacy-policy/ website, including, but not limited to, the following statements:

Privacy Shield

> ReadyTech is in the process of certifying that we comply with the U.S. – E.U. Privacy Shield framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal data from European Union member countries. To learn more about the Privacy Shield program, and to view ReadyTech's certification, please visit https://www.privacyshield.gov/welcome.
>
> In compliance with the US-EU Privacy Shield, ReadyTech commits to resolve complaints about your privacy and our collection or use of your Personal Information. European Union citizens with inquiries or complaints regarding this privacy policy should first contact ReadyTech at get-info @ readytech.com.

> ReadyTech has further committed to refer unresolved privacy complaints under the US-EU Privacy Shield to an independent dispute resolution mechanism, JAMS. If you do not receive timely acknowledgment of your complaint, or if your complaint is not satisfactorily addressed by ReadyTech, please visit the JAMS web site at https://www.jamsadr.com/about/submit-a-case for more information and to file a complaint.

10. Although Respondent initiated an application to Commerce in October 2016 for Privacy Shield certification, it did not complete the steps necessary to participate in the EU-U.S. Privacy Shield framework.

Count 1-Privacy Misrepresentation

11. As described in Paragraph 9, Respondent represents, directly or indirectly, expressly or by implication, that it is actively in the process of certifying compliance with the EU-U.S Privacy Shield framework.

12. In fact, as described in Paragraph 10, Respondent is not actively in the process of certifying compliance with the EU-U.S. Privacy Shield framework. Therefore, the representation set forth in Paragraph 11 is false or misleading.

Violations of Section 5 of the FTC Act

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

THEREFORE, the Federal Trade Commission this seventeenth day of October, 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 above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

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

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of thirty (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 ReadyTech Corporation is a California corporation with its principal office or place of business at 2201 Broadway, Suite 725, Oakland CA 94612.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

1. "Respondent" means ReadyTech Corporation, a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about

Participation in Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy

or security program sponsored by a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

II. Acknowledgments of the Order

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

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For twenty (20) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all 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 ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

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

III. Compliance Report and Notices

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

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (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 fourteen (14) days of its filing.

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

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: In re *ReadyTech Corporation*, FTC File No. 1823100.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

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

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

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

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

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

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

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on October 17, 2038, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Provision in this Order that terminates in less than twenty (20) years;

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

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

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 ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to ReadyTech Corporation ("ReadyTech").

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

This matter concerns alleged false or misleading representations that ReadyTech made to consumers concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield framework allows U.S. companies to transfer data outside the EU consistent with EU law. To join the EU-U.S. Privacy Shield framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. These principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. Commerce maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies indicates whether their self-certification is current. Companies are required to re-certify every year in order to retain their status as current members of the EU-U.S. Privacy Shield framework.

ReadyTech provides online and instructor-led training. According to the Commission's complaint, ReadyTech has set forth on its website, www.readytech.com/policies/privacy-policy/, privacy policies and statements about its practices, including statements related to the status of its participation in the EU-U.S. Privacy Shield framework.

The Commission's complaint alleges that ReadyTech deceptively represented that it was actively in the process of certifying compliance with the EU-U.S. Privacy Shield framework when, in fact, ReadyTech never completed the necessary steps to finalize its application, and was not certified to participate in the EU-U.S. Privacy Shield framework.

Part I of the proposed order prohibits ReadyTech from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that ReadyTech submit an initial compliance report to the FTC. Part IV requires ReadyTech to retain documents relating to its compliance with the order for a five-year period.

Part V mandates that ReadyTech make available to the FTC information or subsequent compliance reports, as requested. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

UBER TECHNOLOGIES, INC.

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

Docket No. C-4662; File No. 152 3054
Complaint, October 25, 2018 – Decision, October 25, 2018

This consent order addresses Uber Technologies, Inc.'s access and use of consumer personal information, including geolocation information. The complaint alleges that Uber has not monitored or audited its employees' access to Rider and Driver personal information on an ongoing basis since November 2014. The complaint also alleges that Uber failed to provide reasonable security for consumer information stored in a third-party cloud storage service. The consent order prohibits Uber from making any misrepresentations about the extent to which Uber monitors or audits internal access to consumers' personal information or the extent to which Uber protects the privacy, confidentiality, security, or integrity of consumers' personal information. The Order also requires Uber to implement a mandated comprehensive privacy program that is reasonably designed to (1) address privacy risks related to the development and management of new and existing products and services for consumers, and (2) protect the privacy and confidentiality of consumers' personal information.

Participants

For the *Commission*: *Ben Rossen* and *James A. Trilling.*

For the *Respondent*: *Erin Earl, Rebecca Engrav* and *Janis Kestenbaum, Perkins Coie LLP.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Uber Technologies, Inc. ("Respondent" or "Uber"), a corporation, has violated the Federal Trade Commission Act, 15 U.S.C. § 45(a), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Uber is a Delaware corporation with its principal office or place of business at 1455 Market St. #400, San Francisco, California 94103.

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

RESPONDENT'S BUSINESS PRACTICES

3. Since at least 2010, Respondent has distributed a mobile software application (the "App") that connects consumers who are transportation providers (hereinafter "Uber Drivers" or "Drivers") with consumers seeking those services (hereinafter "Riders"). Respondent markets

different versions of the App to Riders and Drivers. Respondent also operates a website at www.uber.com.

4. Riders book transportation services from an Uber Driver using a publicly available version of the App that can be downloaded to a smartphone. When a Rider requests transportation through the App, the request is conveyed to a nearby Uber Driver signed into the App.

5. Uber Drivers are consumers who use the App to locate Riders in need of transportation. Respondent recruits and approves consumers to become Uber Drivers, sets the rates that Drivers charge for providing transportation, and collects a portion of the fares that Drivers charge for each ride. Drivers decide when they are available to accept ride requests and use the App to determine which ride requests they will accept.

6. When a consumer signs up to become an Uber Driver, Respondent collects personal information about the consumer, including the consumer's name, email address, phone number, postal address, profile picture, Social Security number, driver's license information, bank account information (including domestic routing and bank account numbers), vehicle registration information, and insurance information.

7. Respondent also collects and stores a variety of personal information from Riders, including, among other things, names, email addresses, postal addresses, profile pictures, and detailed trip records including precise geolocation information.

8. Respondent collects precise geolocation information about both Riders and Drivers in real time. When a Rider requests transportation services and has authorized Respondent to collect such information, Respondent collects precise geolocation information from the Rider's device. During a trip, Respondent collects precise geolocation information from the Rider's device if the Rider has provided consent for Respondent to do so. Respondent also collects such information about the route of the trip from the Driver's mobile device and associates the trip information with the Rider.

9. As of December 2014, there were more than 160,000 active Uber Drivers using the App. As of December 2015, Riders had completed more than 1 billion rides using Respondent's services. In 2015, Respondent had over $1.5 billion in total revenues.

RESPONDENT'S INTERNAL ACCESS TO CONSUMER PERSONAL INFORMATION

10. In November 2014, Respondent was the subject of a number of widely disseminated news reports concerning allegations of improper access and use of consumer personal information, including geolocation data. One article, published on November 17, 2014, reported that an Uber executive had suggested Respondent should hire "opposition researchers" and journalists to look into the "personal lives" of journalists who criticized Respondent's business practices. On November 18, 2014, another article described an internal aerial tracking tool, referred to as "God View," that displayed the personal information of Riders using

Respondent's services. These reports were widely circulated in the press and caused considerable consumer uproar.

11. In an effort to respond to consumer concerns, on November 18, 2014, Respondent issued a statement, which has been continuously posted on Respondent's website and was widely disseminated in the press, describing Respondent's policies concerning access to Rider and Driver data. Respondent stated:

> Uber has a strict policy prohibiting all employees at every level from accessing a rider or driver's data. The only exception to this policy is for a limited set of legitimate business purposes. Our policy has been communicated to all employees and contractors….
>
> The policy is also clear that access to rider and driver accounts is being closely monitored and audited by data security specialists on an ongoing basis, and any violations of the policy will result in disciplinary action, including the possibility of termination and legal action.

(Exhibit A.)

12. Despite Respondent's representation that its practices would continue on an ongoing basis, Respondent has not always closely monitored and audited its employees' access to Rider and Driver accounts since November 2014. Respondent developed an automated system for monitoring employee access to consumer personal information in December 2014 but the system was not designed or staffed to effectively handle ongoing review of access to data by Respondent's thousands of employees and contingent workers.

13. In approximately August 2015, Respondent ceased using the automated system it had developed in December 2014 and began to develop a new automated monitoring system. From approximately August 2015 until May 2016, Respondent did not timely follow up on automated alerts concerning the potential misuse of consumer personal information, and for approximately the first six months of this period, Respondent only monitored access to account information belonging to a set of internal high-profile users, such as Uber executives. During this time, Respondent did not otherwise monitor internal access to personal information unless an employee specifically reported that a co-worker had engaged in inappropriate access.

RESPONDENT'S AMAZON S3 DATASTORE

14. As part of its information technology infrastructure, Respondent uses a third-party service provided by Amazon Web Services ("AWS") called the Amazon Simple Storage Service (the "Amazon S3 Datastore"). The Amazon S3 Datastore is a scalable cloud storage service that can be used to store and retrieve large amounts of data. The Amazon S3 Datastore stores data inside of virtual containers, called "buckets," against which individual access controls can be applied.

15. Respondent relies on the Amazon S3 Datastore to store a wide variety of files that contain sensitive personal information. These files include, among other things, full and partial back-ups of Uber databases. The database back-ups contain a broad range of Rider and Driver personal information, including, among other things, names, nicknames, email addresses, postal addresses, phone numbers, unique device identifiers, trip records, geolocation information, and driver's license numbers. The files also include documents provided by Uber Drivers, such as vehicle registration receipts, proof of insurance documents, and images of driver's licenses.

RESPONDENT'S SECURITY STATEMENTS

16. From at least July 13, 2013 to July 15, 2015, Respondent disseminated, or caused to be disseminated, a privacy policy that expressly applied to Respondent's websites and Apps and contained the following statements regarding the security measures Respondent used to protect the personal information it collected from consumers:

> The Personal Information and Usage Information we collect is securely stored within our databases, and we use standard, industry-wide, commercially reasonable security practices such as encryption, firewalls and SSL (Secure Socket Layers) for protecting your information—such as any portions of your credit card number which we retain (we do not ourselves retain your entire credit card information) and geo-location information.

(Exhibit B.)

17. In numerous instances, Respondent's customer service representatives offered assurances about the strength of Respondent's security practices to consumers who were reluctant to submit personal information to Uber, including but not limited to the following:

> "Your information will be stored safely and used only for purposes you've authorized. **We use the most up to date technology and services to ensure that none of these are compromised**."
>
> "I understand that you do not feel comfortable sending your personal information via online. However, **we're extra vigilant in protecting all private and personal information**."
>
> "All of your personal information, including payment methods, is **kept secure and encrypted to the highest security standards available**."

(Emphases added.)

RESPONDENT'S SECURITY PRACTICES

18. Respondent has engaged in a number of practices that, taken together, failed to provide reasonable security to prevent unauthorized access to Rider and Driver personal information stored in the Amazon S3 Datastore. Among other things, Respondent:

a. Failed to implement reasonable access controls to safeguard data stored in the Amazon S3 Datastore. For example, Respondent:

i. until approximately September 2014, failed to require programs and engineers that access the Amazon S3 Datastore to use distinct access keys, instead permitting all programs and engineers to use a single AWS access key that provided full administrative privileges over all data in the Amazon S3 Datastore;

ii. until approximately September 2014, failed to restrict access to systems based on employees' job functions; and

iii. until approximately September 2015, failed to require multi-factor authentication for individual account access, and until at least November 2016, failed to require multi-factor authentication for programmatic service account access, to the Amazon S3 Datastore;

b. Until at least September 2014, failed to implement reasonable security training and guidance;

c. Until approximately September 2014, failed to have a written information security program; and

d. Until at least November 2016, stored sensitive personal information in the Amazon S3 Datastore in clear, readable text, including in database back-ups and database prune files, rather than encrypting the information.

19. Respondent could have prevented or mitigated the failures described in **Paragraph 18** through relatively low-cost measures.

20. Respondent's failure to provide reasonable security for consumers' personal information stored in its databases, including geolocation information, created serious risks for consumers.

2014 DATA BREACH

21. As a result of the failures described in **Paragraph 18**, on or about May 12, 2014, an intruder was able to access consumers' personal information in plain text in Respondent's Amazon S3 Datastore using an access key that one of Respondent's engineers had publicly posted to GitHub, a code-sharing website used by software developers. The publicly posted key

granted full administrative privileges to all data and documents stored within Respondent's Amazon S3 Datastore. The intruder accessed one file that contained sensitive personal information belonging to Uber Drivers, including over 100,000 unencrypted names and driver's license numbers, 215 unencrypted names and bank account and domestic routing numbers, and 84 unencrypted names and Social Security numbers. The file also contained other Uber Driver information, including physical addresses, email addresses, mobile device phone numbers, device IDs, and location information from trips the Uber Drivers provided.

22. Respondent did not discover the existence of the breach until September 2014.

23. Respondent initially sent breach notification letters to 48,949 affected Uber Drivers in February 2015. In May and July of 2016, Uber learned of more individuals affected by the breach, including approximately 60,000 additional Uber Drivers whose unencrypted names and driver's license numbers were accessed. Uber sent additional breach notification letters to these affected Uber Drivers in June and August of 2016.

2016 DATA BREACH

24. On or about November 14, 2016, Respondent learned of another breach of consumer personal information stored in Uber's Amazon S3 Datastore. Once again, intruders gained access to the Amazon S3 Datastore using an access key that an Uber engineer had posted to GitHub. This time, the key was in plain text in code that was posted to a private GitHub repository. However, Uber granted its engineers access to Uber's GitHub repositories through engineers' individual GitHub accounts, which engineers generally accessed through personal email addresses. Uber did not have a policy prohibiting engineers from reusing credentials, and did not require engineers to enable multi-factor authentication when accessing Uber's GitHub repositories. The intruders said that they accessed Uber's GitHub page using passwords that were previously exposed in other large data breaches, whereupon they discovered the access key in plain text. The intruders downloaded 16 files from Respondent's Amazon S3 Datastore between October 13, 2016 and November 15, 2016. These files contained unencrypted consumer personal information relating to U.S. Riders and Drivers, including, among other things, approximately 25.6 million names and email addresses, 22.1 million names and mobile phone numbers, and 607,000 names and driver's license numbers. Nearly all of the exposed personal information was collected before July 2015 and stored in unencrypted database backup files.

25. Respondent discovered the breach on or about November 14, 2016, when one of the attackers contacted Respondent claiming to have compromised Uber's "databases" and demanding a six-figure payout.

26. Respondent paid the attackers $100,000 through the third party that administers Uber's "bug bounty" program. Respondent created the bug bounty program to pay financial rewards in exchange for the responsible disclosure of serious security vulnerabilities. However, the attackers in this instance were fundamentally different from legitimate bug bounty recipients. These attackers did not merely identify a vulnerability and disclose it responsibly. Rather, the

attackers maliciously exploited the vulnerability and acquired personal information relating to millions of consumers.

27. Respondent failed to disclose the breach to affected consumers until November 21, 2017, more than a year after discovery of the breach. Furthermore, the November 2016 breach occurred in the midst of a nonpublic investigation by the Commission relating to Respondent's data security practices, including, specifically, the security of Respondent's Amazon S3 Datastore. Despite the pendency of this investigation, Respondent failed to disclose the existence of the breach to the Commission until November 2017.

COUNT 1

28. As described in **Paragraph 11**, Respondent has represented, directly or indirectly, expressly or by implication, that internal access to consumers' personal information is closely monitored and audited by data security specialists on an ongoing basis.

29. In truth and in fact, as described in **Paragraphs 12 - 13**, Respondent has not closely monitored and audited internal access to consumers' personal information by data security specialists on an ongoing basis. Therefore, the representation set forth in **Paragraph 28** is false or misleading.

COUNT 2

30. As described in **Paragraphs 16 - 17**, Respondent has represented, directly or indirectly, expressly or by implication, that it would provide reasonable security for consumers' personal information stored in its databases.

31. In truth and in fact, as described in **Paragraphs 18 - 27**, Respondent did not provide reasonable security for consumers' personal information stored in its databases. Therefore, the representation set forth in **Paragraph 30** is false or misleading.

32. The acts and practices of Respondent as alleged in this Complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this twenty-fifth day of October, 2018, has issued this Complaint against Respondent.

By the Commission, Commissioner Wilson not participating.

Exhibit A

Uber's Data Privacy Policy

November 18, 2014 Posted by Nairi

We wanted to take a moment to make very clear our policy on data privacy, which is fundamental to our commitment to both riders and drivers. Uber has a strict policy prohibiting all employees at every level from accessing a rider or driver's data. The only exception to this policy is for a limited set of legitimate business purposes. Our policy has been communicated to all employees and contractors.

Examples of legitimate business purposes for select members of the team include:

- Supporting riders and drivers in order to solve problems brought to their attention by the Uber community.
- Facilitating payment transactions for drivers.
- Monitoring driver and rider accounts for fraudulent activity, including terminating fake accounts and following up on stolen credit card reports.
- Reviewing specific rider or driver accounts in order to troubleshoot bugs.

The policy is also clear that access to rider and driver accounts is being closely monitored and audited by data security specialists on an ongoing basis, and any violations of the policy will result in disciplinary action, including the possibility of termination and legal action.

Uber's business depends on the trust of the riders and

Complaint

drivers that use our technology and platform. The trip history of our riders is confidential information, and Uber protects this data from internal and external unauthorized access. As the company continues to grow, we will continue to be transparent about our policy and ensure that it is properly understood by our employees.

Exhibit B

LEGAL

USER TER... PRIVACY P... COPYRIGH... SECURITY ... OTHER (/W...

UBER PRIVACY POLICY

GLOBAL

effective July 13, 2013

Your privacy matters to Uber Technologies, Inc. (the "Company", "we", or "us"). This Privacy Policy explains how we collect, use, share and protect information about you. We also provide information regarding how you can access and update your information and make certain choices about how your information is used.

The Privacy Policy covers both our "online" (e.g., web and mobile services, including any web sites operated by us such as www.uber.com (/web/20141018005925/https://www.uber.com/), m.uber.com (/web/20141018005925/https://m.uber.com/), mobile applications, however accessed and/or used, whether via personal computers, mobile devices or otherwise) and "offline" (e.g., collection of data through mailings, telephone, or in person) activities owned, operated, provided, or made available by the Company. Our "online" and "offline" activities are collectively referenced as the **"Services."** This Privacy Policy also applies to

your use of interactive features or downloads that: (i) we own or control; (ii) are available through the Services; or (iii) interact with the Services and post or incorporate this Privacy Policy.

BY USING OUR SERVICES OR BY OTHERWISE GIVING US YOUR INFORMATION, YOU AGREE TO THE TERMS OF THIS PRIVACY POLICY. Please review the following carefully so that you understand our privacy practices. If you do not agree to this Privacy Policy, do not use any of our Services or give us any of your information. In addition, please review our Terms and Conditions (/web/20141018005925/https://www.uber.com/legal/terms), which may apply to your use of our websites and mobile applications. This Privacy Policy is incorporated by reference into the applicable Terms and Conditions.

If you have questions about this Privacy Policy, please contact us at privacy@uber.com. (mailto:privacy@uber.com)

Uber Technologies, Inc. complies with the U.S. – E.U. Safe Harbor framework and the U.S. - Swiss Safe Harbor framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal data from European Union member countries and Switzerland. Uber Technologies, Inc. has certified that it adheres to the Safe Harbor Privacy Principles of notice, choice, onward transfer, security, data integrity, access, and enforcement. To learn more about the Safe Harbor program, and to view Uber Technologies, Inc.'s certification, please visit http://www.export.gov/safeharbor/ (/web/20141018005925/http://www.export.gov/safeharbor/).

TABLE OF CONTENTS

1. What Information Do We Collect?

(a) Information You Provide To Us

Personal Information. We may ask you to provide us with certain categories of information such as personal information, which is information that could reasonably be used to identify you personally, such as your name, e-mail address, and mobile number ("**Personal Information**"). We may collect this information through various forms and in various places through

Complaint

the Services, including account registration forms, contact us forms, or when you otherwise interact with us. When you sign up to use the Services, you create a user profile. The current required data fields are:

- Email
- Password
- Name
- Mobile Phone Number
- Zip Code
- Credit Card Number, expiration date & security code and or information regarding your PayPal, Google Wallet or other digital payment accounts

If you choose to upload a photo when registering for our Services, the photo may be viewable by us and by the drivers who are picking you up so that they are able to verify your identity. You may remove or update the photo at any time by logging into your account.

(b) Information We Collect As You Access And Use Our Services

In addition to any Personal Information or other information that you choose to submit to us, we and our third-party service providers may use a variety of technologies that automatically (or passively) collect certain information whenever you visit or interact with the Services ("**Usage Information**"). This Usage Information may include the browser that you are using, the URL that referred you to our Services, all of the areas within our Services that you visit, and the time of day, among other information. We may use Usage Information for a variety of purpose , including to enhance or otherwise improve the Services. In addition, we collect your IP address or other unique identifier ("**Device Identifier**") for your computer, mobile or other device used to access the Services (any, a "**Device**"). A Device Identifier is a number that is automatically assigned to your Device used to access the Services, and our computers identify

your Device by its Device Identifier. Usage Information may be non-identifying or may be associated with you. Whenever we associate Usage Information or a Device Identifier with your Personal Information, we will treat it as Personal Information.

In addition, tracking information is collected as you navigate through our Services, including, but not limited to geographic areas. If you are traveling in a vehicle requested via our Services, the driver's mobile phone will send your GPS coordinates, during the ride, to our servers. Most GPS enabled mobile devices can define one's location to within 50 feet. We collect this information for various purposes – including to determine the charge for the transportation you requested via our Services, to provide you with customer support, to send you promotions and offers, to enhance our Services, and for our internal business purposes. We may also have features that allow you to share this information with other people (such as your family, friends or colleagues) if you choose.

For example, when you choose to split the fare for a trip with other users, all users splitting the fare can see the GPS coordinates recorded by the driver's mobile phone for that particular trip, as well as certain information about the users (such as the User's name and photos) who have agreed to split the fare for that trip.

A few of the methods that may be used to collect Usage Information include, without limitation, the following (and subsequent technology and methods hereafter developed):

Cookies. A cookie is a data file placed on a Device when it is used to access the Services. A Flash cookie is a data file placed on a Device via the Adobe Flash plug-in that may be built-in to or downloaded by you to your Device. Cookies and Flash Cookies may be used for many purposes, including, without limitation, remembering you and your preferences and tracking your visits to our web pages. Cookies work by assigning a number to the

Complaint

user that has no meaning outside of the assigning website.

If you do not want information to be collected through the use of cookies, your browser allows you to deny or accept the use of cookies. Cookies can be disabled or controlled by setting a preference within your web browser or on your Device. If you choose to disable cookies or Flash cookies on your Device, some features of the Services may not function properly or may not be able to customize the delivery of information to you.

You should be aware that the Company cannot control the use of cookies (or the resulting information) by third-parties, and use of third party cookies is not covered by our Privacy Policy.

Web Beacons. Small graphic images or other web programming code called web beacons (also known as "1x1 GIFs" or "clear GIFs") may be included in our web and mobile pages and messages. The web beacons are tiny graphics with a unique identifier, similar in function to cookies, and are used to track the online movements of Web users. In contrast to cookies, which are stored in a user's computer hard drive, web beacons are embedded invisibly on Web pages and are about the size of the period at the end of this sentence. Web beacons or similar technologies help us better manage content on our Services by informing us what content is effective, count users of the Services, monitor how users navigate the Services, count how many e-mails that we send were actually opened or to count how many particular articles or links were actually viewed. We do not tie the information gathered by web beacons to our customers' personal information.

Embedded Scripts. An embedded script is programming code that is designed to collect information about your interactions with the Services, such as the links you click on. The code is temporarily downloaded onto your Device from our web server or a third party service provider, is active only while you are connected to the Services, and is deactivated or deleted

thereafter.

(c) Information Third Parties Provide About You

We may, from time to time, supplement the information we collect about you through our web site or Mobile Application with outside records from third parties in order to enhance our ability to serve you, to tailor our content to you and to offer you opportunities to purchase products or services that we believe may be of interest to you. We may combine the information we receive from those sources with information we collect through the Services. In those cases, we will apply this Privacy Policy to any Personal Information received, unless we have disclosed otherwise.

(d) Information You Provide About A Third Party

If you choose to use our referral service to tell a friend about our Services or a job position, we will ask you for your friend's name and email address. We will automatically send your friend a one-time email inviting him or her to visit the Services. We store this information for the sole purpose of sending this one-time email and tracking the success of our referral program, and do not use this information for any other marketing purpose unless we obtain consent from that person or we explicitly say otherwise. Please be aware that when you use any send-to-a-friend functionality through our Services, your e-mail address may be included in the communication sent to your friend.

If you choose to split a trip fare, we will ask you for your friend's mobile number. We will send your friend a text message informing him or her that you have requested that he or she split the fare for a trip. Your friend may accept or decline your request to split your fare. We will not use this information for any marketing purpose unless we obtain consent from that person or we explicitly say otherwise.

Your friend may contact us through t.uber.com/support

Complaint

(/web/20141018005925/http://t.uber.com/support) to request that we remove this information from our database.

(e) Information Collected by Mobile Applications

Our Services are primarily provided through an application on your mobile, tablet computer or similar device ("**Mobile Application**"). You agree that we may collect and use technical data and related information, including but not limited to, technical information about your device, system and application software, and peripherals, that is gathered periodically to facilitate the provision of software updates, product support and other services to you (if any) related to such Mobile Applications.

When you use any of our Mobile Applications, the Mobile Application may automatically collect and store some or all of the following information from your mobile device ("Mobile Device Information"), including without limitation:

- Your preferred language and country site (if applicable)
- Your phone number or other unique device identifier assigned to your mobile device – such as the International Mobile Equipment Identity or the Mobile Equipment ID number
- The IP address of your mobile device
- The manufacturer and model of your mobile device
- Your mobile operating system
- The type of mobile Internet browsers you are using
- Your geolocation
- Information about how you interact with the Mobile Application and any of our web sites to which the Mobile Application links, such as how many times you use a specific part of the mobile application over a given time period, the amount of time you spend using the Mobile Application, how often you use the Mobile Application, actions you take in the Mobile Application and how you engage with the Mobile Application
- Information to allow us to personalize the services and content available through the Mobile Application

We may use information automatically collected by the Mobile

Application (including the Mobile Device Information) in the following ways:

- To operate and improve our Mobile Applications, other Services, our company's services, and tools;
- To create aggregated and anonymized information to determine which Mobile Application features are most popular and useful to users, and for other statistical analyses;
- To prevent, discover and investigate violations of this Privacy Policy or any applicable terms of service or terms of use for the Mobile Application, and to investigate fraud, chargeback or other matters;
- To customize the content or services on the Mobile Application for you, or the communications sent to you through the Mobile Application.

With respect to geo-location data we track through your Mobile Device, we use that geo-location information for various purposes – including for you to be able to view the drivers in your area that are close to your location, for you to set your pick up location, so the drivers are able to find the location from which you wish to be picked up, to send you promotions and offers, and to allow you (if you choose through any features we may provide) to share this information with other people. Except as otherwise permitted in this Privacy Policy, we will not share this information with third parties for any purpose and will only use this information for the sole purpose of providing you with the ability to request transportation via Uber's Mobile Application. You may at any time no longer allow our Mobile Application to use your location by turning this feature off at the Mobile Device level.

We also provide some of your Personal Information (such as your first name and your photo, if you have chosen to upload your photo to your profile) to the driver/partner who accepts your request for transportation so that the driver may contact and find you, and to those users with whom you have agreed to split the fare for a particular trip. The companies for which drivers work (that are providing the transportation service) are also able to

access your Personal Information, including your geo-location data.

We may associate your unique mobile Device Identifier or Mobile Application usage information with any Personal Information you provide, but we will treat the combined information as Personal Information.

Personal Information may also be collected and shared with third-parties if there is content from the Mobile Application that you specifically and knowingly upload to, share with or transmit to an email recipient, online community, website, or to the public, e.g. uploaded photos, posted reviews or comments, or information about you or your ride that you choose to share with others through features which may be provided on our Services. This uploaded, shared or transmitted content will also be subject to the privacy policy of the email, online community website, social media or other platform to which you upload, share or transmit the content.

(f) Information Collected from Job Applicants

If you wish to apply for a job on our web site(s), we will collect Personal Information such as your name, email address, phone number and may collect additional information such as resume, gender, and your ethnicity. We use the information collected within this area of the web site(s) to determine your qualifications for the position in which you have applied and to contact you to set up an interview.

2. How Do We Use The Information Collected?

Our primary goal in collecting your Personal information or Usage Information is to provide you with an enhanced experience when using the Services.

Based upon the Personal Information you provide us when

registering for an account, we will send you a welcoming email to verify your username and password. We will also communicate with you in response to your inquiries, to provide the services you request, and to manage your account. We will communicate with you by email, telephone, or SMS or text message, in accordance with your wishes.

We use your information to closely monitor which features of the Services are used most, to allow you to view your trip history, store your credit card information on a secure page, view any promotions we may currently be running, rate trips, and to determine which features we need to focus on improving, including usage patterns and geographic locations to determine where we should offer or focus services, features and/or resources.

We use the information collected from our Mobile Application so that we are able to serve you the correct app version depending on your device type, for troubleshooting and in some cases, marketing purposes. The credit card information you provide in your personal profile at sign-up is not stored by us, but is stored and used by our third party credit card processors in order for them to process payment that you owe third parties for transportation services received by you.

We use your Internet Protocol (IP) address to help diagnose problems with our computer server, and to administer our web site(s). Your IP address is used to help identify you, but contains no personal information about you.

We will send you strictly service-related announcements on rare occasions when it is necessary to do so. For instance, if our Services are temporarily suspended for maintenance, we might send you an email. Generally, you may not opt-out of these communications, which are not promotional in nature. If you do not wish to receive them, you have the option to deactivate your account.

In addition, we may use your Personal Information or Usage Information that we collect about you: (1) to provide you with information or services or process transactions that you have requested or agreed to receive including to send you electronic newsletters, or to provide you with special offers or promotional materials on behalf of us or third parties; (2) to process your registration with the Services, including verifying your information is active and valid; (3) to improve the Services or our services, to customize your experience with the Services, or to serve you specific content that is most relevant to you; (4) to enable you to participate in a variety of the Services' features such as online or mobile entry sweepstakes, contests or other promotions; (5) to contact you with regard to your use of the Services and, in our discretion, changes to the Services and/or the Services' policies; (6) for internal business purposes; (7) for inclusion in our data analytics; and (8) for purposes disclosed at the time you provide your information or as otherwise set forth in this Privacy Policy.

Please note that information submitted to the Services via a "contact us" or other similar function may not receive a response.

3. How and When Do We Disclose Information to Third Parties?

We may share non-personally identifiable information, such as aggregated user statistics and log data, with third parties for industry analysis, demographic profiling, to deliver targeted advertising about other products or services, or for other business purposes. We do not sell, share, rent or trade the information we have collected about you, including Personal Information, other than as disclosed within this Privacy Policy or at the time you provide your information. We do not share your Personal Information with third parties for those third parties' direct marketing purposes unless you consent to such sharing at the time you provide your Personal Information.

(a) When You Agree To Receive Information From Third Parties.

You may be presented with an opportunity to receive information and/or marketing offers directly from third parties. If you do agree to have your Personal Information shared, your Personal Information will be disclosed to such third parties and all information you disclose will be subject to the privacy policy and practices of such third parties. We are not responsible for the privacy policies and practices of such third parties and, therefore, you should review the privacy policies and practices of such third parties prior to agreeing to receive such information from them. If you later decide that you no longer want to receive communication from a third party, you will need to contact that third party directly.

(b) Third Parties Providing Services on Our Behalf.

We use third party companies and individuals to facilitate our Services, provide or perform certain aspects of the Services on our behalf – such as drivers and companies they work for to provide the Services, and other third-parties to host the Services, design and/or operate the Services' features, track the Services' analytics, process payments, engage in anti-fraud and security measures, provide customer support, provide geo-location information to our drivers, enable us to send you special offers, host our job application form, perform technical services (e.g., without limitation, maintenance services, database management, web analytics and improvement of the Services' features), or perform other administrative services. We may provide these vendors with access to user information, including Personal Information, this information sharing is limited to only the information needed by the vendor to carry out the services they are performing for you or for us. Each of these vendors are obligated not to disclose or use Personal Information for any other purpose.

While we may use third party analytics service providers to evaluate and provide us with information about the use of the Services and viewing of our content, we do not share Personal Information with these analytics service providers, but they may

set and access their own cookies, web beacons and embedded scripts on your Device and they may otherwise collect or have access to information about you, including non-personally identifiable information.

We use a third party hosting provider who hosts our support section of our website. Information collected within this section of our web site is governed by our Privacy Policy.

(c) Co-branded Services.

Certain aspects of the Services may be provided to you in association with third parties ("**Co-Branded Services**") such as sponsors and charities, and may require you to disclose Personal Information to them. Such Co-Branded Services will identify the third party. If you elect to register for products and/or services through the Co-Branded Services, you may be providing your information to both us and the third party. Further, if you sign-in to a Co-Branded Service with a username and password obtained through our Services, your Personal Information may be disclosed to the identified third parties for that Co-Branded Service and will be subject to their posted privacy policies.

(d) Sweepstakes, Contests and Promotions.

We may offer sweepstakes, contests, and other promotions (any, a "**Promotion**") through the Services that may require registration. By participating in a Promotion, you are agreeing to official rules that govern that Promotion, which may contain specific requirements of you, including, allowing the sponsor of the Promotion to use your name, voice and/or likeness in advertising or marketing associated with the Promotion. If you choose to enter a Promotion, Personal Information may be disclosed to third parties or the public in connection with the administration of such Promotion, including, in connection with winner selection, prize fulfillment, and as required by law or permitted by the Promotion's official rules, such as on a winners list.

(e) Administrative and Legal Reasons.

We cooperate with government and law enforcement officials and private parties to enforce and comply with the law. Thus, we may access, use, preserve, transfer and disclose your information (including Personal Information), including disclosure to third parties such as government or law enforcement officials or private parties as we reasonably determine is necessary and appropriate: (i) to satisfy any applicable law, regulation, subpoenas, governmental requests or legal process; (ii) to protect and/or defend the Terms and Conditions (/web/20141018005925/https://www.uber.com/legal/terms) for online and mobile Services or other policies applicable to any online and mobile Services, including investigation of potential violations thereof; (iii) to protect the safety, rights, property or security of the Company, our Services or any third party; (iv) to protect the safety of the public for any reason; (v) to detect, prevent or otherwise address fraud, security or technical issues; an /or (vi) to prevent or stop activity we may consider to be, or to pose a risk of being, an illegal, unethical, or legally actionable activity. Further, we may use IP address or other Device Identifiers, to identify users, and may do so in cooperation with third parties such as copyright owners, internet service providers, wireless service providers and/or law enforcement agencies, including disclosing such information to third parties, all in our discretion. Such disclosures may be carried out without notice to you.

(f) Business Transfer.

We may share your information, including your Personal Information and Usage Information with our parent, subsidiaries and affiliates for internal reasons. We also reserve the right to disclose and transfer all such information: (i) to a subsequent owner, co-owner or operator of the Services or applicable database; or (ii) in connection with a corporate merger, consolidation, restructuring, the sale of substantially all of our membership interests and/or assets or other corporate change,

Complaint

including, during the course of any due diligence process.

4. What is Online Behavioral Advertising and How Can I Opt-Out?

Targeted advertising (also known as Behavioral Advertising) uses information collected on an individual's web or mobile browsing behavior such as the pages they have visited or the searches they have made. This information is then used to select which advertisements should be displayed to a particular individual on websites other than our web site(s). For example, if you have shown a preference for nursing while visiting our web site(s), you may be served an advertisement for nursing-related programs when you visit a site other than our web site(s). The information collected is only linked to an anonymous cookie ID (alphanumeric number); it does not include any information that could be linked back to a particular person, such as their name, address or credit card number. The information used for targeted advertising either comes from us or through third party website publishers.

If you would like to opt out of targeted advertising from us that occurs when visiting our third party advertising publishers, please click here (/web/20141018005925/http://www.networkadvertising.org/managing/opt_out.asp) to access the NAI Opt-Out Page. Please note that this will opt you out of targeted ads from our Company and any other participating advertisers. If you opt out, you may continue to receive online advertising from us; however, these ads may not be as relevant to you.

In order for behavioral advertising opt-outs to work on your Device, your browser must be set to accept cookies. If you delete cookies, buy a new Device, access our Services from a different device, login under a different screen name, or change web browsers, you will need to opt-out again. If your browser has

scripting disabled, you do not need to opt out, as online behavioral advertising technology does not work when scripting is disabled. Please check your browser's security settings to validate whether scripting is active or disabled.

Additionally, many network advertising programs allow you to view and manage the interest categories they have compiled from your online browsing activities. These interest categories help determine the types of targeted advertisements you may receive. The NAI Opt-Out Page provides a tool that identifies its member companies that have cookies on your browser and provides links to those companies.

5. What About Information I Disclose Publicly?

(a) User Generated Content and Public Information.

The Services may offer publicly accessible blogs or community forums or other ways to permit you to submit ideas, photographs, user profiles, writings, music, video, audio recordings, computer graphics, pictures, data, questions, comments, suggestions or other content, including Personal Information (collectively, "**User Content**"). We or others may reproduce, publish, distribute or otherwise use User Content online or offline in any media or format (currently existing or hereafter developed). Others may have access to this User Content and may have the ability to share it with third parties across the Internet. You should be aware that any User Content you provide in these areas may be read, collected, and use by others who access them. Thus, please think carefully before deciding what information you share, including Personal Information, in connection with your User Content. Please note that Company does not control who will have access to the information that you choose to make public, and cannot ensure that parties who have access to such publicly available information will respect your privacy or keep it secure. This Privacy Policy does not apply to any information that you disclose publicly, share with others or otherwise upload,

whether through the Services or otherwise. We are not responsible for the accuracy, use or misuse of any content or information that you disclose or receive through the Services.

To request removal of your User Content from our blog or community forum or similar features, contact us through t.uber.com/support (/web/20141018005925/http://t.uber.com/support). In some cases, we may not be able to remove your User content, in which case we will let you know if we are unable to do so and why.

(b) Name and Likeness.

We may also publish your name, voice, likeness and other Personal Information that is part of your User Content, and we may use the content, or any portion of the content, for advertising, marketing, publicity and promotional activities. For full terms and conditions regarding User Content you submit to the Services, please review our Terms and Conditions (/web/20141018005925/https://www.uber.com/legal/terms).

6. Does Third Party Content And Links To Third Party Services Appear on the Services?

The Services may contain content that is supplied by a third party, and those third parties may collect web site usage information and your Device Identifier when web pages from any online or mobile Services are served to your browser. In addition, when you are using the Services, you may be directed to other sites or applications that are operated and controlled by third parties that we do not control. We are not responsible for the privacy practices employed by any of these third parties. For example, if you click on a banner advertisement, the click may take you away from one of our websites onto a different web site. These other web sites may send their own cookies to you, independently collect data or solicit Personal Information and may or may not have their own published privacy policies. We

encourage you to note when you leave our Services and to read the privacy statements of all third party web sites or applications before submitting any Personal Information to third parties.

7. What About Social Media Features and Widgets?

Our online and mobile Services may include social media features, such as the Facebook Like button, and widgets such as a "Share This" button, or interactive mini-programs that run on our online and mobile Services. These features may collect your IP address, which page you are visiting on our online or mobile Services, and may set a cookie to enable the feature to function properly. Social media features and widgets are either hosted by a third party or hosted directly on our online Services. Your interactions with these features and widgets are governed by the privacy policy of the company providing them.

8. How Do I Change My Information and What If I Cancel My Account?

You are responsible for maintaining the accuracy of the information you submit to us, such as your contact information provided as part of account registration. If your Personal Information changes, or if you no longer desire our Services, you may correct, delete inaccuracies, or amend information by making the change on our member information page or by contacting us through t.uber.com/support (/web/20141018005925/http://t.uber.com/support). We will make good faith efforts to make requested changes in our then active databases as soon as reasonably practicable.

You may also cancel or modify your communications that you have elected to receive from the Services by following the instructions contained within an e-mail or by logging into your user account and changing your communication preferences.

If you wish to cancel your account or request that we no longer use your information to provide you services, contact us through t.uber.com/support (/web/20141018005925/http://t.uber.com/support).

We will retain your Personal Information and Usage Information (including geo-location) for as long as your account with the Services is active and as needed to provide you services. Even after your account is terminated, we will retain your Personal Information and Usage Information (including geo-location, trip history, credit card information and transaction history) as needed to comply with our legal and regulatory obligations, resolve disputes, conclude any activities related to cancellation of an account (such as addressing chargebacks from your credit card companies), investigate or prevent fraud and other inappropriate activity, to enforce our agreements, and for other business reason. After a period of time, your data may be anonymized and aggregated, and then may be held by us as long as necessary for us to provide our Services effectively, but our use of the anonymized data will be solely for analytic purposes.

9. What Should Parents Know About Children?

The Company cares about the safety of children. Because our Services are not directed toward minors, no one under 18 (and certainly no children under 13) are allowed to register with or use the Services. We do not knowingly collect personal information from anyone under the age of 18. If we discover that we have collected personal information from a person under 18, we will delete that information immediately. If you are a parent or guardian of a minor under the age of eighteen (18) and believe he or she has disclosed Personal Information to us, please contact us at privacy@uber.com. (mailto:privacy@uber.com).

10. What About Security?

The Personal Information and Usage Information we collect is

securely stored within our databases, and we use standard, industry-wide, commercially reasonable security practices such as encryption, firewalls and SSL (Secure Socket Layers) for protecting your information - such as any portions of your credit card number which we retain (we do not ourselves retain your entire credit card information) and geo-location information. However, as effective as encryption technology is, no security system is impenetrable. We cannot guarantee the security of our databases, nor can we guarantee that information you supply won't be intercepted while being transmitted to us over the Internet or wireless communication, and any information you transmit to the Company you do at your own risk. We recommend that you not disclose your password to anyone.

11. What About Changes To The Privacy Policy?

From time to time, we may update this Privacy Policy to reflect changes to our information practices. Any changes will be effective immediately upon the posting of the revised Privacy Policy. If we make any material changes, we will notify you by email (sent to the e-mail address specified in your account) or by means of a notice on the Services prior to the change becoming effective. We encourage you to periodically review this page for the latest information on our privacy practices.

12. Your California Privacy Rights

California's "Shine the Light" law, California Civil Code § 1798.83, requires certain businesses to respond to requests from California customers (those who have an established business relationship with us) asking about the business' practices related to disclosing personal information to third parties for the third parties' direct marketing purposes. Alternately, such businesses may have in place a policy not to disclose personal information of customers to third parties for the third parties' direct marketing purposes unless the customer first affirmatively agrees to the disclosure (opt-in) or if the customer has exercised an option to

Complaint

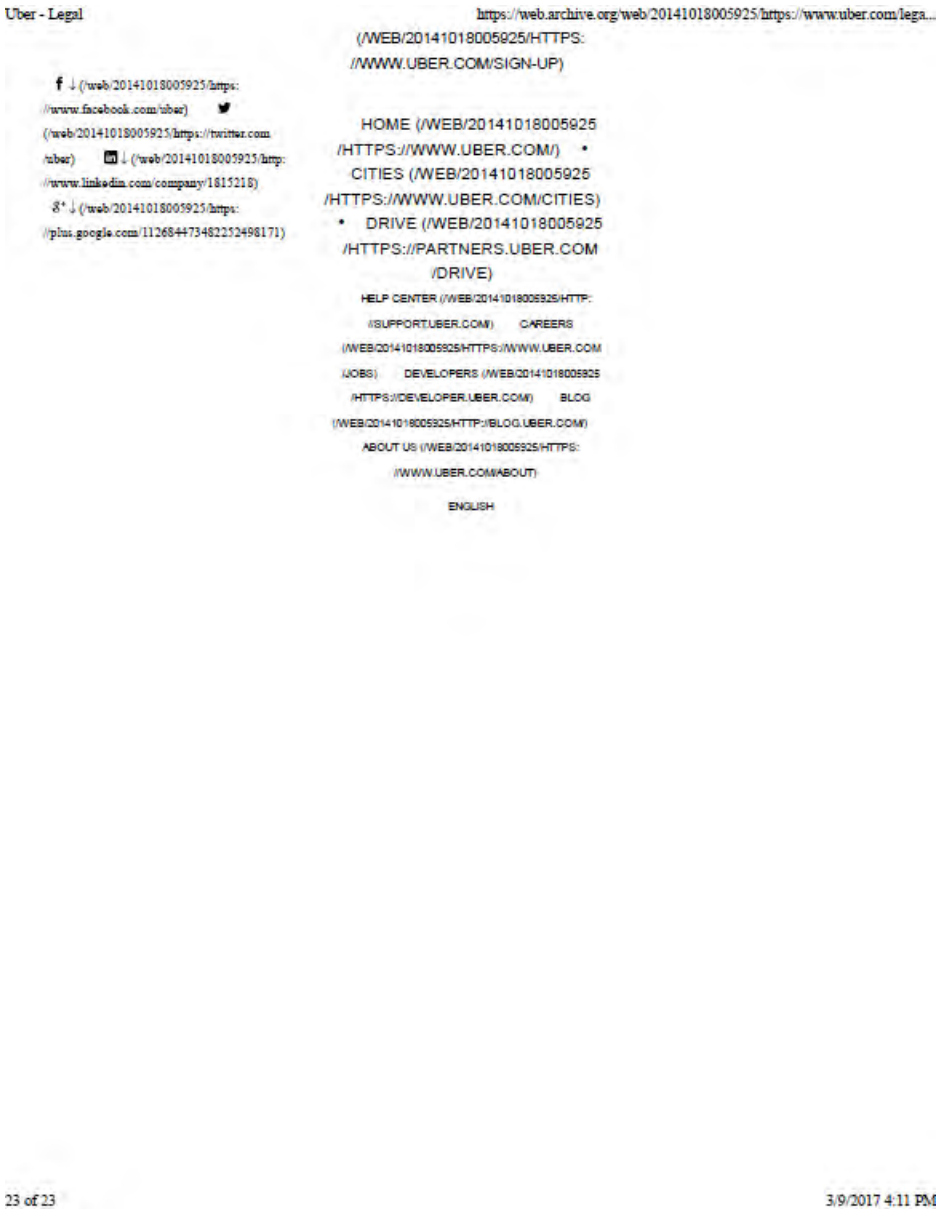
opt-out of such information-sharing (opt-out).

We have opted for this alternative approach, and we do not share personal information of customers information to third parties for the third parties' direct marketing purposes unless you provide us with permission at the time you provide such customer information.

13. What About Consent To Transfer Information To The United States?

If you are located anywhere outside of the United States, please be aware that information we collect, including, Personal Information, will be transferred to, processed and stored in the United States. The data protection laws in the United States may differ from those of the country in which you are located, and your Personal Information may be subject to access requests from governments, courts, or law enforcement in the United States according to laws of the United States. By using the Services or providing us with any information, you consent to this transfer, processing and storage of your information in the United States.

DOWNLOAD UBER (/WEB/20141018005925/HTTPS://WWW.UBER.COM/APP)


Uber - Legal
https://web.archive.org/web/20141018005925/https://www.uber.com/lega...
(/WEB/20141018005925/HTTPS://WWW.UBER.COM/SIGN-UP)
(/web/20141018005925/https://www.facebook.com/uber)
(/web/20141018005925/https://twitter.com/uber)
(/web/20141018005925/http://www.linkedin.com/company/1815218)
(/web/20141018005925/https://plus.google.com/112684473482252498171)
HOME (/WEB/20141018005925/HTTPS://WWW.UBER.COM/) • CITIES (/WEB/20141018005925/HTTPS://WWW.UBER.COM/CITIES) • DRIVE (/WEB/20141018005925/HTTPS://PARTNERS.UBER.COM/DRIVE)
HELP CENTER (/WEB/20141018005925/HTTP://SUPPORT.UBER.COM/) CAREERS (/WEB/20141018005925/HTTPS://WWW.UBER.COM/JOBS) DEVELOPERS (/WEB/20141018005925/HTTPS://DEVELOPER.UBER.COM/) BLOG (/WEB/20141018005925/HTTP://BLOG.UBER.COM/) ABOUT US (/WEB/20141018005925/HTTPS://WWW.UBER.COM/ABOUT)
ENGLISH

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. Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement").

The Commission determined that it had reason to believe that Respondent had 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, and the recommendations of its staff.

BCP then prepared and furnished to Respondent a revised draft Complaint that BCP proposed to present to the Commission for its consideration. Respondent and BCP executed a revised Consent Agreement containing (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 thereafter reconsidered the matter and again determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, as stated in the revised Complaint, and that the revised Complaint should issue stating the Commission's charges in that respect. The Commission withdrew its acceptance of the original Consent Agreement and placed the revised Consent Agreement 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, and the recommendations of its staff. Now, in further conformity with the procedures prescribed in Commission Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent, Uber Technologies, Inc., is a Delaware corporation with its principal office or place of business at 1455 Market St. #400, San Francisco, California 94103.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Covered Incident" means any instance in which any United States federal, state, or local law or regulation requires Respondent to notify any U.S. federal, state, or local government entity that information collected or received, directly or indirectly, by Respondent from or about an individual consumer was, or is reasonably believed to have been, accessed or acquired without authorization.

B. "Personal Information" means individually identifiable information collected or received, directly or indirectly, by Respondent from or about an individual consumer, including: (1) a first and last name; (2) a physical address; (3) an email address; (4) a telephone number; (5) a Social Security number; (6) a driver's license or other government-issued identification number; (7) a financial institution account number; (8) persistent identifiers associated with a particular consumer or device; or (9) precise geo-location data of an individual or mobile device, including GPS-based, WiFi-based, or cell-based location information.

C. "Respondent" means Uber Technologies, Inc. and its successors and assigns.

Provisions

I. Prohibition Against 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 any product or service must not misrepresent in any manner, expressly or by implication:

A. the extent to which Respondent monitors or audits internal access to consumers' Personal Information; or

B. the extent to which Respondent protects the privacy, confidentiality, security, or integrity of any Personal Information.

II. Mandated Privacy Program

IT IS FURTHER ORDERED that Respondent must, no later than the effective date of this Order, establish and implement, and thereafter maintain, a comprehensive privacy program that is reasonably designed to (1) address privacy risks related to the development and management of new and existing products and services for consumers, and (2) protect the privacy and confidentiality of Personal Information. Such program, the content and implementation of which must be documented in writing, must contain controls and procedures

appropriate to Respondent's size and complexity, the nature and scope of Respondent's activities, and the sensitivity of the Personal Information, including:

A. the designation of an employee or employees to coordinate and be responsible for the privacy program;

B. the identification of reasonably foreseeable risks, both internal and external, that could result in Respondent's unauthorized collection, use, or disclosure of Personal Information and an assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including: (1) employee training and management, including training on the requirements of this Order; (2) product design, development, and research; (3) secure software design, development, and testing, including access key and secret key management and secure cloud storage; (4) review, assessment, and response to third-party security vulnerability reports, including through a "bug bounty" or similar program; and (5) prevention, detection, and response to attacks, intrusions, or systems failures;

C. the design and implementation of reasonable controls and procedures to address such risks and regular testing or monitoring of the effectiveness of those controls and procedures;

D. the development and use of reasonable steps to select and retain service providers capable of appropriately protecting the privacy of Personal Information they receive from Respondent and requiring service providers, by contract, to implement and maintain appropriate privacy protections for such Personal Information; and

E. the evaluation and adjustment of Respondent's privacy program in light of the results of the testing and monitoring required by sub-provision C, any changes to Respondent's operations or business arrangements, or any other circumstances that Respondent knows or has reason to know may have an impact on the effectiveness of the privacy program.

III. Privacy Assessments by a Third Party

IT IS FURTHER ORDERED that, in connection with its compliance with the Provision of this Order titled Mandated Privacy Program, Respondent must obtain initial and biennial assessments ("Assessments"):

A. The Assessments must be completed by a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. An individual qualified to prepare such Assessments must have a minimum of 3 years of experience in the field of privacy and data protection. All individuals selected to complete such Assessments must be approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal

Trade Commission, in his or her sole discretion. Any decision not to approve an individual selected to conduct such Assessments must be accompanied by a writing setting forth in detail the reasons for denying such approval.

B. The reporting period for the Assessments must cover: (1) the first 180 days after the issuance date of the Order for the initial Assessment, and (2) each 2-year period thereafter for 20 years after the issuance date of the Order for the biennial Assessments.

C. Each Assessment must:

1. set forth the specific privacy controls that Respondent has implemented and maintained during the reporting period;

2. explain how such privacy controls are appropriate to Respondent's size and complexity, the nature and scope of Respondent's activities, and the sensitivity of the Personal Information;

3. explain how the privacy controls that have been implemented meet or exceed the protections required by the Provision of this Order titled Mandated Privacy Program; and

4. certify that the privacy controls are operating with sufficient effectiveness to provide reasonable assurance to protect the privacy of Personal Information and that the controls have so operated throughout the reporting period.

D. Each Assessment must be completed within 60 days after the end of the reporting period to which the Assessment applies. Respondent must provide each Assessment to the Commission within 10 days after the Assessment has been completed. Respondent must notify the Commission of any portions of the Assessment containing trade secrets, commercial or financial information, or information about a consumer or other third party, for which confidential treatment is requested pursuant to the Commission's procedures concerning public disclosure set forth in 15 U.S.C. § 46(f) and 16 C.F.R. § 4.10.

IV. Covered Incident Reports

IT IS FURTHER ORDERED that Respondent, within a reasonable time after the date of Respondent's discovery of a Covered Incident, but in any event no later than 10 days after the date Respondent first notifies any U.S. federal, state, or local government entity of the Covered Incident, must submit a report to the Commission:

A. The report must include, to the extent possible:

1. the date, estimated date, or estimated date range when the Covered Incident occurred;

2. a description of the facts relating to the Covered Incident, including the causes and scope of the Covered Incident, if known;

3. a description of each type of information that triggered the notification obligation to the U.S. federal, state, or local government entity;

4. the number of consumers whose information triggered the notification obligation to the U.S. federal, state, or local government entity;

5. the acts that Respondent has taken to date to remediate the Covered Incident and protect Personal Information from further exposure or access; and

6. a representative copy of each materially different notice required by U.S. federal, state, or local law or regulation and sent by Respondent to consumers or to any U.S. federal, state, or local government entity.

B. Unless otherwise directed by a Commission representative in writing, all Covered Incident reports 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: Uber Technologies, Inc., File No. 1523054."

V. Acknowledgments of the Order

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

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

B. For 20 years after the issuance date of this Order, Respondent must deliver, or for contingent workers, cause to be delivered, 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, including all employees, agents, and representatives who regularly access Personal Information; and (3) any business entity resulting from any change in structure as set forth in the Provision of this Order 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, or caused to be delivered, a copy of this Order, Respondent must obtain, within 30 days, 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. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, that representatives of the Commission may use to communicate with Respondent; (b) identify all of Respondent's subsidiaries that are registered as business entities in any state of the United States by all of their names, primary telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the products and services offered by each business and the Personal Information each business collects, maintains, transfers or stores; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

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

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

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: "In re: Uber Technologies, Inc., File No. 1523054."

VII. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for 20 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Respondent must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an independent contractor, 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 directed at Respondent, or forwarded to Respondent by a third party, concerning the subject matter of the Order, and any response;

D. All records necessary to demonstrate full compliance with each Provision of this Order, including all submissions to the Commission;

E. A copy of each widely disseminated representation by Respondent that describes the extent to which Respondent maintains or protects the privacy, security, and confidentiality of Personal Information, including any representation concerning a change in Respondent's practices with respect to the privacy, security, and confidentiality of Personal Information;

F. For 5 years after the date of preparation of each Assessment required by this Order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of Respondent, including all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials concerning Respondent's compliance with related Provisions of this Order, for the compliance period covered by such Assessment;

G. For 5 years from the date created or received, reports received by Respondent from individuals or entities that seek payment, rewards, or recognition through a "bug bounty" or similar program for reporting a security vulnerability that relates to potential or actual access to or acquisition of Personal Information, and records sufficient to show Respondent's review, assessment of, and response to any such reports;

H. For 5 years from the date created or received, copies of all subpoenas and other communications with law enforcement, if such communications relate to Respondent's compliance with this Order; and

I. For 5 years from the date created or received, all records, whether prepared by or on behalf of Respondent, that contradict, qualify, or call into question Respondent's compliance with this 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 October 25, 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 a Respondent that is not named as a defendant in such complaint; and

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

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

By the Commission, Commissioner Wilson not participating.

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Uber's business model relies on users and drivers trusting that the company will take care to protect their most sensitive information, including Social Security numbers, geolocation information, driver's license information, and proof of insurance. This case calls into question whether the company deserves that trust.

As recounted in the Commission's Complaint, Uber misled law enforcement even as it was under investigation for misleading the public about its security practices. Specifically, in the midst of the Commission's investigation, Uber experienced a *second* serious breach – a breach rooted in the very slipshod security practices already being investigated. Rather than informing the Commission or the public of this second attack on its systems, Uber apparently paid the attackers to sweep it under the rug, waiting more than a year after learning of the breach before informing the public or the Commission.[1]

Given the serious misconduct uncovered in this investigation, I support this action. But, I believe the Commission should have given greater weight to several of the suggestions made in the comments.[2]

In particular, I agree with World Privacy Forum and EPIC that the Commission should make required audits and assessments public, subject to appropriate redactions. The FTC has responded to this comment by stating that these documents are available by filing a Freedom of

1 This and other events of the last several years raise serious questions about the company's culture, corporate governance, and commitment to following the law. As recently as 2017, the company agreed to pay $20 million to settle FTC charges that it misled prospective drivers with exaggerated earning claims. And according to our Complaint in this matter, Uber reportedly created a tracking tool – "God view" – to surveil the whereabouts of its riders. Another report detailed a company executive's desire to target critical journalists with opposition research.

2 The comments also suggested that we further define privacy assessments/audits and that we seek deletion or "disgorgement" of ill-gotten data. The comments are available at https://www.ftc.gov/policy/public-comments/2018/05/initiative-754.

Information Act request, but proactive disclosure would be superior, given the public interest in keeping this company in compliance.

Statement of Commissioner Rebecca Kelly Slaughter

I support the action announced today to give final approval to an administrative consent order with Uber Technologies, Inc., resolving charges that the company deceived consumers regarding its privacy and data security practices. Notably, the consent order imposes additional obligations on Uber in light of the fact that the company failed to inform the FTC that it had suffered a significant data breach during the course of the agency's investigation of a similar prior breach.

While I believe that the injunctive provisions in the order will provide strong protections for consumers and their personal information, I also believe that the FTC should have additional authority and remedies to address deceptive or unfair conduct relating to privacy and data security. Namely, we do not have the ability to issue rules under the Administrative Procedures Act that would provide additional guidance for how companies must treat data, nor do we have the ability to assess civil penalties against companies that violate the FTC Act in connection with their data practices. The threat of civil penalties would provide a greater incentive to firms to follow through on the promises they make to consumers and to make appropriate investments to implement reasonable data security safeguards.

In a high-profile case such as this, which has been the subject of significant public attention and press reports, many stakeholders understandably are interested in Uber's future conduct and its compliance with this order. The FTC's Division of Enforcement is responsible for monitoring compliance under all federal and administrative court orders that are still in effect pertaining to consumer protection matters. The agency's compliance monitoring efforts include not just the review of formal reports and assessments that are required under orders, but in many instances also include a continuous open channel of communication between attorneys in the Division of Enforcement and representatives of the companies under order regarding both past and future business practices. These ongoing compliance efforts are non-public.

Two public comments submitted on the proposed consent order requested that the Commission proactively release copies of the third-party privacy assessments Uber is required to provide to the Commission under the order. While these assessments are available to any requester in response to a FOIA request, I would have preferred to see the proactive release of the assessments in this specific case due to the objectively high level of public interest in this matter, including in the assessments in particular. However, I want to emphasize that any privacy or data security assessment that is released to the public – through FOIA or any other means – will not provide a complete picture of a company's compliance under an FTC order, or the

FTC's efforts in monitoring that company's compliance. This is not simply because such reports must be redacted to protect proprietary information, but because the FTC's compliance monitoring efforts in many cases extend far beyond what can be gleaned from an isolated assessment.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has withdrawn its acceptance of the agreement containing consent order from Uber Technologies, Inc. ("Uber") that the Commission released for public comment in this proceeding on August 15, 2017 ("August 2017 proposed consent agreement"), and has accepted, subject to final approval, a new agreement containing consent order from Uber ("April 2018 proposed consent agreement").

The April 2018 proposed consent agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. All comments received during this period will become part of the public record. Interested persons who submitted comments during the public comment period for the August 2017 proposed consent agreement should resubmit their original comments, or submit new comments, during the new comment period if they would like the Commission to consider their comments when the Commission decides whether to make final the April 2018 proposed consent agreement. After thirty (30) days, the Commission again will review the April 2018 proposed consent agreement, and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

Since 2010, Uber has operated a mobile application (the "App") that connects consumers who are transportation providers ("Drivers") with consumers seeking those services ("Riders"). Riders book transportation or delivery services through a publicly-available version of the App that can be downloaded to a smartphone. When a Rider requests transportation through the App, the request is conveyed to a nearby Uber Driver signed into the App.

Drivers use the App to determine which ride requests they will accept. Uber collects a variety of personal information from Drivers, including names, email addresses, phone numbers, postal addresses, Social Security numbers, driver's license numbers, bank account information, vehicle registration information, and insurance information. With respect to Riders, Uber collects names, email addresses, postal addresses, and detailed trip records with precise geolocation information, among other things.

In November 2014, Uber was the subject of various news reports describing improper access and use of consumer personal information, including geolocation information, by Uber employees. One article reported that an Uber executive had suggested that Uber should hire

"opposition researchers" to look into the "personal lives" of journalists who criticized Uber's practices. Another article described an aerial tracking tool known as "God View" that displayed the personal information of Riders using Uber's services. These reports led to considerable consumer uproar. In an effort to respond to consumer concerns, Uber issued a statement describing its policies concerning access to Rider and Driver data. As part of that statement, Uber promised that all "access to rider and driver accounts is being closely monitored and audited by data security specialists on an ongoing basis, and any violations of the policy will result in disciplinary action, including the possibility of termination and legal action."

As alleged in the proposed complaint, Uber has not monitored or audited its employees' access to Rider and Driver personal information on an ongoing basis since November 2014. In fact, between approximately August 2015 and May 2016, Uber did not timely follow up on automated alerts concerning the potential misuse of consumer personal information, and for approximately the first six months of this period only monitored access to account information belonging to a set of internal high-profile users, such as Uber executives. During this time, Uber did not otherwise monitor internal access to personal information unless an employee specifically reported that a co-worker had engaged in improper access. Count one of the proposed complaint alleges that Uber's representation that it closely monitored and audited internal access to consumers' personal information was false or misleading in violation of Section 5 of the FTC Act in light of Uber's subsequent failure to monitor and audit such access between August 2015 and May 2016.[1]

The proposed complaint also alleges that Uber failed to provide reasonable security for consumer information stored in a third-party cloud storage service provided by Amazon Web Services ("AWS") called the Amazon Simple Storage Service (the "Amazon S3 Datastore"). Uber stores in the Amazon S3 Datastore a variety of files that contain sensitive personal information, including full and partial back-ups of Uber databases. These back-ups contain a broad range of Rider and Driver personal information, including, among other things, names, email addresses, phone numbers, driver's license numbers, and trip records with precise geolocation information.

From July 13, 2013 to July 15, 2015, Uber's privacy policy described the security measures Uber used to protect the personal information it collected from consumers, stating that such information "is securely stored within our databases, and we use standard, industry-wide commercially reasonable security practices such as encryption, firewalls and SSL (Secure Socket Layers) for protecting your information—such as any portions of your credit card number which we retain… and geo-location information." Additionally, Uber's customer service representatives offered assurances about the strength of Uber's security practices to consumers who were reluctant to submit personal information to Uber.

1 Count one of the proposed complaint and the underlying factual allegations are unchanged from the proposed complaint against Uber that the Commission issued previously as part of the August 2017 proposed consent agreement.

Analysis to Aid Public Comment

As described below, count two of the proposed complaint alleges that the above statements violated Section 5 of the FTC Act because Uber engaged in a number of practices that, taken together, failed to provide reasonable security to prevent unauthorized access to Rider and Driver personal information in the Amazon S3 Datastore.[2] Specifically, Uber allegedly:

- Failed to implement reasonable access controls to safeguard data stored in the Amazon S3 Datastore. For example, Uber (1) until approximately September 2014, permitted engineers to access the Amazon S3 Datastore with a single, shared AWS access key that provided full administrative privileges over all data stored there; (2) until approximately September 2014, failed to restrict access to systems based on employees' job functions; and (3) until approximately September 2015, failed to require multi-factor authentication for individual account access, and until at least November 2016, failed to require multi-factor authentication for programmatic service account access, to the Amazon S3 Datastore;

- Until at least September 2014, failed to implement reasonable security training and guidance;

- Until approximately September 2014, failed to have a written information security program; and

- Until at least November 2016, stored sensitive personal information in the Amazon S3 Datastore in clear, readable text, rather than encrypting the information.

As a result of these failures, intruders accessed Uber's Amazon S3 Datastore multiple times using access keys that Uber engineers had posted to GitHub, a code-sharing site used by software developers.

First, on or about May 12, 2014, an intruder accessed Uber's Amazon S3 Datastore using an access key that was publicly posted and granted full administrative privileges to all data and documents stored within Uber's Amazon S3 Datastore (the "2014 data breach"). The intruder accessed one file that contained sensitive personal information belonging to Uber Drivers, including over 100,000 unencrypted names and driver's license numbers, 215 unencrypted names and bank account and domestic routing numbers, and 84 unencrypted names and Social Security numbers. Uber did not discover the breach until September 2014. Uber sent breach notification letters to affected Uber Drivers in February 2015. Uber later learned of more

2 Count two of the proposed complaint addresses the same allegedly false or misleading statements as did count two of the proposed complaint against Uber that the Commission issued as part of the August 2017 proposed consent agreement. The proposed complaint includes allegations that the now withdrawn complaint included to support count two and also includes additional allegations to support count two based on new information the Commission obtained after August 2017.

affected Uber Drivers in May and July 2016 and sent breach notification letters to those Drivers in June and August 2016.

Second, between October 13, 2016 and November 15, 2016, intruders accessed Uber's Amazon S3 Datastore using an AWS access key that was posted to a private GitHub repository ("the 2016 data breach"). Uber granted its engineers access to Uber's GitHub repositories through engineers' individual GitHub accounts, which engineers generally accessed through personal email addresses. Uber did not have a policy prohibiting engineers from reusing credentials, and did not require engineers to enable multi-factor authentication when accessing Uber's GitHub repositories. The intruders who committed the 2016 breach said that they accessed Uber's GitHub page using passwords that were previously exposed in other large data breaches, whereupon they discovered the AWS access key they used to access and download files from Uber's Amazon S3 Datastore. The intruders downloaded sixteen files that contained unencrypted consumer personal information relating to U.S. Riders and Drivers, including approximately 25.6 million names and email addresses, 22.1 million names and mobile phone numbers, and 607,000 names and driver's license numbers. Nearly all of the exposed personal information was collected before July 2015 and stored in unencrypted database backup files.

Uber discovered the 2016 data breach on or about November 14, 2016, when one of the attackers contacted Uber claiming to have compromised Uber's "databases" and demanding a six-figure payout. Uber paid the attackers $100,000 through the third party that administers Uber's "bug bounty" program. Respondent created the bug bounty program to pay financial rewards in exchange for the responsible disclosure of serious security vulnerabilities. However, the attackers who committed the 2016 data breach were fundamentally different from legitimate bug bounty recipients. Instead of responsibly disclosing a vulnerability, the attackers maliciously exploited the vulnerability and acquired millions of consumers' personal information.

Uber failed to disclose the 2016 data breach to affected consumers until November 21, 2017, more than a year after discovering it. Uber also failed to disclose the 2016 data breach to the Commission until November 2017 despite the fact that the breach occurred in the midst of a nonpublic Commission investigation relating to Uber's data security practices, including, specifically, the security of Uber's Amazon S3 Datastore.

The proposed consent order contains provisions designed to prevent Uber from engaging in acts and practices in the future similar to those alleged in the proposed complaint.

Part I of the proposed order prohibits Uber from making any misrepresentations about the extent to which Uber monitors or audits internal access to consumers' personal information or the extent to which Uber protects the privacy, confidentiality, security, or integrity of consumers' personal information. This Part is identical to Part I of the August 2017 proposed consent agreement.

Part II of the proposed order requires Uber to implement a mandated comprehensive privacy program that is reasonably designed to (1) address privacy risks related to the development and management of new and existing products and services for consumers, and (2)

protect the privacy and confidentiality of consumers' personal information. Part II.B includes new language that requires Uber's mandated privacy risk assessments to include consideration of risks and safeguards related to (a) secure software design, development, and testing, including access key and secret key management and secure cloud storage; (b) review, assessment, and response to third-party security vulnerability reports, including through a "bug bounty" or similar program; and (c) prevention, detection, and response to attacks, intrusions, or systems failures.

Part III of the proposed order requires Uber to undergo biennial assessments of its mandated privacy program by a third party. Part III has been revised from the August 2017 proposed consent agreement to require Uber to submit to the Commission each of its assessments rather than only its initial assessment.

Part IV of the proposed order requires Uber to submit a report to the Commission if Uber discovers any "covered incident" involving unauthorized access or acquisition of consumer information. This Part is new.

Parts V through IX of the proposed order are reporting and compliance provisions. Part V requires dissemination of the order now and in the future to all current and future principals, officers, directors, and managers, and to persons who participate in conduct related to the subject matter of the order, including all employees, agents, and representatives who regularly access personal information. Part VI mandates that Uber submit a compliance report to the FTC one year after issuance of the order and submit additional notices as specified. Parts VII and VIII require Uber to retain documents relating to its compliance with the order, and to provide such additional information or documents as are necessary for the Commission to monitor compliance. Part IX states that the order will remain in effect for 20 years.

These provisions include modifications from the August 2017 proposed consent agreement. Part V expands the acknowledgement of order provision to require Uber to obtain signed acknowledgements from all employees, agents, and representatives who regularly access personal information that Uber collects or receives from or about consumers, rather than limiting the requirement to employees with managerial responsibility related to the order. And Part VII contains modified recordkeeping provisions and new recordkeeping provisions relating to Uber's bug bounty program and its subpoenas and communications with law enforcement.

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.

IN THE MATTER OF

1-800 CONTACTS, INC.

OPINION OF THE COMMISSION AND FINAL ORDER IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. 9372; File No. 141 0200
Complaint, August 8, 2016 – Decision, November 7, 2018

This case addresses 1-800 Contacts, Inc.'s settlement agreements with over a dozen rivals prohibiting both 1-800 and the other parties from bidding on keywords containing the other's trademarks, and requiring each party to implement negative keywords to ensure that their ads do not appear in search engine results pages for searches that contain each other's trademarks. The complaint, 164 F.T.C. 360, alleges that these agreements are in restraint of trade in violation of Section 5 of the Federal Trade Commission Act. In his Initial Decision, 164 F.T.C. 373, the Administrative Law Judge found that the challenged agreements pose significant, unjustified anticompetitive consequences in the relevant market for the sale of contact lenses online. The Administrative Law Judge ordered 1-800 Contacts to cease and desist from enforcing or attempting to enforce any and all provisions, terms, or requirements in an existing agreement or court order that impose a condition on a Seller, which prohibits, restricts, regulates, or otherwise places any limitation on truthful, non-deceptive, and non-infringing advertising or promotion. *Id.* at 637. The Respondent appealed the Initial Decision. The Commission scheduled oral argument, 165 F.T.C. 1415, and subsequently rescheduled the arguments, 165 F.T.C. 1471. The Commission heard oral arguments on June 26, 2018.

Participants

For the *Commission*: *Gustav Chiarello, Kathleen Clair, Joshua Barton Gray, Stuart Hirschfeld, Nathaniel Hopkin* and *Charlotte Slaiman.*

For the *Respondent*: *Garth Vincent, Munger Tolles & Olson; Darryl Nirenberg, Steptoe & Johnson.*

OPINION OF THE COMMISSION

By Chairman Joseph J. Simons, for the Commission:

This proceeding considers Complaint Counsel's challenge to a number of agreements among horizontal competitors—in most instances, trademark litigation settlements—that, allegedly, anticompetitively limit internet search advertising and restrict bidding in internet search auctions to the detriment of consumers. Respondent 1-800 Contacts sued rival contact-lens sellers for trademark infringement when sellers' online advertising appeared in response to consumers' internet searches for "1-800 Contacts." In nearly all cases, the litigation settled before trial. The resulting settlement agreements require the parties, when bidding at search engine advertising auctions, to take steps to ensure their ads do not appear in response to searches for the other party's trademark terms.

At first glance, this proceeding may appear to contemplate little more than a few terms embedded in a document that purports to resolve a trademark dispute among internet sellers of

contact lenses. But, in reality, this case grapples with issues of enormous import. We consider here consumer marketplaces that embody the very basic institutions of 21st century commerce. Increasingly, consumers no longer shop for goods by walking down Main Street and looking at the price tags on window displays or by wandering through the aisles of retail establishments comparing prices on shelves and product characteristics written on packages. Rather, consumers now frequently—and with increasing frequency—open their web browsers, enter desired product names or qualities into a search engine, and wait for Main Street or supermarket aisles to be digitally transported to them. This phenomenon is comparatively recent, but e-commerce already comprises a significant and growing share of our economy's retail sales. Indeed, the Census Bureau estimated that e-commerce retail sales in the United States totaled $127.3 billion in the second quarter of 2018, which comprised approximately 9.6 percent of total retail sales.[1]

We consider here the manner in which and conditions under which prices for contact lenses are advertised throughout the internet economy. Our decision will affect not only the price that consumers pay for some contact lenses but also the very manner in which substantial parts of price competition will occur throughout consumer markets today and tomorrow. As this agency has explained time and again, robust, accurate, and intelligible price competition among those who compete for consumers' dollars is one of the cornerstones of our vibrant market economy. When information is withheld from consumers, it frustrates their ability to compare the prices and offerings of competitors. This is as true today, when consumers search for goods online, as it was when people shopped open-air markets for vegetables every evening. In that important respect, nothing has changed.

Chief Administrative Law Judge ("ALJ") D. Michael Chappell held a 19-day administrative hearing involving the testimony of 43 witnesses, either live or by deposition, and more than 1250 exhibits. Judge Chappell issued an Initial Decision that held that the advertising restraints at issue harm consumers and competition in the market for the sale of contact lenses online. The ALJ held that the Supreme Court's decision in *FTC v. Actavis*, 570 U.S. 136 (2013) did not establish antitrust immunity for the trademark settlements. The ALJ also determined that the agreements do not have countervailing procompetitive benefits that outweigh or justify the demonstrated anticompetitive effects. He therefore concluded that the agreements unreasonably restrain trade in violation of the Federal Trade Commission Act ("FTC Act"). Respondent has appealed, and Complaint Counsel oppose that appeal.

Respondents in this appeal ask us to permit them to eradicate an important form of price competition as a means to protect the intellectual capital embedded in their trademarks. Of course, their claims deserve and receive full and respectful consideration. At the same time, we must be mindful that what is at stake is not only the proper antitrust response to certain lawsuit settlements, but also the very means by which and conditions under which retail price competition takes place in the 21st century internet economy. These are matters vital to the interests of consumers and producers in our evolving marketplace economy.

1 U.S. Census Bureau, U.S. Census Bureau News (Aug. 17, 2018), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf (estimating adjusted retail e-commerce sales for the second quarter of 2018).

We affirm the ALJ's conclusions that *Actavis* does not confer antitrust immunity. If anything, *Actavis* follows a long line of cases that holds that patent-related settlements can sometimes violate the antitrust laws. Moreover, *Actavis* made clear that the effect of intellectual property on the application of antitrust laws in such settlements should be assessed through consideration of traditional antitrust factors. We therefore hold that the challenged agreements unreasonably restrain trade in violation of Section 5 of the FTC Act, although our analysis differs from that of the Initial Decision in some respects. We find that the agreements harm consumers and competition for the online sale of contact lenses. We also find that Respondent has not demonstrated valid offsetting procompetitive justifications for the advertising restraints, and that the restraints were not reasonably necessary to achieve the claimed procompetitive benefits. Consequently, we enter a cease-and-desist order that prohibits 1-800 Contacts from enforcing the unlawful provisions in the challenged agreements and prevents 1-800 Contacts from entering into similar agreements in the future. We also find that challenged agreements harm competition in bidding for search engine key words, artificially reducing the prices that Respondent paid and the quality of the search engine results delivered to consumers—without offsetting efficiencies.

I. BACKGROUND

A. Respondent, 1-800 Contacts

1-800 Contacts sells contact lenses to consumers throughout the United States. It started as a mail-order contact lens business in a college dorm in 1992. IDF 30-33.[2] The business changed its name in 1995 when it obtained the 1-800 Contacts telephone number. IDF 36. The company launched its website in 1996, and beginning in 2004, its internet sales exceeded its telephone sales. IDF 37, 67. In 2015, 1-800 Contacts' revenues were approximately $460 million. IDF 68. Its annual volume of contact lenses sold via the Internet to U.S. consumers currently exceeds the online sales of contact lenses to U.S. consumers by any other company. IDF 69.

B. The Contact Lens Industry

Contact lenses are a billion dollar industry in the United States. IDF 4. Contact lenses are medical devices that can be sold only pursuant to a prescription written by an optometrist or ophthalmologist, also called eye care practitioners ("ECPs"). IDF 8-12. A consumer interested in wearing contact lenses must first visit an ECP for a lens fitting and prescription. IDF 10. A consumer's prescription specifies the brand as well as the power and other characteristics of the

2 We use the following abbreviations in this opinion:

Compl.:	Complaint
Answer:	Respondent 1-800 Contacts, Inc.'s Answer and Defenses to Administrative Complaint
ID:	Initial Decision
IDF:	Initial Decision Finding of Fact
Stip.:	Joint Stipulation Regarding Search Engine Mechanics and Glossary of Terms
RAB:	Respondent's Brief on Appeal
CCB:	Complaint Counsel's Answering Brief to Respondent's Appeal Brief
RRB:	Respondent's Reply Brief on Appeal

contact lenses. A consumer's prescription expires in one year in most states, and two years in others; consequently, the consumer must regularly return to an ECP. IDF 18-19, 23.

In 2003, Congress enacted the Fairness to Contact Lens Consumers Act, which, along with the FTC's implementing regulations, gives patients an automatic right to their contact lens prescriptions upon completion of a fitting. IDF 17; *see also* 15 U.S.C. § 7601 (2003). This facilitates their ability to fill contact lens prescriptions through any retail channel they choose. ID at 111. Because prescriptions identify the power, base curve, and specific lens brand, the lenses a consumer receives are identical in every way, irrespective of the choice of retailer. IDF 23-27; Coon, Tr. 2667, 2687; Bethers, Tr. 3612; CX9017 (Blackwood Dep.) at 304. Consumers often buy contact lenses from ECPs when they return every 1-2 years for a new prescription. Other contact lens retailers compete mostly for consumers' "refill" sales. IDF 76, 403-05.

There are four types of retailers in the industry. IDF 73. First, many ECPs operate independent practices ("independent ECPs") and sell both their services (eye exams) and the products they prescribe (contact lenses). Independent ECPs sell contact lenses directly to consumers and, in 2015, accounted for 40 percent of all contact lens sales in the United States. IDF 75-76, 79, 491. Second, national and regional optical retail chains, such as LensCrafters and Visionworks, accounted for 20 percent of contact lens sales in 2015. IDF 84-85, 491. Third, mass merchants, such as Walmart and Target, and club stores, such as BJ's and Sam's Club, sell contact lenses and accounted for 23 percent of contact lens sales in 2015. IDF 90, 93, 491. Fourth, so-called "pure-play" online retailers, such as 1-800 Contacts, sell only online and do not have brick-and-mortar locations; pure-play online sellers accounted for 17 percent of contact lens sales in 2015. IDF 77, 98-99, 491. In 2015, 1-800 Contacts accounted for approximately [redacted] percent of online sales, which is more than four times the sales of the second-largest online retailer. IDF 495; *see also* IDF 494 (citing CX9001 (Bethers, IHT) at 159-60 (1-800 Contacts' CEO testifying that 1-800 Contacts' sales constituted more than 60 percent of the online contact lens market)).

The price for contact lenses varies significantly based on the retail channel. Among brick-and-mortar retailers, independent ECPs typically have the highest prices for contact lenses, followed by optical retail chains, which, on average, sell contact lenses priced just below those sold by ECPs. IDF 431-32. Mass merchants offer lower contact lens prices than independent ECPs and optical retail chains. IDF 441. Membership club stores have the lowest contact lens prices. IDF 448; Bethers, Tr. 3545.

Online contact-lens retailers—other than 1-800 Contacts—generally offer prices well below those of independent ECPs, optical retail chains, and mass merchants. IDF 442 (citing Bethers, Tr. 3536-37, 3544-45, Clarkson, Tr. 189-90 ("in most cases online pricing is significantly lower than for any of the brick-and-mortar channels, with the exception of the clubs")), 444 (online retailer AC Lens explaining ECPs' "prices are typically so much higher"); 446 (online seller Memorial Eye charged significantly lower prices online than it did in its physical stores).

But 1-800 Contacts' prices are higher than those of other online retailers. IDF 691. It sets its prices below ECPs' and optical retail chains' prices, but above prices offered by mass

merchants and club stores. IDF 433-34, 441; Coon, Tr. 2695, 2708-10; Bethers, Tr. 3543-46. Importantly, 1-800 Contacts' prices are approximately [redacted] percent higher than other online retailer prices. IDF 692 (citing CX8007 (Athey Expert Report at 013-14, 045-51 ¶¶ 31-32, Exhibit D-1 to D-7)); *see also* CX0295 at 064, *in camera* (in January 2014, 1-800 Contacts prices were higher than those of other online retailers by [redacted] percent per box, [redacted] percent for a six month supply, and [redacted] percent for a 12 month supply); RX1228 at 036, *in camera* (2015 analysis showing that 1-800 Contacts' prices were higher than those of other online retailers; the net prices of Coastal Contacts, LensDirect, AC Lens, Vision Direct, and Lens.com were [redacted] lower than 1-800 Contacts' net prices).

C. Paid Search Advertising

Online retailers use online advertising to attract new customers. Internet search engines, such as Google, Bing, and Yahoo!, allow internet users to search and retrieve content on the World Wide Web. In response to a user's search query, the search engine employs algorithms to match the text of the query with portions of the Web that may contain relevant content. Stip. at 2, 5. Links to webpages deemed potentially responsive to the user's search are ranked and presented to the user on a search engine results page ("SERP"). *Id.*

A typical SERP displays two sorts of search results: "organic" links and "sponsored" links, which are advertisements. Stip. at 2; ID at 36. Organic search results are links to websites that the search engine has identified as relevant to the user's query. No one can pay the search engine to have an organic result appear or to change a result's rank on the SERP. Rather, the appearance and rank of organic links are based on relevance to the user's search, with the most relevant results at the top of the SERP. Stip. at 5.

Sponsored links typically are displayed above, below, or to the side of the organic results, and often appear in a different colored box labeled with the word "Ad." Stip. at 5-6; ID at 36. Google and Bing display up to four search advertisements at the top of the page, above the organic search results. Stip. at 5; IDF 212, 234. As the name suggests, advertisers pay to have sponsored links appear on a SERP. To determine which ads appear, and in what order, search engines use an auction to sell advertising positions. Advertisers bid on "keywords," which are words or phrases that trigger the display of ads when they are determined to "match" a user's search. Stip. at 2; IDF 163. But the auction bids alone do not determine whether a particular ad appears. Search engines evaluate other factors, such as an ad's quality and its relevance to a user's search query, in determining the ad's location on a SERP and whether it displays at all. Stip. at 9-12; ID at 26-28. Thus, even a high auction bid will not result in an ad appearing if the search engine does not find the ad relevant to the user's search. Search engines have an incentive to show relevant ads because search engines are paid for displaying an ad only if the user clicks on the ad.[3] Juda, Tr. 1072.

3 The price that an advertiser pays to the search engine each time its advertisement is clicked is the cost-per-click ("CPC"). IDF 155. The CPC for each advertiser is based on the outcome of a generalized second-price auction.

Google, the leading search engine in the United States, receives more than eight out of every ten dollars spent on paid search advertising. IDF 137; Stip. at 5. Google's paid search platform is called "AdWords." When bidding on keywords in AdWords, advertisers may designate a keyword as "broad match," "phrase match," "exact match," or "negative match." Stip. at 6-9. When an advertiser designates a keyword as "broad match," its ad may appear when a Google search contains the specific keyword, any of its plural forms, synonyms, or phrases similar to the word.[4] When designated as "phrase match," the ad may appear when a search contains the keyword with additional words before or after.[5] And when designated as "exact match," the ad may appear when a search contains the exact keyword and nothing more.[6] In contrast, an advertiser may use "negative keywords" to ensure its ad does not appear when a user performs a search for a selected word or phrase.[7] Similar to other keywords, negative keywords can be designated as broad match, phrase match, or exact match. *See* Stip. at 8-9.

Generally, search engines do not currently restrict keywords available for bidding in advertising auctions.[8] IDF 290, 298. In fact, it is common for companies to pay search engines to present their ads in response to a user's search query of another company's brand name. IDF 651-53. Before the agreements at issue in this case were in place, Google displayed ads for many of 1-800 Contacts' retail competitors when those retailers bid on, and Google determined the ads were relevant to searches for 1-800 Contacts' trademarks. IDF 653, 656.

RX 0733 (Ghose Report) ¶51. Advertisers are not charged the amount they bid. Instead, the CPC is the bid amount needed to beat the rank of the advertiser in the next lower position. CX9019 (Juda Dep.) at 60, 137-38.

4 Broad match seeks to match within the meaning of the user's search, rather than focusing on the text of any particular keyword. For example, if an advertiser purchases the keyword "low-carb diet plan" and selects broad match, Google may select that advertiser's ad in response to searches for "carb-free foods" or "Mediterranean diets" even though the advertiser did not bid on those particular keywords. Stip. at 7.

5 For example, for the phrase match keyword "tennis shoes," ads may be shown on searches for "red leather tennis shoes" or "buy tennis shoes on sale." Stip. at 7-8.

6 For example, the exact match keyword "tennis shoes" may be matched to searches for "tennis shoes" but not for "red tennis shoes." Stip. at 8.

7 For instance, "a retailer that sells eyeglasses may add the negative keyword 'wine glasses' to prevent its ads from showing in response to searches for that term." ID at 25.

8 Prior to 2004, Google permitted a trademark owner to restrict use of its trademark by third parties as keywords and in the text of advertisements. In April 2004, Google changed its trademark policy to allow third parties to bid on trademarks as keywords, but still prohibited advertisers from using others' trademarks in the text of their ads without authorization. When Google changed its policy, Google stated on its website that "Google is not in a position to arbitrate trademark disputes between advertisers and trademark owners." Google encouraged "trademark owners to resolve their disputes directly with the advertisers." IDF 293. Google further revised its trademark policy in 2009 and now allows advertisers to include another company's trademark in the text of ads unless the trademark holder complains to Google. IDF 287, 290-91, 294; *see also* CX9022 (Charlston Dep.) at 16-17 (describing Google's policy as "reactive").

At the time Microsoft launched Bing in 2009, Microsoft did not permit advertisers to bid on keywords consisting of a trademark owned by a third-party. IDF 296. In 2011, Bing changed its policy and began permitting advertisers to bid on competitors' trademarked keywords. IDF 298.

Paid search advertising is an important method for marketing contact lenses online to obtain new customers and increase brand awareness. The paid search ad is presented to the consumer at a time when the consumer is more likely looking to buy. IDF 497-98, 500-03 (importance of paid search advertising to AC Lens), 523 (importance to LensDirect), 528-29 (importance to Lens Discounters), 532-33 (importance to Lenses for Less), 535, 538 (importance for Memorial Eye), 542-43 (importance for Vision Direct), 547-50 (importance for Walgreens), 553-54 (importance for Walmart), 557-58 (importance for Web Eye Care). In fact, many online retailers devote most of their advertising expenditures to search advertising. IDF 499 (search advertising accounts for 60-70 percent of AC Lens' advertising expenditures), 521 (most of VisionWorks contact lens marketing budget is spent on keyword search advertising), 522 (paid search advertising accounted for 85-90 percent of LensDirect's marketing expenditures in 2016), 527 (online paid search advertising is the "main form of advertising" for Lens Discounters), 531 (Lenses for Less uses no forms of internet advertising other than search advertising), 534 (the "vast, vast, vast majority" of advertising spending for Memorial Eye was for online search advertising), 540-41 (Vision Direct spent more for search advertising than for any other type of advertising), 546 (most of Walgreens' contact lens advertising budget was spent on paid search advertising), 552 (search advertising is the only type of online advertising for contact lenses used by Walmart), 555 (Web Eye Care only engages in online advertising); CX9014 (Batushansky Dep.) at 110 (approximately [redacted] percent of Web Eye Care's online advertising expenditures are for search advertising).

In contrast to other online contact lens retailers, 1-800 Contacts also advertises heavily offline, including printed matter, radio, television, and other means. IDF 61-62. According to Respondent, the company has "made enormous investments" in building its brand and convincing consumers to buy contact lenses online rather than from brick-and-mortar retailers. RAB at 6; IDF 50-66. Between 2002 and 2014, 1-800 Contacts spent a total of [redacted] on television advertising. IDF 64. Yet online advertising is still important to 1-800 Contacts. Between 2002 and 2014, it spent a total of [redacted] on online advertising. IDF 65. In 2014, [redacted] percent of 1-800 Contacts' advertising budget was spent on internet advertising, and between [redacted] percent of 1-800 Contacts' internet advertising budget was spent on paid search advertising each year from 2004 through 2014. IDF 66. When 1-800 Contacts bids on its trademark keywords, it bids high enough to ensure that 1-800 Contacts' sponsored ad is the first advertisement displayed in response to searches for its own trademark. IDF 575; CX9028 (Roundy Dep.) at 86; CX9031 (Schmidt Dep.) at 125-26.

D. 1-800 Contacts' Conduct, Litigation, and the Settlement Agreements

In 2002, 1-800 Contacts filed a complaint against Vision Direct alleging, *inter alia*, trademark infringement, claiming Vision Direct caused pop-up ads to appear when internet users visited the 1-800 Contacts website. The complaint did not include allegations regarding the use of 1-800 Contacts' trademarks as keywords to trigger search engine advertisements.[9] IDF 301. 1-800 Contacts filed a similar action challenging pop-up ads against Coastal Contacts in March

9 This lawsuit predated the change in Google's trademark policy that allowed advertisers to bid on other companies' trademarks as keywords. IDF 304.

2004. CX1615 (including trademark dilution claims). 1-800 Contacts resolved its disputes with Vision Direct and Coastal Contacts by executing settlement agreements that included terms related to pop-up advertising and the use of trademark keywords. IDF 306, 307 (Vision Direct settlement agreement, CX0311, included as prohibited acts "causing a Party's website or Internet advertisement to appear in response to any Internet search for the other Party's brand name, trademarks, or URLs"), 314, 315 (Coastal Contacts settlement agreement, CX0310, included as prohibited acts "causing a Party's website or Internet advertisement to appear in response to any Internet search for the other Party's brand name, trademarks or URLs but not through a search employing Generic or Descriptive terms").

In addition to addressing pop-up ads, 1-800 Contacts monitored whether sponsored ads of its online competitors appeared on SERPs for queries involving the 1-800 Contacts trademarks. IDF 319-20, 322-23. Between 2005 and 2010, the company sent cease-and-desist letters to many of the online contact lens retailers whose ads appeared in the monitoring. IDF 325. The company later filed suit against several of these online retailers alleging federal trademark infringement and unfair competition under the Lanham Act §§ 32 and 43(a),[10] trademark dilution, state and common law unfair competition, and unjust enrichment based on the retailers' ads appearing on SERPs in response to searches for 1-800 Contacts' trademark terms. IDF 328-31. 1-800 Contacts filed suit against AC Lens (CX1623, Feb. 18, 2010), Contact Lens King (CX0461, Mar. 8, 2010), Empire Vision (CX0808, Feb. 25, 2010), EZ Contacts USA (CX1617, Dec. 6, 2007), Lensfast (CX1618, Dec. 23, 2008), Lenses for Less (CX0452, Jan. 20, 2010), Lens.com (CX1125, Aug. 13, 2007), LensWorld (CX1622, Jan. 8, 2008), Memorial Eye (RX0072, Dec. 23, 2008), Standard Optical (CX0965, July 13, 2010), Tram Data (CX0638, May 6, 2010), Walgreens (CX1620, June 8, 2010), and Web Eye Care (CX1621, Aug. 10, 2010).

1-800 Contacts settled most of the cases.[11] In the suit against Lens.com, however, the case went to a judge. In December 2010, the U.S. District Court for the District of Utah issued an opinion granting summary judgment in favor of Lens.com on 1-800 Contacts' trademark litigation claims. *See* 1-*800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151 (D. Utah 2010). The court found "insufficient evidence for a jury to conclude that Defendant infringed on Plaintiff's mark for all advertisements that did not use Plaintiff's mark in them." *Id.* at 1181.[12]

10 Under federal trademark law, to succeed on a trademark infringement claim, a plaintiff must prove (1) that it has a protectable mark, and (2) that the defendant used the mark without the plaintiff's consent in a manner that is likely to cause consumer confusion. *See* RX0734-0018 (Hogan Expert Report). "The most traditional form of trademark confusion is generally known as '*source confusion*,' which is confusion as to the source of a good or service. . . . [C]ourts also recognize confusion as to *affiliation, connection, or sponsorship*. . . . because the Lanham Act . . . prohibits activity likely to cause '[t]he public's belief that the mark's owner sponsored or otherwise approved the use of the trademark[.]'" *Id.* at 0025. Courts have recognized that confusion is possible even if it does not occur at the point of sale. "*Initial interest confusion* . . . refers to the use of another's trademark in a manner calculated to capture initial consumer attention." *Id.* at 0027.

11 In litigation against LensWorld, the court entered a default judgment and an order that prohibited LensWorld from purchasing 1-800 Contacts' federally registered trademarks as keywords for search engine advertising and required LensWorld to implement certain negative keywords where possible. IDF 337.

12 The court, in *dictum*, went on to discuss the propriety of a claimed oral agreement that assertedly required Lens.com to employ negative keywords to prevent its ads from appearing in response to searches for 1-800

In July 2013, the Tenth Circuit upheld this portion of the district court judgment. *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013). The appellate court, however, did not resolve the question of whether use of challenged trademark keywords, divorced from the text of the resulting ads, could result in a likelihood of confusion, because it found that 1-800 Contacts' infringement claim "fail[ed] for lack of adequate evidence" of confusion. *Id.* at 1242-43.

Between 2004 and 2013, 1-800 Contacts entered into thirteen settlement agreements (including the agreements with Vision Direct and Coastal Contacts) to resolve its trademark disputes. IDF 343; *see* CX0313 (2008 settlement agreement with EZ Contacts USA); CX0314; CX0316 (2009 settlement agreement with Vision Direct entered as a permanent injunction by the federal court); CX0315 (2009 settlement agreement with Lensfast); RX0028 (2010 settlement agreement with AC Lens); CX0319 (2010 settlement agreement with Empire Vision); CX0320 (2010 settlement agreement with Lenses for Less); CX0321 (2010 settlement agreement with Tram Data); CX0322 (2010 settlement agreement with Walgreens); CX0323 (2010 settlement agreement with Contact Lens King); CX0324 (2010 settlement agreement with Web Eye Care); RX0408 (2011 settlement agreement with Standard Optical); CX0326 (2013 settlement agreement with Memorial Eye). The settlement agreements include recitals that describe the litigation between the parties and state "the Parties have determined that, in order to avoid the expense, inconvenience, and disruption" of litigation, "it is desirable and in their respective best interests to terminate" the litigation and "settle any claims related thereto." IDF 359. The settlement agreements release the parties of "any and all liability" arising from the claims and require dismissal of the litigation. IDF 360.

Although the language of the agreements varies, each includes provisions that prohibit the parties from using the other party's trademarks, URLs, and variations of marks as search advertising keywords. IDF 361, 363. The settlement agreements also require the parties to employ "negative" keywords to prevent their ads from displaying whenever a search includes (or, as stated in some of the agreements, "contains") the other party's trademarks---even in situations when the advertiser did not bid on the other party's actual trademark and the ad appears due to the search engine's determination that the ad is relevant and useful to the consumer. IDF 364, 368. The agreements, however, do not specify whether negative keywords must be implemented under broad-match, phrase-match, or exact-match protocols. IDF 365.[13] The settlement agreements do not prohibit parties from bidding on generic keywords such as "contacts" or "contacts lens," so long as they employ negative keywords as required. IDF 366-67.

Ten of the thirteen settlement agreements state that they do not prohibit the "use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use

---

Contacts' trademark. "Were this actually an agreement entered into by the parties, the court questions whether it would survive an antitrust challenge. . . . A trademark right does not grant its owner the right to stamp out every competitor advertisement." *Id.* at 1188.

13 Absent a negative keyword, in a broad or phrase match, a party that bids on the keyword "contacts" might find its ad displayed in response to a search for 1-800 Contacts.

in a[] non-Internet context" (*e.g.*, comparative advertising, parodies, and other non-infringing uses). *See* IDF 369.

1-800 Contacts enforced the settlements to prevent advertisements prohibited by the agreements from appearing. For instance, in April 2010, legal counsel for 1-800 Contacts wrote to AC Lens claiming AC Lens had breached the settlement agreement. IDF 372. Again, in 2014, 1-800 Contacts' legal counsel notified AC Lens of another claimed breach. IDF 373. Legal counsel and 1-800 Contacts employees similarly contacted other online retailers to notify them that they were breaching the settlement agreements. *See* IDF 374-79 (communications with Coastal Contacts in 2006, 2011, and 2014), 380-82 (communications with Vision Direct in 2009, 2010, and 2013), 383-86 (communications with Walgreens in 2010 and 2014), 387 (communications with EZ Contacts in 2008), 388 ("Notice of Breach" sent by 1-800 Contacts' counsel to Lensfast in 2014), 389-90 (letters from legal counsel sent to Contact Lens King in 2010 and 2014), 391 (legal counsel contacted Empire Vision in 2010), 392 (legal counsel sent letter to Lenses for Less in 2010).

In 2013, 1-800 Contacts entered into a sourcing and services agreement with Luxottica, a company that sells and distributes contact lenses through affiliates. IDF 86, 393; *see* CX0331 (Luxottica Sourcing and Services Agreement). Under that agreement, 1-800 Contacts provides fulfillment services by shipping contacts to Luxottica's retail chain stores (*e.g.*, LensCrafters, Pearle Vision, Sears Optical, and Target Optical). The sourcing and services agreement contains reciprocal advertising restrictions similar to those in the thirteen settlement agreements; it prohibits use of trademark keywords and requires exact-match negative keywords. IDF 396.

E. Procedural History

1. The FTC's Complaint

In August 2016, the FTC issued an administrative Complaint against 1-800 Contacts, alleging that the thirteen settlement agreements and the sourcing agreement (collectively, the "Challenged Agreements") and subsequent policing of the agreements unreasonably restrain both price competition in search advertising auctions and the availability of truthful, non-misleading advertising in violation of Section 5 of the FTC Act. Compl. ¶¶ 3, 25, 33. The Complaint alleges that the Challenged Agreements prevented the parties from disseminating ads that would have informed consumers that identical products were available at different prices, which reduced price competition among online contact lens retailers and made it costlier for consumers to search prices offered by the retailers. Compl. ¶ 31. As a result, the Complaint alleges, at least some consumers paid higher prices for contact lenses. *Id.*

The Complaint also alleges that Respondent's conduct undermined the efficiency of search advertising auctions, distorted the prices in those auctions by eliminating bidders, and degraded the quality of service offered by search engines, including the quality of the SERP displayed to users. *Id.*

2. Complaint Counsel's Motion for Partial Summary Decision

Prior to the hearing before the ALJ, Complaint Counsel filed a motion for partial summary decision to dismiss the second and third defenses asserted in Respondent's Answer. Respondent's second defense contended that the Complaint is barred because the trademark lawsuits underlying the settlement agreements had not been alleged and shown to be objectively and subjectively unreasonable. The third defense argued that 1-800 Contacts' conduct is protected under the *Noerr-Pennington* doctrine and the First Amendment.

On February 1, 2017, the Commission granted the motion for partial summary decision. *See 1-800 Contacts, Inc.*, Docket No. 9372, Commission Opinion and Order Granting Motion for Partial Summary Decision (Feb. 1, 2017). The Commission found that *Noerr* is not a defense because the Complaint challenges only private agreements. The Commission also found that the objective or subjective reasonableness of the trademark disputes is not an affirmative defense, even if the nature of the disputes may inform the antitrust analysis.

3. The Initial Decision

Chief Administrative Law Judge Chappell issued a 214-page Initial Decision and Order on October 20, 2017, finding the Challenged Agreements violated Section 5 of the FTC Act. ID at 7, 138, 166, 190, 200. At the outset, the ALJ rejected 1-800 Contacts' assertion that, under *FTC v. Actavis*, the trademark settlement agreements should not be subject to antitrust scrutiny. The ALJ found that trademark settlements are not antitrust immune. *Id.* at 7, 120-22.

When considering liability, the ALJ applied Sherman Act Section 1 principles. To begin, he found there was "no dispute in this case that there was a contract, combination, or conspiracy" because 1-800 Contacts entered into fourteen agreements with online competitors. *Id.* at 118. Applying the rule of reason, the ALJ found that the relevant market in which to analyze the agreements' effects was "the online sale of contact lenses in the United States," *id.* at 138, 200, and that Complaint Counsel had met its burden of showing anticompetitive effects in that market. *Id.* at 7, 190, 200.

Specifically, the ALJ ruled that Complaint Counsel had established actual anticompetitive effects with harm to consumers and competition. *Id.* He explained that the advertising restrictions imposed by the Challenged Agreements harmed consumers by reducing the availability of information, which made it costlier for consumers to find and compare options for buying contact lenses online. He concluded that the reduced advertising "more likely than not resulted in consumers purchasing from 1-800 Contacts at higher prices than they would have paid to lower-priced competitors." *Id.* at 155-56.

The ALJ stated that, because Complaint Counsel had proven that the challenged agreements resulted in harm to consumers and competition, his Initial Decision need not, and did not, determine whether 1-800 Contacts' motives were anticompetitive. *Id.* at 139. In addition, although the Complaint alleged that "[a]s horizontal agreements that restrain price competition and restrain truthful non-misleading advertising, the Bidding Agreements are inherently suspect," Compl. ¶ 32, the ALJ did not address this allegation. ID at 138-39. The ALJ also

concluded that, having found liability under one theory (harm to consumers), he did not need to consider the other theory of alleged harm, based on injury to search engines. *Id.* at 166.

After finding anticompetitive effects, the ALJ considered and rejected Respondent's asserted procompetitive justifications. He concluded that, even if the settlement agreements reduced litigation costs and were favored by public policy, Respondent failed to proffer any consumer benefits flowing from the reduced litigation costs. *Id.* at 167-69. The ALJ also rejected Respondent's justifications related to trademark law. *Id.* at 169-84. According to the ALJ, even if protecting trademarks and thereby encouraging investment in a brand name is a procompetitive goal, Respondent improperly *assumes* the fact of infringement. The ALJ found that Respondent failed to provide legal support for its assertion that merely displaying an ad in response to a search query for a trademark term is "likely to confuse" consumers about source or affiliation, regardless of the text of the ad. *Id.* at 170. The ALJ also found that Respondent failed to support the conclusion that the appearance of an online ad in response to a trademark search due to broad matching an advertiser's bids on generic keywords (*i.e.*, the failure to identify trademark terms as negative keywords) is a trademark "use." *Id.*

Having found liability, the ALJ issued an order that bars 1-800 Contacts from agreeing with any marketer or seller of contact-lens products to prohibit or limit participation in search advertising auctions (including prohibiting or restricting the use of keywords or requiring the use of negative keywords) or to prohibit or limit search advertising. ID at 203. The ALJ's order contains a carve-out clause regarding future litigation; the carve-out establishes that the order does not prohibit Respondent from initiating or prosecuting a lawsuit or implementing or enforcing the order entered by any court of law, including an order approving a litigation settlement. *Id.* The ALJ's order also requires Respondent to cease enforcing existing agreements that are inconsistent with the terms of the order's prohibitions. *Id.* at 204.

II. STANDARD OF REVIEW

The Commission reviews the ALJ's findings of fact and conclusions of law *de novo*, considering "such parts of the record as are cited or as may be necessary to resolve the issues presented." 16 C.F.R. § 3.54(a). The Commission may "exercise all the powers which it could have exercised if it had made the initial decision." *Id.* The *de novo* standard of review applies to both findings of fact and inferences drawn from those facts. *See Realcomp II, Ltd.*, 2007 WL 6936319, at *16 n.11 (F.T.C. Oct. 30, 2009), *aff'd*, 635 F.3d 815 (6th Cir. 2011). We adopt the ALJ's findings of fact to the extent that they are not inconsistent with this opinion.

III. JURISDICTION

Respondent does not dispute that the Commission has jurisdiction over it and over the conduct challenged in the Complaint. Section 5 of the Federal Trade Commission Act grants the Commission authority to prevent "unfair methods of competition in or affecting commerce" by "persons, partnerships, or corporations," 15 U.S.C. § 45(a)(1)-(2). 1-800 Contacts is a corporation as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44, over which the Commission has jurisdiction. *See* Joint Stipulations of Jurisdiction, Law, and Fact, JX0001 ¶ 2. The acts and practices of 1-800 Contacts at issue, including the agreements being challenged,

are in commerce or affect commerce as "commerce" is defined in Section 4 of the FTC Act. IDF 3; Joint Stipulations of Jurisdiction, Law, and Fact, JX0001 ¶ 3; Answer ¶ 6.

IV. 1-800 CONTACTS' SETTLEMENTS ARE NOT IMMUNE FROM ANTITRUST SCRUTINY

A. *Actavis* Does Not Immunize Commonplace Settlement Agreements or Settlements within the Scope of Potential Judicial Relief

Respondent contends the settlement agreements between 1-800 Contacts and thirteen rival online sellers of contact lenses are not subject to antitrust scrutiny.[14] Respondent asserts that *Actavis* stands for the proposition that there can be no antitrust challenge to a settlement agreement that is commonplace in form. Here, Respondent claims its settlements of trademark litigation took the form of common, non-use agreements. According to Respondent, *Actavis* exempted commonplace forms of settlement from antitrust scrutiny and held that "a party challenging a settlement must show that the settlement's form is unusual." RAB at 10 (internal quotation marks omitted). Respondent, however, reads *Actavis* much too broadly; the Court created no such shield from antitrust review.

As support for its argument, Respondent quotes the following sentence fragment in *Actavis:* "commonplace forms have not been thought for that reason alone subject to antitrust liability." RAB at 3 (quoting *Actavis*, 133 S. Ct. at 2233). The Court's wording is much more limited than Respondent suggests. The Supreme Court presented two examples of settlements: (1) where "Company A sues Company B for patent infringement and demands, say $100 million in damages" and receives "some amount less than the full demand as part of the settlement – $40 million, for example"; and (2) where "B has a counterclaim for damages against A" and "the original infringement plaintiff, A … end[s] up paying B to settle B's counterclaim." *Actavis*, 570 U.S. at 151-52. The Court then explained: "Insofar as the dissent urges that settlements taking *these* commonplace forms have not been thought for that reason alone subject to antitrust liability, we agree, and do not intend to alter that understanding." *Id*. at 152 (emphasis added). The Court did not state a general rule that removes settlement agreements from antitrust scrutiny, but rather characterized two specific types of settlements as commonplace, and made it clear that the form of the settlement *alone* is not what subjects an agreement to antitrust scrutiny.

Other portions of *Actavis* confirm this conclusion. Specifically, *Actavis* favorably cites three precedents that found antitrust liability for patent-related settlement agreements. First the Court relied on *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963). *Actavis* characterized the *Singer* Court as "emphasizing that the Sherman Act 'imposes strict limitations on the concerted activities in which patent owners may lawfully engage' . . . it held that the agreements, although settling patent disputes, violated the antitrust laws." *Actavis*, 570 U.S. at 149 (quoting and citing *Singer*, 374 U.S. at 195, 197). *Actavis* also discussed *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952), and its holding that the settlement agreement between two patentees did not confer antitrust immunity: "Far from it, the agreement was found to violate the Sherman Act."

14 Respondent's arguments about immunity for its settlement agreements, of course, offer no shelter for its Source and Services Agreement with Luxottica. That Agreement is not a settlement agreement.

Actavis, 570 U.S. at 150 (citing *New Wrinkle*, 342 U.S. at 380). Finally, the *Actavis* Court noted that *Standard Oil Co. v. United States*, 283 U.S. 163 (1931) warned that the settlement agreements among patentees would have violated the Sherman Act "had the patent holders … 'dominate[d]' the industry and 'curtail[ed] the manufacture and supply of an unpatented product.'" *Actavis*, 570 U.S. at 150-51 (quoting *Standard Oil*, 283 U.S. at 174). The *Actavis* Court stated these three cases sought "to accommodate patent *and* antitrust policies, finding challenged terms and conditions unlawful unless patent law policy offsets the antitrust law policy strongly favoring competition." *Id.* at 151 (emphasis added). There is no hint that the Court was departing from precedent and implementing a new standard limiting antitrust liability to "commonplace" forms of settlement agreements.

In any case, the challenged settlements are in fact unusual. Respondent directs us to consider the "form" of the settlements, not their substance. Thus, Respondent describes each settlement as "a standard, non-use agreement whereby a party agreed not to use another's trademark," a form that practicing lawyers allegedly recognize as regularly used to settle trademark litigation. RAB at 11, 13. Antitrust law, however, "has consistently prioritized substance over form." *See In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538, 550 (1st Cir. 2016) (citing, *inter alia*, *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191–92 (2010); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 760 (1984) ("[The Sherman Act] is aimed at substance rather than form.")).

When we consider the substance of these settlement agreements, we find they *are* unusual. Trademark litigation typically seeks to bar the use on the infringer's labels, ads, or other promotional materials of the plaintiff's trademark or a similar mark in a way likely to confuse consumers. *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997), cited repeatedly by Respondent, provides a classic example where Clorox's PINE-SOL products allegedly confused consumers of Sterling Winthrop's LYSOL products. The settlement agreement upheld by the court restricted Clorox's ability to market products as disinfectants or as special purpose cleansers under the PINE-SOL mark. *Id.* at 54. There the agreement did "no more than regulate how the name PINE-SOL may be used" in direct competition with LYSOL and did not restrict Clorox or other firms[15] from selling products that compete with LYSOL under a brand name other than PINE-SOL. *Id.* at 57. It therefore raised none of the competition concerns attached to agreements that divide markets. *Id.* at 55. Given this limited restraint upon one competitor among many, the court concluded that Clorox had not shown that the agreement significantly restricted Clorox, or restricted at all any of the other large potential entrants, from competing. *Id.* at 59.

Here, as discussed below, the settlement agreements effectively shut off an entire—and very important—channel of advertising triggered by an alleged use of the trademark in the generation of search advertising. Stated differently, each settlement reaches farther than a cure based on rewording a label or an ad—effectively eliminating an entire channel of competitive advertising at the key moment when the consumer is considering a purchase. Furthermore, 1-800 Contacts systematically applied similar restrictions to rival after rival that sought to

15 The court emphasized that Clorox had "presented no evidence" that other firms could not enter. *Id.* at 58.

challenge its position. And, contrary to *Clorox*'s premise, the agreements did achieve a market division through their reciprocal prohibitions on bidding in specific search auctions. Thus, from the perspective of substance, the settlement agreements between 1-800 Contacts and its thirteen rivals were indeed unusual.

Respondent, however, argues that under *Actavis*, settlement agreements that provide the same relief a court could have ordered are commonplace vis-à-vis the asserted trademark rights and immune from antitrust scrutiny. Respondent asserts that the challenged settlement agreements merely provide relief a court could have ordered if 1-800 Contacts had prevailed. RAB at 12-13. Respondent identifies no statement in *Actavis* of their asserted rule and no court opinion supporting the assertion or explaining why the scope of plenary powers of courts should determine the allowable extent of private agreements. In none of the cases addressed above did the Court, while engaging in its antitrust analysis of intellectual property-related settlement agreements, ask whether the agreement provided relief that a court could have ordered. *See Actavis*; *Singer Mfg.*; *New Wrinkle*; *Standard Oil*. A court's plenary authority is irrelevant to whether private parties may agree to restrict competition, and private parties cannot rely on a court's remedial authority to shield their agreements from antitrust scrutiny. *See infra* Section V.A.3.a.i.

Respondent appears to argue that because a prohibition on use of a trademark is within the exclusionary potential of the trademark (and therefore is a remedy that a court could have ordered), a settlement requiring non-use is immune from antitrust condemnation. *See* RRB at 4. But the crux of the *Actavis* decision was that there could be antitrust liability for a settlement of non-sham litigation with anticompetitive effects within the scope of the patent's exclusionary potential. The *Actavis* majority could not have been clearer:

> Solvay's patent, if valid and infringed, might have permitted it to charge drug prices sufficient to recoup the reverse settlement payments it agreed to make to its potential generic competitors. And we are willing to take this fact as evidence that the agreement's anticompetitive effects fall within the scope of the exclusionary potential of the patent. But we do not agree that that fact, or characterization, can immunize the agreement from antitrust attack.

Actavis, 570 U.S. at 147 (internal quotation and citation omitted). Here, even assuming *arguendo* that the settlement agreements' effects were within the scope of Respondent's enforceable trademark rights[16]—and hence within the scope of relief that a court might have ordered, *Actavis* stands for the possibility of antitrust liability, not for the foreclosure of antitrust review. As *Actavis* explains, we need to consider *both* antitrust and intellectual property policies. *See id.* at 148 ("it would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well"). Respondent's rule looks only to half of the equation, *i.e.*, trademark policies, and does not withstand a thorough understanding of *Actavis*.

16 *But cf. infra* Section V.B.1.b (discussing Respondent's assertions regarding trademark rights).

B. The "*Actavis* Considerations"

Respondent argues that even if the Commission finds the challenged settlements were unusual, dismissal still would be appropriate because Complaint Counsel did not prove any of the five "*Actavis* considerations" that, taken together, could outweigh the desirability of settlements, to favor antitrust scrutiny. The *Actavis* Court identified five factors that convinced it to give the FTC an opportunity to prove its antitrust claim: (1) the specific restraint's potential for genuine adverse effects on competition; (2) the potential that the anticompetitive consequences will sometimes prove unjustified; (3) the likelihood that the patentee possesses the power to bring about unjustified competitive harm in practice; (4) the administrative feasibility of an antitrust action; and (5) the risk that finding antitrust liability for a particular form of settlement would prevent litigants from settling (i.e., the litigants' ability to settle in other ways that do not harm competition). 570 U.S. at 153-58. Respondent treats these factors as threshold requirements for conducting antitrust review and argues that the ALJ erred by ignoring these considerations. RAB at 16. We disagree that *Actavis* requires this five-factor test to be applied to antitrust review of all settlements of intellectual property litigation. Moreover, even if the Court had created such a requirement, the litigation in this case would pass.

But the Court did not characterize these considerations as prerequisites for antitrust review of all intellectual property-related settlement or as defining the content of their analysis under the rule of reason. Rather, the Court described the factors as considerations relevant to the particular antitrust claim before it:

> We recognize the value of settlements and the patent litigation problem. But we nonetheless conclude that this patent-related factor should not determine the result here. Rather, five sets of considerations lead us to conclude that the FTC should have been given the opportunity to prove its antitrust claim.

Actavis, 570 U.S. at 153. Interpreting these considerations as requirements applicable to all settlements (or even all settlements of intellectual property disputes) risks straight-jacketing the analysis within bounds that were intended to address a particular case. *Cf. Loestrin 24*, 814 F.3d at 551 n.12 ("the five [*Actavis*] considerations should not overhaul the rule of reason, nor should they create a new five-part framework in antitrust cases").

Regardless of whether the Court intended to create a new litmus test, many of the same considerations are present in this case, and they favor proceeding with the antitrust inquiry. As Respondent suggests, RAB at 16, the first three factors all relate to whether a challenged settlement poses a significant risk of unjustified anticompetitive harm. Sections V.A.1, V.A.3.b, and V.C below explain at length that the restraints at issue bear considerable potential for unjustified competitive harm by limiting truthful advertising, increasing prices paid for contact lenses, and impeding search auction bidding. The remaining two *Actavis* considerations also support antitrust review. Our analysis below demonstrates the administrative feasibility of this inquiry: antitrust liability can be found without the need to relitigate trademark infringement issues in situations such as this, where the challenged restraints are not reasonably necessary to achieve procompetitive benefits. For all the reasons stated above, we conclude that 1-800 Contacts' settlements are not immune from antitrust scrutiny.

V. ANTITRUST ANALYSIS OF THE CHALLENGED AGREEMENTS

The Complaint alleges that the series of agreements between 1-800 Contacts and numerous online sellers of contact lenses are agreements to restrain competition in violation of Section 5 of the FTC Act and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act. Compl. ¶¶ 33-34. To assess whether the Challenged Agreements violate Section 5 of the FTC Act, we are guided by case law concerning Section 1 of the Sherman Act.[17]

Under Section 1 of the Sherman Act,[18] except for a small group of restraints that are *per se* unlawful because they "always or almost always tend to restrict competition," restraints are evaluated under the rule of reason. *See, e.g.*, *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018) (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)). When applying the rule of reason, courts rely on a burden-shifting framework. Under this framework, the plaintiff has the burden to prove that the challenged restraint has, or is likely to have, a substantial anticompetitive effect that harms consumers. If the plaintiff meets its initial burden, the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the plaintiff must show that the procompetitive justification could be reasonably achieved through less anticompetitive means or that the anticompetitive harms outweigh the procompetitive benefits. *See, e.g.*, *id.* at 2284; *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 507 (2d Cir. 2004); *accord Polygram Holding, Inc.*, 136 F.T.C. 310, 349-50 (2003), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005). When operationalizing this framework, the sequence for evaluating particular evidence may vary under a particular structured analysis, but the ultimate burdens remain unchanged.

In *Polygram*, the Commission traced the Supreme Court's development of the rule of reason. 136 F.T.C. at 325-44. One feature of the Court's jurisprudence is that the rule of reason calls for "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," with a goal to reach "a confident conclusion about the principal tendency of a restriction." *Realcomp*, 2007 WL 6936319, at *18 (quoting *California Dental*, 526 U.S. at 781). Cases such as "*BMI*, *NCAA*, and *IFD* indicate[] that the evaluation of horizontal restraints takes place along an analytical continuum in which a challenged practice is examined in the detail necessary to understand its competitive effect." *Polygram*, 136 F.T.C. at 336 (citing *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) ("*IFD*")).

17 The Commission's authority under Section 5 of the FTC Act extends to conduct that violates the Sherman Act. *See, e.g.*, *Actavis*, 570 U.S. at 145; *California Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95 (1953), *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 463-64 & n.4 (1941). In the present case, our analysis under Section 5 is the same as it would be under Section 1 of the Sherman Act.

18 Violations of Section 1 of the Sherman Act require (1) a contract, combination, or conspiracy, that (2) unreasonably restrains trade. *See, e.g.*, *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011). Here, the trademark litigation settlement agreements and the Luxottica Sourcing and Services Agreement easily satisfy the first element. ID at 117-18. Consequently, our analysis focuses on the second element.

The Court has defined three separate but not entirely distinct ways for a plaintiff to show that a challenged restraint resulted in anticompetitive effects under a rule of reason analysis. First, the *IFD* Court observed that the particular horizontal restraint at issue, by its very nature established that anticompetitive effects were likely; it did not require "elaborate industry analysis . . . to demonstrate the anticompetitive character of such an agreement." *IFD*, 476 U.S. at 459. In *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988), and *Polygram*, we labeled such restraints "inherently suspect." Second, the Court in *IFD* held that, even if the restriction in question was "not sufficiently naked" to be considered inherently suspect based on the nature of the restraint, the plaintiff's *prima facie* case was established, even without a detailed market analysis, because the record contained direct evidence of anticompetitive effects. *IFD*, 476 U.S. at 460. Third, the Court's discussion made clear that the traditional mode of analysis—inquiring into market definition and market power to determine whether an arrangement has the potential for genuine adverse effects on competition—was also available. *Id.* Any one of these modes of analysis is sufficient to establish a *prima facie* case.

In this case, we use two of these modes of analysis to assess whether 1-800 Contacts' agreements resulted in anticompetitive effects: (1) we consider whether the Challenged Agreements are inherently suspect; and (2) we examine whether there is direct evidence of anticompetitive effects. Each mode of analysis provides an independent basis for finding that the Challenged Agreements have substantial anticompetitive effects and leads us to find liability. We explain the structure of the analysis based on the case law for these modes in the sections devoted to each. We also examine Complaint Counsel's allegation that the Challenged Agreements have substantial anticompetitive effects on competition with respect to bidding on search terms, which again leads us to find a violation of Section 5 of the FTC Act.

Although we discuss particular evidence that leads us to conclude that the restraints in the Challenged Agreements have substantial anticompetitive effects under different modes of analysis, our review of the evidence is not rigidly compartmentalized. For instance, evidence regarding the significance of search advertising generally and searches for 1-800 Contacts' trademarks in particular, which is discussed as part of the inherently suspect analysis, informs our understanding of the direct evidence of anticompetitive effects. Although the two modes of analysis provide different structures, they reach the same conclusion. The restraints on advertising and bidding at advertising auctions imposed by 1-800 Contacts' agreements have substantial anticompetitive effects and, unless reasonably necessary to achieve a valid procompetitive rationale, violate Section 5 of the FTC Act.

A. Analysis of the Challenged Agreements for Effects on Consumers Under *Polygram's* Inherently Suspect Framework

In *Polygram*, we held that in a limited but significant category of cases, "the conduct at issue is inherently suspect owing to its likely tendency to suppress competition." *Polygram*, 136 F.T.C. at 344. In these cases, "scrutiny of the restraint itself . . . without consideration of market power" is sufficient to condemn the restraint, unless the defendant can "articulate a legitimate justification" for that restraint. *Id.* at 344-45; *see also California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999) (describing a "quick-look analysis" applicable when "an observer with even a

rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets"); *IFD*, 476 U.S. at 459 (finding "no elaborate industry analysis" was required to demonstrate the anticompetitive character of a "horizontal agreement among participating dentists to withhold from their customers a particular service that they desire").

Drawing from the Supreme Court's analysis in *California Dental*, 526 U.S. at 779, *Polygram* spelled out the structure of the "inherently suspect" analysis for the plaintiff's demonstration that a restraint has anticompetitive effects. A plaintiff must

> demonstrate[] that the conduct at issue is inherently suspect owing to its likely tendency to suppress competition. . . . [T]he defendant can avoid summary condemnation only by advancing a legitimate justification for those practices. . . . When the defendant advances such cognizable and plausible justifications, the plaintiff must make a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition. Such a showing still need not prove actual anticompetitive effects or entail "the fullest market analysis." Depending upon the circumstances of the cases and the degree to which antitrust tribunals have experience with restraints in particular markets, such a showing may or may not require evidence about the particular market at issue, but at a minimum must entail the identification of the theoretical basis for the alleged anticompetitive effects and a showing that the effects are indeed likely to be anticompetitive. Such a showing may, for example, be based on a more detailed analysis of economic learning about the likely competitive effects of a particular restraint, in markets with characteristics comparable to the one at issue. The plaintiff may also show that the proffered procompetitive effects could be achieved through means less restrictive of competition.

Polygram, 136 F.T.C. at 344-49 (quoting *California Dental*, 526 U.S. at 779) (citations omitted). On review, then Chief Judge Douglas Ginsburg, writing for the D.C. Circuit, "accept[ed] the Commission's analytical framework." *Polygram*, 416 F.3d at 36; *see also North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 361 (5th Cir. 2008) ("the Commission's articulation of the shifting burdens employed in its [inherently suspect] analysis appears, at least facially, to comport with the framework provided by the Supreme Court's precedent").

1. The Anticompetitive Nature of the Restraints

Inherently suspect conduct "ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation." *Polygram*, 136 F.T.C. at 344-45. Consequently, our analysis considers whether there is a "close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare." *Polygram*, 416 F.3d at 37. The determination is based on the conduct's "likely tendency to suppress competition." *Polygram*, 136 F.T.C. at 344. "At this stage, the focus of the inquiry is on the nature of the restraint rather than on the market effects in a particular case." *North Texas Specialty Physicians*, 140 F.T.C. 715, 733 (2005) ("*NTSP*").

We previously recognized that an inherently suspect analysis and a *per se* analysis are "close neighbors." *NTSP*, 140 F.T.C. at 719. Consequently, the Commission previously condemned conduct as inherently suspect that approximates conduct that had otherwise been characterized as *per se* violations of the antitrust laws. For instance, in *Polygram*, we condemned as inherently suspect an agreement between record album distributors to suspend temporarily advertising and discounting of particular performers' earlier concert albums. The D.C. Circuit agreed, explaining that "[a]n agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors, which would ordinarily be condemned as *per se* unlawful. The Supreme Court has recognized time and again that agreements restraining autonomy in pricing and advertising impede the 'ordinary give and take of the market place.'" *Polygram*, 416 F.3d at 37 (quoting *IFD*, 476 U.S. at 459). Similarly, in *NTSP*, we condemned as inherently suspect certain contracting practices of a physician trade association, while also recognizing that "NTSP's activities could be characterized as *per se* illegal because they are closely analogous to conduct condemned *per se* in this and other industries . . . ." *NTSP*, 140 F.T.C. at 731.

In the present case, the agreements between 1-800 Contacts and its rivals prohibit each party from causing or allowing advertisements to appear in response to an internet search for the other party's trademarks or URLs, or variations of the trademarks or URLs. Those agreement terms and 1-800 Contacts' subsequent enforcement of them prevent the agreeing parties from offering advertising in response to an internet search for "1-800 Contacts" or similar queries. IDF 371. Thus, the Challenged Agreements are, in essence, agreements between horizontal competitors to restrict the information provided by advertising to consumers when they search for 1-800 Contacts' trademark terms and URLs; consumers could have used that withheld information to compare and evaluate the prices and other features of competing online sellers. Ultimately, the effect of the advertising restrictions is to make information enabling consumer comparisons more difficult and costly to obtain.

Online search is one of the key methods by which consumers discover vendors and compare products and services. IDF 564. It is an important method by which lower-priced rivals compete with 1-800 Contacts. IDF 565. Rival online sellers generally offer lower prices than 1-800 Contacts, IDF 693, and much of the advertising for those retailers emphasizes those lower prices. *See* IDF 587, 591, 603, 611, 646, 703, 724; Holbrook, Tr. 1904. This is particularly important because the advertising is presented to a consumer at a time when the consumer is more likely to be looking to buy. IDF 498.

Economic theory indicates that restrictions on this type of advertising are likely to harm competition. A flow of information between buyers and sellers is an essential part of the market system. Buyers have to find out who they can buy from and on what terms, and sellers must let consumers know how to find them, what they have to offer, and on what terms. IDF 681 (citing CX8006 (Evans Expert Report) at 080 ¶ 178). Restrictions on advertising interfere with that flow of information and raise the cost to consumers of finding the most suitable offering of a product or service. CX8006 (Evans Expert Report) at 080-084; IDF 683. Faced with these higher search costs, consumers must either spend more time and money looking for a lower-

priced supplier or end their search because the cost of continued search exceeds the likelihood of finding a lower price. Ultimately, as a result of the reduced information flow, some consumers will pay higher prices for the particular good or service while others stop their search before they find a price that induces them to buy, which reduces the quantity sold. In addition, advertising restrictions "reduce[] sellers' incentives to lower prices. One reason a restriction on advertising may reduce a seller's incentives to lower prices is that, absent an ability to advertise, lower per-unit prices may not be sufficiently offset by higher volume." *Polygram*, 136 F.T.C. at 355 (citations omitted).

Empirical studies confirm the anticompetitive effects of advertising restrictions. Complaint Counsel's expert, Dr. Evans explains,

> Economists have conducted more than 21 studies that assess the effect of advertising restrictions on prices and other aspects of competition. . . . Almost all of these studies[19] find that advertising restrictions result in higher prices. Many of them show that the consumers are not getting higher quality products or services at those higher prices. At least one of the studies finds that the advertising restrictions tend to suppress entry.

CX8006 (Evans Expert Report) at 081-082. As Dr. Evans concludes: "There is a consensus in the economics literature that restrictions on advertising among rivals impair competition and harm consumers." *Id.* at 081. Dr. Evans also confirmed that greater availability of pricing information affects the prices that consumers pay for products sold online. *Id.* at 084. Dr. Evans noted that prior empirical work found that consumers paid significantly less for life insurance plans and cars because online price comparison sites made price shopping much easier. *Id.* Dr. Evans also cited a study finding that dissemination of price information online made demand curves for online sellers much more elastic. *Id.* The Commission has prior experience with this literature; we cited many of these same empirical studies when we considered the economics of advertising restrictions at issue in *Polygram*. *See Polygram*, 136 F.T.C. at 355 n.52.

Consistent with the economic literature, over the past 40 years, the Commission has repeatedly found that advertising restrictions harm competition and consumers. *See Am. Med. Ass'n*, 94 F.T.C. 701, 1010 (1979) (condemning an agreement among physicians not to advertise), *aff'd,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) (*per curiam*); *Mass. Board*, 110 F.T.C. at 598 (condemning a licensing board's ban on advertising). Among the more recent cases, in *Polygram*, we concluded that an agreement between music companies not to advertise two recordings for a short time period was inherently suspect. *See Polygram*, 136 F.T.C. at 353-58. Courts have similarly recognized the role of advertising in fostering competition and have condemned advertising restrictions. The Supreme Court explained that advertising "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977). The Supreme Court further explained, "[I]t is clear as an economic matter that . . . restrictions on

19 Among the cited studies, there is only one, involving advertising for professional services, that shows lower prices when there is no advertising. *See* CX8006 (Evans Expert Report) at 081 n.186.

fare advertising have the forbidden significant effect upon fares. . . . Restrictions on advertising 'serve to increase the difficulty of discovering the lowest cost seller . . . and [reduce] the incentive to price competitively.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992) (quoting *Bates*, 433 U.S. at 377).

More recently, in *California Dental*, the Court found "unexceptionable" the Ninth Circuit's "statements that 'price advertising is fundamental to price competition' and that 'restrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for [sellers] to compete on the basis of price.'" *California Dental*, 526 U.S. at 773 (quoting *California Dental Ass'n v. FTC*, 128 F.3d 720, 727 (9th Cir. 1997)). The Court, however, found that the professional services market at issue permitted "the possibility that the particular restrictions on professional advertising could have different effects from those 'normally' found in the commercial world." *Id.* Thus, even when the Court did not affirm liability in *California Dental*, it recognized that in ordinary commercial markets, bans on truthful advertising normally are likely to cause competitive harm.

Courts have long condemned advertising restrictions. The D.C. Circuit affirmed our analysis in *Polygram*. *Polygram Holding Inc. v. FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005) ("we have no difficulty with the Commission's conclusion . . . An agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors"). Other advertising restrictions have similarly been condemned. *See, e.g.*, *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (finding advertising restraint that prohibited attorneys from advertising in particular geographical regions *per se* unlawful); *United States v. Gasoline Retailers Ass'n, Inc.*, 285 F.2d 688 (7th Cir. 1961) (agreement between trade association and gasoline station operators that stations would not advertise—including by posting signs at the stations showing prices—or give premiums was *per se* Sherman Act violation).

Our conclusion that the particular advertising restrictions imposed by the Challenged Agreements are inherently suspect is a limited finding. We do not contend that all advertising restrictions are necessarily inherently suspect. The restrictions in this particular case prohibit the display of ads that would enable consumers to learn about alternative sellers of contact lenses and give them the opportunity to make price comparisons at the time they are likely to make a purchase. Importantly, the restrictions at issue here are not limitations on the content of an advertisement a consumer would otherwise see; they are restrictions on a consumer's opportunity to see a competitor's ad in the first place. Moreover, the record shows that the suppressed ads often emphasize lower prices. In this context, we find the advertising restrictions are inherently suspect. Because the Challenged Agreements restrict the ability of lower cost online sellers to show their ads to consumers, it is easy to see how "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental*, 526 U.S. at 770.

2. Preliminary Analysis of Respondent's Justifications

That conclusion is not the end of the analysis. As we explained in *Polygram*,

> If the challenged restrictions are . . . inherently suspect, then the defendant can . . . advanc[e] a legitimate justification for those practices. . . . At this early stage of the analysis, the defendant need only articulate a legitimate justification. . . . [T]he proffered justifications must be both cognizable under the antitrust laws and at least facially plausible. . . . When the defendant advances such cognizable and plausible justifications, the plaintiff must make a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition.

Polygram, 136 F.T.C. at 345-48. Moreover, Respondent bears the burden of "articulat[ing] the specific link between the challenged restraint and the purported justification." *Polygram*, 136 F.T.C. at 347. In this case, Respondent must articulate the specific link between restraints on its competitors' use of search advertising and the protection of its own trademark rights.

"[C]ognizability allows the deciding tribunal to reject proffered justifications that, as a matter of law, are incompatible with the goal of antitrust law to further competition. Cognizable justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve product quality, service, or innovation." *Id.* at 345-46. "A justification is plausible if it cannot be rejected without extensive factual inquiry. The defendant . . . must articulate the specific link between the challenged restraint and the purported justification to merit a more searching inquiry into whether the restraint may advance procompetitive goals . . . ." *Id.* at 347.[20]

Here, Respondent has articulated two legitimate justifications that are cognizable and, at least, facially plausible: avoidance of litigation costs through settlement and trademark protection.[21] Settling costly litigation is a cognizable and facially plausible justification for the settlement agreements. As the Supreme Court explained in *Actavis* and we recognized in *Schering-Plough*, 136 F.T.C. 956, 1003 (2003), there is a "general legal policy favoring settlement of disputes." *Actavis*, 570 U.S. at 153; *see also In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 202 (2d Cir. 2006) (noting public's "strong interest in settlement" of complex and expensive cases). While this public policy favoring settlements does not create antitrust immunity, *see supra* Section IV, it is, nonetheless, a legitimate justification that we do not ignore.

Settling lawsuits is generally economically efficient. IDF 355 (citing RX0739 (Murphy Expert Report) at 0053; CX9042 (Evans Dep.) at 196). Avoiding unnecessary expenses is consistent with competition principles. The record shows that these concerns motivated 1-800 Contacts' rivals to settle. *See* IDF 349 (knowing that Lens.com had spent $2 million and its

20 Respondent apparently concedes that it bears the burden of showing that its justification is cognizable. RAB at 39 (stating "even if 1-800 Contacts had the burden to do more than prove that its claims were cognizable . . . .").

21 A third purported benefit—avoidance of consumer confusion—is subsumed among the benefits of trademark protection.

litigation was not yet concluded, Memorial Eye settled its case because of the cost of the litigation and the legal uncertainty), 352 (AC Lens made a business decision to settle in light of potential costs and protracted nature of the litigation), 353 (Web Eye Care settled because the costs of litigation were "way more than we wanted to spend" and "not worth it" and because of the risks of losing the litigation), 354 (Empire Vision settled to avoid the litigation expense). *But cf. infra* Section V.A.5.a (noting the absence of evidence linking litigation cost savings in this case to benefits to consumers).

Similarly, at this stage of the analysis, we consider protecting trademark rights to be a legitimate procompetitive justification. As Respondent's experts, Drs. Landes and Murphy, explained, trademarks provide informational benefits to consumers about product and quality attributes that reduce consumers' search costs. Trademark protection preserves those quality signals for consumers and encourages firms to invest in both product quality and the trademark. *See* RX0737 (Landes Expert Report) at 0005-0014, RX0739 (Murphy Expert Report) at 0032-0035. Also, at least facially, Respondent's contention that the settlement agreements advance this procompetitive goal is plausible; "it cannot be rejected without extensive factual inquiry." *Polygram*, 136 F.T.C. at 347. The trademark litigation underlying the settlement agreements was not sham. *Lens.com, Inc. v. 1-800 Contacts, Inc.*, 2014 WL 12596493 (D. Utah Mar. 3, 2014); IDF 340 (District court dismissed Memorial Eye's counterclaim alleging the suit filed by 1-800 Contacts was sham litigation). Also, the record shows that 1-800 Contacts had a brand identity that it wished to preserve. It had a marketing strategy to create brand awareness and during the period 2002 through 2014 had spent [redacted] on television advertising and [redacted] on internet advertising to build that brand. IDF 60, 64-65.

It is important to note that our determination that two of 1-800 Contacts' procompetitive justifications are legitimate at this stage of the analysis is not the end of our evaluation. We return to Respondent's procompetitive justifications with an "extensive factual [and legal] inquiry" when we move farther into the rule of reason analysis. In Sections V.A.3.a and V.A.5, we consider Complaint Counsel's contention that the procompetitive benefits could be reasonably achieved through less anticompetitive means and examine whether Respondent's procompetitive rationales are supported by the facts.[22]

3. Complaint Counsel's More Detailed Showing

Because Respondents have advanced legitimate procompetitive justifications, we do not summarily condemn the Challenged Agreements based only on an initial review of the nature of the restraints. Instead, to satisfy their burden under the rule of reason, Complaint Counsel must make a further showing. As we explained in *Polygram*,

22 We recognize the current limited inquiry regarding 1-800 Contacts' procompetitive justifications and the later steps in the rule of reason burden-shifting analysis "could be combined, [but] we think it analytically superior and consistent with the relevant case law to first screen the purported justification for legitimacy before engaging in a more extensive, and therefore longer and more resource-intensive, inquiry whether detailed analysis supports or refutes the justification. Antitrust courts have long held that preliminary analysis of purported justifications is appropriate." *Polygram*, 136 F.T.C. at 348 n.43.

> When the defendant advances such cognizable and plausible justifications, the plaintiff must make a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition. Such a showing still need not prove actual anticompetitive effects or entail "the fullest market analysis." Depending upon the circumstances of the cases and the degree to which antitrust tribunals have experience with restraints in particular markets, such a showing may or may not require evidence about the particular market at issue, but at a minimum must entail the identification of the theoretical basis for the alleged anticompetitive effects and a showing that the effects are indeed likely to be anticompetitive. . . . The plaintiff may also show that the proffered procompetitive effects could be achieved through means less restrictive of competition.

Polygram, 136 F.T.C. at 348-49 (footnote and citations omitted); *see also Actavis*, 570 U.S. at 159 (explaining that the showing does not require that "the Commission . . . litigate the patent's validity, . . . present every possible supporting fact or refute every possible pro-defense theory. . . . '[t]here is always something of a sliding scale in appraising reasonableness,' and as such 'the quality of proof required should vary with the circumstances.'") (quoting *California Dental*, 526 U.S. at 780 and 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1507 (1986)).

In short, Complaint Counsel may meet their burden to show that the restraints at issue are likely to harm competition by either (i) identifying the theoretical basis for the alleged anticompetitive effects and showing that these effects are likely in this particular setting or (ii) explaining how Respondent could have minimized the anticompetitive effects of its conduct or accomplished its procompetitive justifications through less restrictive alternatives. Here, Complaint Counsel show both that, in the context of online sales of contact lenses, the proffered procompetitive effects of the advertising restraints in the Challenged Agreements could be achieved through means less restrictive of competition, and that restraints "are indeed likely . . . to harm competition," *Polygram*, 136 F.T.C. at 348. We address each of these approaches separately.

a. Respondent's Proffered Procompetitive Justifications Could Be Achieved Through Less Anticompetitive Means

First, Complaint Counsel can rebut Respondent's showing that litigation cost savings and trademark protection are cognizable and plausible procompetitive justifications by establishing that "the proffered procompetitive effects could be achieved through means less restrictive of competition." *Polygram*, 136 F.T.C. at 349; *see, e.g.*, *American Express*, 138 S. Ct. at 2284 (if defendant successfully shows a procompetitive justification, "then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means"); *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998) (plaintiff may demonstrate that the challenged conduct is not reasonably necessary or could be achieved by less restrictive means); 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1505 (4th ed. 2017). The challenged conduct is not reasonably necessary if the parties could have achieved similar efficiencies by practical, significantly less restrictive alternatives. *See United States v. Brown Univ.*, 5 F.3d 658, 678–79 (3d Cir. 1993);

United States v. Visa U.S.A., Inc., 344 F.3d 229, 238 (2d Cir. 2003); 7 Areeda & Hovenkamp, *supra*, ¶ 1505; FTC & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations among Competitors § 3.36(b).

Complaint Counsel argue that the Challenged Agreements are not reasonably necessary to protect 1-800 Contacts' trademarks, but rather are unreasonably overbroad, prohibiting a wide range of truthful, non-confusing advertising; according to Complaint Counsel, the asserted procompetitive benefits could be achieved through less restrictive means. CCB at 4. Respondent disagrees. It contends that the Challenged Agreements are not overbroad and maintains that none of Complaint Counsel's alternatives is workable.

i. Overbreadth

When an agreement limits truthful price advertising on the basis of trademark protection, it must be narrowly tailored to protecting the asserted trademark right. The agreements here are not—they restrict advertising regardless of whether the ads are likely to be confusing and, apparently, regardless of whether competitors actually use the trademark term (requiring negative keywords).

Respondent and the Dissent argue that the Challenged Agreements cannot be overbroad because their restrictions are similar to what a court could have ordered. RRB at 4. The fact that a court has authority to enter an order of non-use, however, does not support a finding that it is always a permissible restraint when implemented by private parties.

As we have already discussed, *see supra* Section IV.A, a court's plenary authority to issue relief is irrelevant to the question of whether private parties may, consistent with the antitrust laws, agree to restrict their competition. Courts have broad injunctive authority, and Respondent has failed to explain why the scope of judicial powers should define the scope of lawful private activity. Indeed, courts can order "fencing-in" relief, which restricts even *legal* conduct in order to help prevent future violations; this does not mean that private parties can agree among themselves to bar the same lawful, competitive activities.[23] Private parties cannot agree to limit non-infringing conduct with the effect of restraining competition, even if a court could do so. Moreover, in fashioning relief in trademark cases, courts are guided by equitable principles, which require closely tailoring injunctions to the harm that they address and giving due consideration to the public interest and the potential effect on competition between the parties. *SunAmerica Corp. v. Sun Life Assur. Co. of Canada*, 77 F.3d 1325, 1336 (11th Cir.

23 In some particularly egregious cases, for example, courts have banned defendants from practicing in certain industries altogether. *See, e.g., FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000), *aff'd*, 312 F.3d 259 (7th Cir. 2002) (banning defendants from engaging or assisting others in the businesses of telemarketing and marketing career advisory goods or services); *FTC v. Gill*, 265 F.3d 944, 957-58 (9th Cir. 2001) (affirming district court order banning defendant from engaging in the credit repair business); *FTC v. E.M.A. Nationwide, Inc.*, 2013 WL 4545143, at *8 (N.D. Ohio Aug. 27, 2013), *aff'd*, 767 F.3d 611 (6th Cir. 2014) (enjoining defendants from working in the debt relief and mortgage assistance industries). That does not mean that private parties who are competitors can enter into an agreement preventing one of them from practicing in a particular industry.

1996) (quoting 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 30.03 [1] (4th ed. 1995)). Private parties need not consider public interest factors in their settlement agreements, and they cannot rely on the remedial authority of courts to shield their private agreements from antitrust scrutiny.

Similarly unavailing is Respondent's and the Dissent's suggestion that, just because a court issues a non-use injunction or approves non-use settlements in other trademark cases, it means that the remedy is appropriate here. Respondent asserts that non-use injunctions are "common" and are "the order of the day" in trademark infringement actions. RAB at 11-12. But, in the vast majority of trademark infringement cases, non-use is a perfectly reasonable remedy because it resolves the trademark issue without affecting competition; it simply requires a company with a name confusingly similar to a rival's to refrain from identifying itself or its products by such a name. Consider, for example, the *Clorox* case cited above. *Clorox v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997). In *Clorox*, the court found that the "PINE-SOL" trademark and the "LYSOL" trademark were confusingly similar. Indeed, the U.S. PTO initially refused to grant the PINE-SOL trademark for that very reason. *Id.* at 53. In that context, the non-use agreement prevented a competitor from using a confusingly similarly name for its products.

Here, no company names are alleged to be the cause of any confusion, and as noted above, non-use restrictions cut off an important channel of truthful price advertising. *See supra* Section IV.A. Whereas a typical trademark non-use remedy affects how a product may be labeled or what language may be used in the text of an ad, the non-use restriction here limits the number of times competitor ads are shown and insulates some 1-800 Contacts' consumers from becoming aware of its rivals.

Respondent also points to cases in which courts have issued orders that would prohibit use of trademarks in internet advertising, but most of those cases are either consent judgments or default judgments and involve infringing conduct beyond mere keyword bidding.[24] In any event, decisions about the appropriate remedy are inherently case-specific, and the fact that a court in some other context, with no or little consideration of the effects on competition, granted a broad injunction does not constitute an endorsement of the private agreements here or render them procompetitive.

24 The two litigated cases Respondent's expert cites are distinguishable in material respects. See RX0734 (Hogan Expert Report) at 0099-0100 ¶149. In *Skydive Ariz., Inc. v. Quattrocchi*, 2010 WL 1743189, at *8 (D. Ariz. Apr. 29, 2010), among other things, defendant used plaintiff's trademark on its website and falsely told its customers that the skydiving certificates it sold would be redeemable at plaintiff's facilities. The other litigated case is *PODS Enterprises, LLC v. U-Haul International, Inc.*, 126 F. Supp. 3d 1263, 1292 (M.D. Fla. 2015). In that case, PODS Enterprises sued U-Haul for referring to its product as a "U–Box pod" and using the terms "pod" or "pods" thousands of times on its website. The court broadly prohibited use of the term except in comparative advertisement, but it did not specifically discuss banning use of the term in keyword bidding or the effect on competition.

ii. Less Anticompetitive Alternatives

Complaint Counsel identify three alternatives to the restrictions in the Challenged Agreements. They suggest that Respondent could (1) bar the rival from using specific text alleged by 1-800 Contacts to cause confusion, including prohibiting the rival from using a name confusingly similar to its own; (2) require clear disclosure in each search advertisement of the identity of the rival seller; or (3) require the rival to refrain from using confusing or deceptive language in its search ads.

These options present alternative ways for avoiding litigation costs and achieving the procompetitive benefits that flow from trademark protection. The first and third proposed alternatives would adequately address consumer confusion stemming from the content of the ad. Respondent, however, claims that its trademark was infringed by the mere appearance of competitor ads in response to a trademark search, not from any confusing ad content. *See* RAB at 41. Assuming, *arguendo*, and contrary to our findings below, that protection against such infringement has been established as a valid procompetitive benefit here, alternatives one and three would not adequately address it. But the second proposed alternative—requiring clear disclosure of the identity of the rival seller—is a workable option that would achieve both litigation cost savings and protection of trademark rights, including prevention of the consumer confusion associated with infringement, in a significantly less anticompetitive manner. Respondent's arguments to the contrary are unpersuasive.

Respondent contends that a disclosure requirement would be unworkable because "clear and conspicuous disclosure" is an amorphous standard that would likely generate future litigation. RAB at 40-41.[25] We, however, do not find a requirement to clearly disclose the seller's identity to be "amorphous." The Commission has ordered parties to implement clear and conspicuous disclosures in numerous cases involving misleading advertising and did not find the requirements too amorphous or otherwise problematic to serve its remedial goals.[26] Moreover, nothing prevents the parties, as part of their settlement, from agreeing on the specific language of the disclosure that would need to be included in the ads to dispel any purported consumer confusion.

---

25 Courts have been inconsistent in their burden allocation in assessing less restrictive alternatives, "[b]ut the difference in assignment of this proof burden is more apparent than real." 11 Herbert Hovenkamp, *Antitrust Law* ¶ 1914c (3rd ed. 2011). As a leading antitrust treatise explains:

> The most workable allocation gives the plaintiff the burden of suggesting, or proffering, a particular alternative claimed to achieve the same benefits but less restrictive of competition. The defendant then has the burden of showing that the proffered alternative is either unworkable or not less restrictive.

Id.

26 *See, e.g.*, *Paypal, Inc.*, 2018 WL 2716645 (F.T.C. May 23, 2018); *Lenovo (United States), Inc.*, 2017 WL 6885837 (F.T.C. Dec. 20, 2017); *Warner Bros. Home Entertainment, Inc*., 2016 WL 6892613 (F.T.C. Nov. 17, 2016); *Machinima, Inc.*, 2016 WL 1130011 (F.T.C. Mar. 16, 2016).

Respondent also asserts that Complaint Counsel failed to introduce evidence that a clear disclosure would reduce consumer confusion.[27] But Complaint Counsel introduced evidence that there was only a *de minimis* likelihood of confusion in the first place,[28] and Respondent's attempt to demonstrate confusion from keyword bidding was severely flawed, *see infra* note 39. At the same time, courts have held that a "minimal or moderate amount of potential confusion found could be cured effectively by use of a disclaimer." *See Soltex Polymer Corp. v. Fortex Indus., Inc*., 832 F.2d 1325, 1330 (2d Cir. 1987). Indeed, the Tenth Circuit's ruling in 1-800 Contacts' own litigation supports the adequacy of disclosure. *See 1-800 Contacts, Inc.*, 722 F.3d at 1245 (consumer confusion would be unlikely "when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for"); *see also Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 937 (9th Cir. 2015) ("clear labeling can eliminate the likelihood of initial interest confusion in cases involving Internet search terms"); *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1154 (9th Cir. 2011) (clear labeling might eliminate the likelihood of initial interest confusion in internet advertising); *Playboy Enters. Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1025 & n.16 (9th Cir. 2004) ("if a banner advertisement clearly identified its source or, even better, overtly compared PEI products to the sponsor's own, no confusion would occur under PEI's theory" (that appearance of a banner advertisement immediately after users type in PEI's marks caused initial interest confusion)). Any potential for confusion lingering after clear disclosure of the rival seller's identity could be removed by a further disclosure disclaiming affiliation with 1-800 Contacts.[29]

Respondent additionally argues that this proposed alternative is "merely theoretical" because the record does not contain any real-world trademark settlements embodying such terms. RAB at 40. But insistence on identifying examples of other settlements that incorporate Complaint Counsel's specific proposal is unrealistic given the relatively new context of search-based keyword advertising, particularly in light of the large number of cases dismissing claims based on keyword bidding altogether.[30] Moreover, settlement agreements are often subject to confidentiality provisions and consequently unavailable. *Cf.* RX0734 (Hogan Expert Report) at 0107 ("many of the agreements I have knowledge of are subject to confidentiality provisions"). In any event, an absence of such settlement examples in the record does not determine whether

27 The Dissent argues that we "[d]ismiss 1-800 Contacts' trademark infringement claims based on [our] evaluation of consumer confusion . . . ." Dissenting Statement at 21. That is incorrect. We merely evaluate Respondent's argument regarding the evidence produced showing consumer confusion. As Section V.A.3.a.i. and this section show, our Opinion does not hinge on the merits of the trademark claim. We find that challenged restraints are overbroad, which is a question wholly suited for a rule-of-reason inquiry.

28 *See* CX8008 (Jacoby Expert Report) at 008-010; Jacoby, Tr. 2130.

29 During oral argument, Respondent's counsel indicated that Google's policy prohibits a party from including a competitor's trademark in the text of the ad, even if the trademark is mentioned in order to disclaim any affiliation. Stone, Oral Arg. Tr. at 90. Google's trademark counsel, however, testified that Google does not prohibit use of another's trademark in an ad unless the trademark owner notifies Google that it does not want its trademark to be used in the ads by that advertiser. *See* CX9022 (Charlston Dep.) at 16-17, *in camera*.

30 *See infra* note 38 and accompanying text.

the proposed alternative is workable. The idea that disclaimers can be used to eliminate consumer confusion is not new, and courts have ordered disclaimers as a remedy in internet-based trademark infringement cases. *See, e.g.*, *Nissan Motor Co., Ltd. v. Nissan Computer Corp.*, 89 F. Supp. 2d 1154 (C.D. Cal. 2000), *aff'd*, 246 F.3d 675 (9th Cir. 2000) (preliminary injunction requiring defendant Nissan Computer Corporation, owner of the websites nissan.com and nissan.net, to clearly identify itself on the website, disclaim affiliation with, and identify the correct website for, Nissan Motor Co., and not to display any automobile-related information or web links.); *Tempur-Pedic N. Am., LLC v. Mattress Firm, Inc.*, 2017 WL 2957912, at *11 (S.D. Tex. July 11, 2017) (permitting defendant to continue to use plaintiff's trademark in Google AdWords, but limiting number of times defendant could use the mark on its webpage and requiring disclaimer of affiliation); *Simone v. VSL Pharm., Inc.*, 2016 WL 3466033, at *27 (D. Md. June 20, 2016) (allowing competitor to post AdWords ads containing trademark term if such ads also include adequate disclaimer of affiliation, to be pre-approved by the court).

The FTC, too, in its decades of experience preventing and remedying false advertising claims and consumer deception, has ordered respondents to provide disclosures to avoid consumer confusion.[31] In fact, in 2013, the Commission published guidelines to assist businesses in providing clear, effective disclosures in space-constrained internet ads.[32] We thus have successfully employed remedial mechanisms similar to those urged by Complaint Counsel. We see no reason why a brief statement identifying the ad sponsor and/or disclaiming affiliation with 1-800 Contacts would be ineffective or unworkable.[33]

---

31 *See supra* note 24.

32 .Com Disclosures: How to Make Effective Disclosures in Digital Advertising, available at https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.

33 In addition to asserting federal trademark infringement claims under the Lanham Act §§ 32 and 43(a), Respondent's lawsuits alleged state and common law unfair competition (Utah Code Ann. § 13-5-1 et seq.), federal trademark dilution (15 U.S.C. § 1125(c)), and unjust enrichment, which they claim provide additional justifications for the challenged settlements. *See* RAB at 2. The state and common law unfair competition claims as well as the unjust enrichment claims are co-extensive with the federal trademark infringement claims, so they do not justify the restrictive settlement terms for the reasons discussed in the text. *See Amoco Oil Co. v. Rainbow Snow*, 748 F.2d 556, 558 (10th Cir. 1984) ("This 'likelihood of confusion' test is also applicable to Amoco's . . . state claims of infringement, Utah Code Ann. § 70-3-13 (1953), and its common law claims of unfair competition and deceptive trade practices."); *Primary Children's Med. Ctr. Found. v. Scentsy, Inc.*, 2012 WL 2357729, at *9 n.4 (D. Utah, June 20, 2012), *as amended*, (July 6, 2012) ("Because [plaintiff's] state law claims [including unfair competition under Utah Code Ann. § 13-5a-101 *et seq.* and common law unfair competition] all require a finding of trademark infringement or a likelihood of confusion, the court does not find it necessary to analyze these claims separately [from the federal claims]."); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151, 1190 (D. Utah 2010) (granting summary judgment on Respondent's unjust enrichment claim because it did not adequately show trademark infringement; "if Plaintiff were able to obtain payment under unjust enrichment, common law would effectively expand the scope of Plaintiff's statutory protection"). As to Respondent's federal trademark dilution claim, this purported justification pertains at most to two agreements. Of the thirteen complaints filed in connection with the challenged settlement agreements, only two asserted federal trademark dilution, and these complaints challenged pop-up ads appearing on 1-800 Contacts' website, not the display of ads on SERPs in response to searches for trademark terms. Indeed, Respondent *stopped* asserting trademark dilution claims after 2004, which suggests that even Respondent believed these claims to be either weak or at most peripheral to its case.

Given the inherently suspect nature of Respondent's advertising restraints and our finding that the procompetitive benefits asserted to justify those restraints could be achieved by significantly less anticompetitive means, we can conclude that Respondent has engaged in unfair methods of competition in violation of Section 5 of the FTC Act. Although Complaint Counsel have met their burden by demonstrating that Respondent could have chosen a less restrictive alternative to achieve the same procompetitive benefit, we also consider whether Complaint Counsel has satisfied its further showing by focusing alternatively on the particular restraints and context presented here.

b. Complaint Counsel's Showing that the Restraints Are Likely, in the Particular Context, to Harm Competition

Our review of the record shows that the restraints "are indeed likely, in the particular context, to harm competition." *Polygram*, 136 F.T.C. at 348. Online search advertising is a key method for consumers to discover, compare, and reach online contact lens vendors and for lower-priced retailers to compete. IDF 564-65. It enables online sellers to increase brand awareness and to obtain new customers. IDF 497. It is displayed at the key moment when the consumer is more likely to be looking to buy. IDF 498.

For 1-800 Contacts, search advertising is important. From 2004 to 2014, between [redacted] percent of 1-800 Contacts' internet advertising budget was spent on paid search advertising each year. IDF 66. 1-800 Contacts earns approximately [redacted] of its sales from paid search advertising. IDF 580.

Search advertising is similarly important for 1-800 Contacts' online competitors. The record shows that online retailers have found search advertising much more effective in reaching potential buyers than other types of advertising. For example, AC Lens has found that, compared to other marketing channels, search advertising generates the most new customer orders and the most revenue, at a cost consistent with AC Lens' financial goals. IDF 500-01. Thus, for AC Lens, search advertising is the most effective and important marketing channel to grow its business. IDF 502.

Other online competitors reported similar reliance on search advertising. Vision Direct advertised almost exclusively online. IDF 540. Search advertising "was a major driver" in building its business, including driving traffic to Vision Direct's website and generating new and repeat sales. IDF 542-43. Web Eye Care predominantly relies on paid search advertising, because it has determined that search advertising "drives the most traffic" and orders at an acceptable cost. IDF 556-58. For LensDirect, paid search advertising constitutes its most important marketing channel and has been effective in generating growth. IDF 523. Lens Discounters found that paid search advertising is "essential" to its ability to attract new customers because it reaches customers who are seeking to purchase contact lenses online. IDF

Respondent's briefing on appeal does not provide any explanation as to why dilution claims justify the settlements. Nor does it provide any reasons why its dilution concerns would not be adequately addressed by the less restrictive alternatives that Complaint Counsel have proposed. Accordingly, trademark dilution does not justify the Challenged Agreements either.

528. For Memorial Eye, search advertising was the "most efficient," form of advertising, which was "critical" to the company's growth. IDF 535, 537. Similarly, search advertising was "[e]specially important" for Walgreens when it began selling contact lenses online because it helped let people know that Walgreens sold contact lenses; it was "an essential form" of advertising for Walgreens to remain competitive with other online retailers of contact lenses. IDF 549-50.

Not only is search advertising in general important, the record shows that search advertising generated by searches for 1-800 Contacts' trademark terms is important. Trademark search is a significant source of 1-800 Contacts' business. IDF 566. It accounts for the substantial majority of 1-800 Contacts' new customer orders attributable to paid search advertising. IDF 570. In 2006, 2007, and 2008, trademark search generated far more orders than non-trademark searches. IDF 572. In 2015, between 20 and 31 percent of 1-800 Contacts' initial web orders came from users searching for 1-800 Contacts' trademark terms. IDF 571. 1-800 Contacts' trademark terms have higher conversion rates[34] than non-branded search terms. IDF 573.

Similarly, for 1-800 Contacts' online rivals, advertising displayed for searches on 1-800 Contacts' trademark terms is important. During the period from 2002 through 2016, Google displayed advertisements for nine of the 14 contact lens retailers that are parties to the Challenged Agreements, as a result of their direct bidding on 1-800 Contacts' trademark terms prior to entering into the agreements. IDF 653. These nine firms found such keyword bidding to be worth the cost, and Google determined their advertisements were sufficiently relevant to warrant display. *Id.* In addition, parties to the Challenged Agreements consistently testified that, absent the agreements, they would bid, or test bidding, on 1-800 Contacts' trademark terms and/or remove negative keywords from their advertising accounts. IDF 590 (AC Lens), 595 (Empire Vision), 616 (Lenses for Less), 630 (Vision Direct), 634-35 (Walgreens), 650 (Web Eye Care).

Respondent argues that the Challenged Agreements prohibit ads for only a small number of searches. RAB 17. That argument is contradicted by the evidence. The volume of searches for 1-800 Contacts' trademark terms is significant. Based on the comScore dataset of searches by users for the period July 2013, through July 2016 (the "comScore dataset"[35]) analyzed by Complaint Counsel's expert witness, Dr. Susan Athey, 17 percent of search queries for contact lenses were for 1-800 Contacts' trademark terms. IDF 657. The volume of searches for 1-800 Contacts' trademark terms in the comScore dataset was similar in size to the collective volume of searches for the top three generic terms ("contact," "contact lenses," and "contacts"). IDF

34 A "conversion" refers to a sale made over the internet. The conversion rate is the number of times a conversion occurs divided by the total number of ad clicks. IDF 156.

35 ComScore is a company that collects data from a panel of internet users by installing software on consumers' devices to track their behavior, including collecting information on the screens that users see when they perform searches. IDF 700. Dr. Athey received from comScore detailed online search information from 377,002 internet users in the United States from July 11, 2013, through August 14, 2016, covering all the search queries those users performed on all major search engines and reported at a query-by-query level. IDF 701.

658-59. The 1-800 Contacts search term is the largest, single brand-name search term, according to the comScore data analyzed by Dr. Athey. IDF 660.

The reason that 1-800 Contacts' rivals' ads are so important at this key moment is that the rival online sellers offer lower prices, IDF 661, 693, and advertising for those retailers often emphasizes those lower prices. *See* IDF 587, 591, 603, 611, 646, 703, 724; Holbrook, Tr. 1904. That information is valuable: online shoppers for contact lenses are primarily concerned with low prices, IDF 705-08. Yet, in a 2012 consumer survey of 1-800 Contacts' customers, more than one-third of respondents explained that they initially purchased from 1-800 Contacts because "It Was the Only Online Contacts Site of Which I Was Aware," IDF 695, 697, and a 2015 AEA Investors Fund analysis based on another survey found that actual price variances were "much more" than consumers thought them to be. RX1228 at 36.

Consumers respond to competitors' ads displayed in response to searches for 1-800 Contacts' trademark terms. Based on data analyzed by Complaint Counsel's expert, Dr. Athey, firms that are currently bidding on "1-800 Contacts," have a higher conversion rate for those searches than for other search terms. IDF 661. 1-800 Contacts observed that an increase in competitor ads appearing in response to a search for 1-800 Contacts' trademark terms tends to decrease sales for 1-800 Contacts. IDF 711. For example, in a report covering the week ending September 22, 2007, 1-800 Contacts noted a 6 percent week-over-week drop in trademark paid search orders, in part because of competition from Vision Direct, which had been "advertising in the 2nd position on many of [the SERPs for searches for 1-800 Contacts'] branded terms in Google." IDF 717. *See also* IDF 726 (report for the week ending March 12, 2010: 1-800 Contacts experienced a lower click-through-rate than in prior weeks, which is "likely the result of additional competitor's ads . . . showing up on our best terms such as *1800contacts* and *1800 contacts*"), 727 (report for the week ending June 11, 2010: 1-800 Contacts' trademark paid search orders through Google and click-through rates for trademark ads "were slightly softer than [the preceding week] because of increased competition on [1-800 Contacts'] best branded terms").

Similarly, 1-800 Contacts found that reducing the competitor ads that appear in response to searches for 1-800 Contacts' trademark terms increased sales. IDF 710. For example, in a report covering the week of June 20, 2008, 1-800 Contacts attributed an increase in orders as being helped in part by "LensWorld finally removing all their ads from all of [1-800 Contacts'] trademark keywords." IDF 719. *See also* IDF 725 (report for the week ending January 8, 2010: 1-800 Contacts achieved "an all-time record high" for orders obtained through searches for its trademark keywords, due in part to fewer advertisers appearing on searches for 1-800 Contacts' trademark terms that week, "which always helps improve performance"), 730 (reporting that in late August 2010, orders from new customers coming through search ads on searches for 1-800 Contacts' trademarks "jumped to the highest level of the year," due in part to the appearance of "fewer competitors on [1-800 Contacts'] best TM words such as *1800contacts 1 800 contacts* and *1800 contacts*."), 723 (report for the week of March 6, 2009: "[t]here are substantially less competitors showing up on our list of monitored TM words . . . in Google[,] which is likely helping improve our TM [conversion rate] and TM order volume.").

In addition, it is worth highlighting that Challenged Agreements covered 14 different online contact-lens retailers that account for 79 percent of online contact lenses in the United States. IDF 496. That is in stark contrast to the *Clorox* case. There, the court saw a jilted competitor who wanted to use an antitrust claim to negotiate a better trademark settlement. The court recognized that "the antitrust laws do not exist to protect competitors from agreements that in retrospect turn out to be unfavorable to the complaining party." *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 57 (2d Cir. 1997). The court further expressed its skepticism where the challenged agreement restricted only one brand, PINE-SOL, and left "established large competitors" that are "some of the largest corporations in the country" free to compete, "as these companies have repeatedly done." *Id.* at 58. Predictably, Clorox was unable to muster much evidence of consumer harm. The court found implausible the assertion by Clorox, a "megabrand with substantial brand equity," that restrictions on the ability to use the PINE-SOL brand somehow erected an insurmountable barrier to competition. *Id.* The court dismissed as unpersuasive Clorox's anecdotes of failed products because the trademark allegedly did not fit the new market. The court also rejected Clorox's theory that only Clorox could provide competition to the LYSOL brand. *Id.* In short, *Clorox* bears very little resemblance to the present case. Unlike the one competitor that was worse off in *Clorox*, the challenged agreements here cover the landscape of online contact-lens retailers resulting in harm to competition overall. And unlike Clorox's thin evidence of consumer harm, the record here is replete with direct evidence of anticompetitive effects.

The Dissent claims that the disposition of *Clorox* should be the same here. In particular, the Dissent claims that the court in *Clorox* thought "the form and scope of trademark settlement agreements deserves 'substantial weight' because the settling parties 'are in the best position to determine what protections are needed' and 'it is usually unwise for courts to second-guess such decisions.'" Dissenting Statement at 19 (quoting *Clorox,* 117 F.3d at 57). But looking at the form and scope of an agreement is at the very heart of a Section 1 analysis. For instance, we neither ignore nor defer to the parties in assessing the form and scope of an agreement in reverse payment cases because, indeed, the form and scope of the agreement lie at the very core of how parties make a reverse payment. By asking us to simply defer to the parties to a settlement, we fear that the Dissent essentially advocates for application to cases at the intersection of antitrust and trademarks a version of the "scope of the patent" test that was rejected in *Actavis*. We decline to follow that suggestion.

This examination of the context of the particular advertising restraints in the Challenged Agreements demonstrates that anticompetitive effects are likely. Economics and prior cases counsel that the challenged advertising restrictions prevent consumers from obtaining information that would permit price and service comparisons. The record evidence showing the significance of search advertising and searches for 1-800 Contacts trademark terms in particular; the price competition offered by 1-800 Contacts' rivals; and the consumer responses to online competitors' ads generated by searches for 1-800 Contacts trademarks confirm that the Challenged Agreements are "indeed likely, in [this] particular context, to harm competition." *Polygram*, 136 F.T.C. at 348.

4. 1-800 Contacts' Response to Complaint Counsel's Showing of Anticompetitive Effects

1-800 Contacts responds to Complaint Counsel's showing that the restraints are inherently suspect and likely to have substantial anticompetitive effects by challenging the factual, economic, and legal support for the demonstration of those anticompetitive effects. These challenges are not persuasive.

Respondent and the Dissent argue that the Challenged Agreements affected advertising by only some companies, in only one medium, in response to only a portion of internet searches related to contact lenses. RAB at 17. Of course, the fact that some advertising remained unrestrained does not excuse a restraint affecting a competitively significant subset of ads. While the Challenged Agreements do not prevent all advertising for the online sale of contact lenses, they affect a particularly significant type of advertising for online sales at the crucial moment when sales are about to be made. *See* IDF 661 (finding a higher conversion rate for bids on "1-800 Contacts" than for other search terms). The suppressed ads would have enabled consumers to learn about alternative, lower-priced sellers of contact lenses and to make price comparisons. Prohibiting this particular type of advertising is likely to have substantial anticompetitive effects.

Respondent argues that the ads banned by the settlements could have different effects from advertising in other markets. *See* RRB at 23. Although Respondent points to some attributes of search advertising—some consumers may be conducting navigational searches and expect to see the most relevant results appearing first,[36] and some consumers may be unable to distinguish between paid search ads and organic results—Respondent does not identify any record evidence demonstrating that consumers' purchasing behavior in response to search ads generated by 1-800 Contacts' trademark terms differs from their response to other advertising. Nor does Respondent identify any other market effects that differ from other contexts. As previously discussed, consumers respond to the presence of rivals' contact lens ads by clicking on the ads and converting those clicks to sales, even if some consumers are performing navigational searches. IDF 710-19, 723-31. Thus, when consumers are presented with information that informs them of alternative online sellers offering lower prices, they respond to advertising in this market the same way that they do elsewhere.

Respondent similarly argues that the economic literature has not looked specifically at paid search advertising, which involves "complexities" in the algorithms employed by search engines. RRB at 22. Although the algorithms underlying the search auctions are complex, the behavior of consumers and advertiser-sellers in response to this type of advertising is the same as for other types of advertising. Respondent identifies no differences in the responses of market participants, so the fact that economic studies did not specifically examine search advertising

36 Respondent suggests that absent the advertising restrictions rivals' ads would appear first. Yet "1-800 Contacts' strategy to search advertising was to spend as much as necessary when bidding on its trademark keywords to meet its goal of ensuring that 1-800 Contacts' advertisement was the first advertisement displayed in response to searches for its trademark." IDF 575; CX0935. Viewed in light of this strategy, the advertising restrictions may enable 1-800 Contacts to reduce its bids and pay lower prices, but they do not better satisfy consumer expectations.

does not affect their relevance. As the D.C. Circuit has explained, condemnation of a particular horizontal restraint as inherently suspect looks only for "the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare." *Polygram*, 416 F.3d at 37.

Finally, Respondent argues that a finding that the settlement agreements are inherently suspect is inconsistent with the Supreme Court's opinion in *Actavis*. *See* RRB at 22. We disagree. *Actavis* does not stand for the proposition that no restriction in a settlement agreement–even an intellectual property settlement agreement—can be inherently suspect. Indeed, the Supreme Court has often concluded that restraints embedded in settlement agreements are unlawful without resorting to a full rule-of-reason analysis. See *Singer Mfg.*; *New Wrinkle*; *U.S. v. Masonite Corp.*, 316 U.S. 265 (1942). Rather, *Actavis* describes how to analyze the reverse payment settlements there at issue. It says that Hatch-Waxman reverse-payment, patent settlements, without more, are not inherently suspect because reverse payments are a special breed of settlement. In particular, the Court recognized that reverse payment settlements are complex cases where the likelihood of "anticompetitive effects depends upon [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*, 570 U.S. at 159. Here, Respondent's agreements take the form of a quintessential advertising restraint that is targeted to interfere with price-setting mechanism among online contact-lens sellers. The restraint involves none of the complexities identified by the Court in conjunction with reverse payments, and there is no reason its competitive harms cannot be established through *Polygram*'s inherently suspect framework.

Putting aside whether the restraints at issue here are properly classified as inherently suspect, Complaint Counsel's more detailed showing described above and lack of offsetting efficiencies meet the requirements of the rule of reason to support liability. The *Actavis* Court noted that the Commission need not "litigate the patent's validity, empirically demonstrate the virtues or vices of the patent system, present every possible supporting fact or refute every possible pro-defense theory" to show that a reverse payment is anticompetitive. *Id.* at 159. Rather, "'[t]here is always something of a sliding scale in appraising reasonableness,'" and as such "'the quality of proof required should vary with the circumstances.'" *Id*. (quoting *California Dental*, 526 U.S. at 780) (internal citations omitted). The Court stressed: "As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences." *Id*. Here, we simply follow *Polygram*'s framework for structuring the rule-of-reason inquiry in the context of an advertising restriction case and analyze the intellectual property issues in that framework.

5. Validity of the Asserted Procompetitive Justifications

As discussed in Section V.A.2, the avoidance of litigation costs through settlement and the protection of trademark rights are cognizable and facially plausible procompetitive

justifications because, under the right circumstances, both cost savings and trademark protection can result in enhanced competition and innovation. But Complaint Counsel have shown that the purported procompetitive benefits could have been accomplished through means less restrictive of competition. *See supra* Section V.A.3.a. Even if no less restrictive alternative were available, however, Respondent's case would falter because it has not shown that its purported justifications have a basis in fact, *i.e.*, that they are valid as well as plausible and cognizable. As we noted in *Polygram*, the respondent "has the burden of producing factual evidence in support of its contentions." 136 F.T.C. at 350; s*ee also Mass. Board*, 110 F.T.C. at 604 ("if the efficiency justification is plausible, further inquiry . . . is needed to determine whether the justification is really valid").

At this point, then, we look closer at Respondent's asserted justifications and require sufficiently detailed evidence to establish that the justifications are not merely plausible, but actually valid. *See Polygram*, 416 F.3d at 36 (explaining that respondent's burden at this stage is to show the restraint "in fact" does not harm consumers or has procompetitive virtues). We find that Respondent has not met this burden.[37]

a. Avoidance of Litigation Costs through Settlement

Although Respondent has identified litigation cost savings, it has not demonstrated that these cost savings would have procompetitive effects. Respondent must provide "some explanation connecting [its] practice[s] to consumers' benefits." *Chicago Prof'l Sports, L.P. v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992); *see also Polygram*, 136 F.T.C. at 345 (describing legitimate justifications as "reasons why the practices are likely to have beneficial effects for consumers"). But Respondent provides no basis for finding that the litigation cost savings would be passed through to consumers or would otherwise benefit competition in a way that could offset the anticompetitive effects. Capital savings are not cognizable efficiencies in and of themselves, though they may be cognizable if defendant demonstrates that avoidance of capital expenditures provides a tangible, verifiable benefit to consumers by lowering prices or improving service quality. *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 350 (3d Cir. 2016). "While increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice have been accepted by courts as justifications for otherwise anticompetitive agreements, mere profitability

37 In addition, the ALJ found that two other justifications suggested by Respondent—increased online sales of contact lenses and minimization of search costs—were unsupported, but Respondent has not challenged those portions of the ALJ's decision on appeal. Accordingly, Respondent waived its arguments with respect to those justifications. *See* 16 C.F.R. § 3.51(b) ("[a]ny objection to a ruling by the Administrative Law Judge, or to a finding, conclusion, or a provision of the order in the initial decision, which is not made a part of an appeal to the Commission shall be deemed to have been waived"); *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003) ("a party seeking to raise a claim or issue on appeal must plainly and prominently so indicate"; otherwise, the issue "will be considered abandoned"). In any event, we agree with the ALJ that the increased sales justification lacks evidentiary support (*see* ID at 188-89), and the asserted benefit from minimization of consumer search costs is neither factually nor legally valid (*see id.* at 184-87 & n.45). *Cf. Polygram*, 136 F.T.C. at 356 (noting expert testimony that an agreement among competitors not to advertise is likely to harm consumers and competition by *raising* consumers' search costs).

or cost savings have not qualified as a defense under the antitrust laws." *Law*, 134 F.3d at 1023. Respondent has not demonstrated that the litigation cost savings provide benefits to consumers that could or would offset the competitive harms attributable to its conduct.

Moreover, the litigation settlement justification is at most partial. It has no bearing whatsoever on the Luxottica Sourcing and Services Agreement. That agreement involved no litigation, no settlement, and no litigation cost savings.[38]

The Dissent argues that our decision errs by failing to account for saved litigation costs that do not result in cost savings to consumers. The Dissent claims that our analysis contradicts *Actavis*, which it believes accommodates any saved litigation costs—irrespective of whether the savings passed down to consumers or not. Though not openly stated, the Dissent asks us to take up the *total* welfare standard for evaluating efficiencies, which does not require a showing of how the proffered efficiency benefits consumers.[39] We, however, believe the sounder approach—and the approach that is most consistent with long-standing antitrust practice—would be to ensure that if consumers are harmed by the challenged restraints, Respondent should be required to explain and detail how its restraints actually benefit consumers. The Dissent advocates skipping that step; we decline.

b. Trademark Protections

Respondent and the Dissent argue that 1-800 Contacts' agreements facilitate trademark protection, which allows retailers to market products in a way that reduces the likelihood of consumer confusion and incentivizes brand-building. Both maintain that brand-building, in turn, assures consumers of consistent quality and reduces consumer costs of making purchasing decisions. Respondent's Post-Trial Brief at 36-38, 45; Dissenting Statement at 24-26. Although trademark protection can be a legitimate justification, it does not justify the restraints challenged in this case.

To overcome Complaint Counsel's showing of anticompetitive effects, Respondent must show that trademark protection is more than a procompetitive justification in theory and is, in fact, a valid justification for the restraints challenged here. *See Polygram*, 136 F.T.C. at 349 (explaining that if the respondent fails to refute the plaintiff's detailed showing of competitive harm, the respondent has the burden of showing that "detailed evidence supports its proffered justification"); *Mass. Board*, 110 F.T.C. at 604 (requiring a showing that "the justification is really valid"). We find that Respondent has not carried that burden.

---

38 Section III.B of the Dissent offers considerations that might justify the challenged restraints in the Luxottica Sourcing and Services Agreement. But Respondent did not assert these potential efficiencies as procompetitive benefits and consequently did not attempt to carry its burden of establishing them. Nor has Respondent argued or submitted evidence that the challenged restraint is an ancillary restraint saved by the Luxottica Sourcing and Services Agreement.

39 *See* Dennis W. Carlton, *Does Antitrust Need to be Modernized?*, 21 J. ECON. PERSP. 155, 157 (2007) ("The proper objective of antitrust should be total surplus, not consumer surplus.").

To establish a federal trademark infringement claim under either Lanham Act § 32 (15 U.S.C. § 1114) or § 43 (15 U.S.C. § 1125(a)), a plaintiff must show that use of its mark is likely to cause consumer confusion as to the source, affiliation, or sponsorship of a company's products or services. *Scott Fetzer Co. v. House of Vacuums, Inc*., 381 F.3d 477, 483 (5th Cir. 2004) (citing 15 U.S.C.A. § 1114(1); *id*. § 1125(a)); *A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 210 (3d Cir. 2000). Confusion must be probable, not merely possible, *id.*, and use of the mark must be likely to confound "an appreciable number of reasonably prudent purchasers exercising ordinary care." *Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 12 (1st Cir. 2008) (quoting *Int'l Ass'n of Machinists and Aerospace Workers, AFL–CIO v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir.1996)) (internal quotation marks omitted); *see also Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1151 (9th Cir. 2002); *Savin Corp. v. Savin Grp.*, 391 F.3d 439, 456 (2d Cir. 2004).

Although claims based on keyword bidding have sometimes withstood dispositive motions,[40] apart from a single district court summary judgment decision from over ten years ago,[41] no court has found bidding on trademark keywords to constitute trademark infringement, absent some additional factor, such as a misleading use of the trademark in the ad text that confuses consumers as to the advertisement's source, sponsorship, or affiliation.[42] Rather, "[c]ourts have consistently rejected the notion that buying or creating internet search terms, alone, is enough to raise a claim of trademark infringement." *Tempur-Pedic N. Am.*, 2017 WL 2957912, at *7 (holding, on motion for preliminary injunction, that "[b]ecause the court has concluded that the purchase of AdWords alone, without directing consumers to a potentially confusing website, is unlikely to cause customer confusion, the AdWords will not be included in the injunction"); *see Acad. of Motion Picture Arts & Sciences v. GoDaddy.com, Inc.*, 2015 WL 5311085, *50 (C.D. Cal. Sept. 10, 2015) ("There is a growing consensus in the case authorities that keyword advertising does not violate the Lanham Act.").[43] Indeed, Respondent lost the one

40 *See e.g.*, *Hearts on Fire Co., LLC v. Blue Nile, Inc.*, 603 F. Supp. 2d 274, 288 (D. Mass. 2009); *Fair Isaac Corp. v. Experian Info. Sols. Inc.*, 645 F. Supp. 2d 734, 760–61 (D. Minn. 2009).

41 *See Soilworks, LLC v. Midwest Indus. Supply, Inc.*, 575 F. Supp. 2d 1118 (D. Ariz. 2008).

42 *See* CX8014 at 021 (¶ 43) (Tushnet Rebuttal Report) (noting that the "preeminent expert on internet advertising law . . . has been unable to identify any case in which a defendant lost a trial on likely confusion based on purchases of a plaintiff's trademark as a search engine keyword – despite the filing of over a hundred such cases"); Hogan, Tr. 3459-61 (1-800 Contacts' trademark law expert acknowledging that he was not aware of any court that had found liability based on keyword bidding alone); *USA Nutraceuticals Grp., Inc. v. BPI Sports, LLC*, 165 F. Supp. 3d 1256, 1266 (S.D. Fla. 2016) ("[Plaintiff] points to no case indicating that the simple purchase of advertising keywords, without more, may constitute initial interest confusion. . . .").

43 *See also, e.g.*, *USA Nutraceuticals*, 165 F. Supp. 3d at 1274 (denying motion for preliminary injunction; "consumers viewing the advertisements are unlikely to be confused as to what, if any, relationship or affiliation exists" between plaintiff and defendant, as the advertisement "makes clear [who] is the proponent of the particular product"); *Novation Ventures, LLC v. J.G. Wentworth Co., LLC*, 2015 WL 12765467, at *8 (C.D. Cal. Sept. 21, 2015) (granting motion to dismiss; "[i]f a consumer conducts an Internet search for the term 'Novation' and Defendants' advertisements appear in the search results – again, labeled with the word 'Ad' – it would not confuse consumers."); *Infogroup, Inc. v. DatabaseLLC*, 95 F. Supp. 3d 1170, 1190-91 (D. Neb. 2015) (denying motion for preliminary injunction; no likelihood of success on claim based on keyword bidding where ads "do not use [plaintiff's] marks in the advertisement itself, and each is either separated from the search results or plainly labeled

infringement case that it pursued to judgment. *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013) (affirming, in relevant part, summary judgment in favor of defendant). As the appellate court explained:

> Perhaps in the abstract, one who searches for a particular business with a strong mark and sees an entry on the results page will naturally infer that the entry is for that business. But that inference is an unnatural one when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for.

---

as a sponsored advertisement."); *Goldline, LLC v. Regal Assets, LLC*, 2015 WL 1809301, at *3 (C.D. Cal. Apr. 21, 2015) (granting motion to dismiss claims based on keyword advertising; "there is simply nothing stated, that if deemed true, constitute[s] commercial use that would likely cause confusion as to the origin or affiliation"); *Infostream Grp., Inc. v. Avid Life Media Inc.*, 2013 WL 6018030, at *5 (C.D. Cal. Nov. 12, 2013) (granting motion to dismiss; "[plaintiff] cannot plausibly claim that [defendant's] mere use of keywords caused any consumer confusion"); *Allied Interstate LLC v. Kimmel & Silverman, P.C.*, 2013 WL 4245987, *6 (S.D.N.Y. Aug. 12, 2013) (granting defendant's motion for judgment on the pleadings; display of ads "is an indicator of the relevance, not of the source of Defendants' advertising," and Google's labeling of the ads "in no way suggests that it is advertising for or by Plaintiff"); *Gen. Steel Domestic Sales, LLC v. Chumley*, 2013 WL 1900562, *10 (D. Colo. May 7, 2013), *judgment aff'd*, 627 Fed. Appx. 682, 2015-2 Trade Cas. (CCH) ¶ 79255 (10th Cir. 2015) (after trial, finding no likelihood of confusion due to trademark keyword bidding; "[a]dvertisements on Google appear in a list as distinct and independent entries that internet users can browse and select at will …. [T]he connection between the search term entered and the appearance of an advertisement is too attenuated to suggest an actual affiliation."); *CollegeSource, Inc. v. AcademyOne, Inc.*, 2012 WL 5269213, at *20 (E.D. Pa. Oct. 25, 2012), *aff'd*, 597 F. App'x 116 (3d Cir. 2015) (granting summary judgment for defendant; no likelihood of confusion found where the surrounding ad context, including separation of sponsored ad links and labeling of sponsored links, decreased any potential likelihood of confusion); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1122 (E.D. Cal. 2010) (granting motion to dismiss; "it is hardly likely that with several different sponsored links appearing on a page that a consumer might believe each one is the true 'producer' or 'origin' of the [plaintiff's] product"); *Boston Duck Tours, LP v. Super Duck Tours, LLC*, 527 F. Supp. 2d 205 (D. Mass. 2007) (finding that trademark keyword purchase did not violate preliminary injunction; because triggered advertisement clearly identified the defendant as the source of the ad, trademark use did not result in a likelihood of confusion but constituted "fair, albeit aggressive, competition not prohibited by the Lanham Act"); *J.G. Wentworth, S.S.C. Ltd. P'ship v. Settlement Funding LLC*, 2007 WL 30115, at *6 (E.D. Pa. Jan. 4, 2007) (granting motion to dismiss; "Even accepting plaintiff's allegations as true – *i.e.*, assuming that defendant did in fact use plaintiff's marks through Google's AdWords program or in the keyword meta tags for its web site – as a matter of law defendant's actions do not result in any actionable likelihood of confusion under the Lanham Act."); *Gov't Employees Ins. Co. v. Google, Inc.*, 2005 WL 1903128, at *7 (E.D. Va. Aug. 8, 2005) (on motion for judgment as a matter of law, finding that "plaintiff has failed to establish a likelihood of confusion stemming from Google's use of GEICO's trademark as a keyword and has not produced sufficient evidence to proceed on the question of whether the Sponsored Links that do not reference GEICO's marks in their headings or text create a sufficient likelihood of confusion); *cf. 3form, Inc. v. Lumicor, Inc.*, 2012 U.S. Dist. LEXIS 27504, at *26 (D. Utah Mar. 1, 2012) (granting motion for summary judgment based on use of trademark metatags because "the fact that a competitor's search results appear as one of many options when conducting a web search will not confuse consumers, as they will have different appearances").

Id. at 1245. Despite the accumulating evidence regarding the weakness of trademark infringement claims, 1-800 Contacts continued to police and enforce the Challenged Agreements and, consequently, continued to extend their anticompetitive effects.[44]

A leading trademark treatise agrees that displays of non-deceptive advertising links arising from competitors' purchases of trademark keywords are not confusing. *See* 5 McCarthy on Trademarks and Unfair Competition § 25A:8 (5th ed. Supp. 2018 update). The author explains that while "a web user may be 'distracted' or 'diverted' by the search engine displaying ads for other sources . . . distraction or diversion is not the same as 'confusion' by the web shopper." Rather, initial interest confusion can occur "only if the web user mistakenly thought she was going to a web site about TOYOTA cars when she clicked on the keyword link for VOLKSWAGEN. That would depend on how clearly labeled was the advertising link for VOLKSWAGEN." *Id.*

We are neither deciding matters of trademark law nor suggesting that to determine whether the Challenged Agreements unreasonably restrain competition, we need to conduct a mini-trial on the merits of the underlying trademark litigations. Respondent's justifications, however, must meet at least a minimum threshold of validity—more than merely surviving challenges as shams. In this case, the agreements restrict a type of competitive advertising that has never been found to violate the trademark laws, and the weight of authority overwhelmingly points to non-infringement. We are not convinced that trademark protection in this case is a valid procompetitive benefit that merits suppressing truthful advertising.

The justification for including negative keywords in the agreements is even weaker. Not only is there a lack of support for a finding of confusion, discussed above, but no court has ever found that bidding on a generic keyword (like "contacts"), which may be broad or phrase matched by the search engine to a trademark search, is even a "use." On the contrary, in the 2010 decision rejecting Respondent's case against Lens.com, the district court stated:

It is beyond dispute that a competitor cannot be held liable for purchasing a *generic keyword* to trigger an advertisement that does not incorporate a holder's mark in any way, even if that competitor's advertisement appeared when a *consumer* entered a trademarked *search term*.

---

44 Respondent's effort to supply new information in support of its contention that the appearance of competitor ads in response to searches for "1-800 Contacts" generated consumer confusion—by introducing a consumer survey conducted by its expert, Dr. Van Liere—is unpersuasive. We find that survey deeply flawed and skewed in a way that overstates the difference between the percentage of confused consumers in the test group and the percentage of confused consumers in the control group. Among the problems with the survey are the removal of 1-800 Contacts' own ad from the test SERP, even though that ad would generally appear at the top of the sponsored results in the real world (IDF 767, 772-73); the failure to test whether the purported confusion was caused by use of the trademark keyword, rather than by other factors, such as the existence of sponsored links (*see* CX8011 (Jacoby Rebuttal Report) at ¶¶ 7-9, 11-19); and providing more total links in the test SERP than in the control SERP (*id.* at ¶¶ 30, 33(b)). For the reasons described in the Initial Decision, we also find that the expert opinions of Dr. Goodstein and Dr. Ghose, as well as the Memorial Eye customer service records, do not establish that consumers are likely to be confused about source, sponsorship, or affiliation of the sponsored ads. *See* ID at 172-75, 181-84.

Lens.com, 755 F. Supp. 2d at 1174 (emphasis in original).[45] Because there is no support for a trademark infringement claim based on a failure to designate negative keywords, Respondent has failed to establish that protecting trademark rights justifies negative keyword agreements between competitors.

Given the inherently suspect nature of Respondent's advertising restraints and Complaint Counsel's more detailed showing of likely competitive harm to consumers in the particular context at hand, Respondent's failure to establish a basis in fact for its asserted procompetitive justifications—a showing that they are valid as well as plausible and cognizable—provides a further basis for condemning its conduct. Even if there were no less restrictive alternatives, Respondent has not established that its anticompetitive restraints in fact have procompetitive virtues. We conclude that Respondent has engaged in unfair methods of competition in violation of Section 5 of the FTC Act.

The Dissent criticizes this Opinion for classifying the challenged restraints as inherently suspect. The Dissent asserts that we have not analyzed the challenged agreements under the rule of reason and therefore risk suppressing procompetitive conduct. These criticisms are misplaced. We rely on the *Polygram* framework because the challenged restraints are of a type that have been routinely condemned as inherently suspect, and *Polygram* furnishes a well-crafted framework for analyzing such restraints. But we also recognize that there may be plausible, cognizable justifications for trademark settlements. In fact, we consider Respondent's specific evidence in support of those procompetitive justifications and ultimately find the evidence wanting. We also find that Respondent has less restrictive ways of accomplishing those procompetitive justifications and evaluate an extensive record of direct evidence showing anticompetitive effects. In short, though we find these restraints inherently suspect, we ultimately perform the "sedulous" analysis required under the rule of reason. *See Cal. Dental*, 526 U.S. at 781.

B. Analysis of the Challenged Agreements for Effects on Consumers Using Direct Evidence of Anticompetitive Effects

Even if we did not rely on the inherently suspect nature of the restraints in the Challenged Agreements to conclude that there is liability, a second way independently to establish plaintiff's initial burden to show that a particular horizontal restraint has anticompetitive effects is to consider direct evidence of those effects. When there is direct evidence of anticompetitive effects, detailed market analysis and proof of market power is unnecessary. "[S]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output can obviate the need for an inquiry into market power, which is but

45 Respondent asserts that, on appeal, the "Tenth Circuit expressly did 'not resolve [this particular] matter'" concerning whether bidding on generic keywords could be trademark infringement. RRB at 7 (quoting *1-800 Contacts, Inc.*, 722 F.3d at 1243) (brackets in RRB). This misconstrues the Tenth Circuit's decision. What the appellate court expressly chose not to resolve was whether use of the challenged keywords alone could result in a likelihood of confusion. *1-800 Contacts, Inc.*, 722 F.3d at 1242-43.

a surrogate for detrimental effects." *IFD*, 476 U.S. at 460-61 (internal quotation marks omitted); *see also Ohio v. American Express Co.*, 138 S. Ct. at 2285 n.7 (explaining that market definition is unnecessary for the analysis of horizontal restraints when actual anticompetitive effects have been demonstrated).

When plaintiff satisfies the initial burden to show anticompetitive effects using direct evidence, the burden then shifts to the defendant. The defendant can challenge plaintiff's support underlying the initial showing. In addition, defendant can seek to establish procompetitive justifications for its conduct. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011). Ultimately, the fact-finder must consider whether the anticompetitive harms outweigh any procompetitive benefits.

1. Direct Evidence of Anticompetitive Effects for Consumers

Like Judge Chappell, who considered the evidence only under this mode of analysis, we conclude that Complaint Counsel successfully established their *prima facie* case through direct evidence of two anticompetitive effects: the restriction of truthful advertising and an increase in contact lens prices sold online.

a. Restriction of Truthful Advertising

Respondent and the Dissent argue that a restriction on truthful advertising does not qualify as an anticompetitive effect; according to Respondent, only reduced output or higher prices for the underlying product is sufficient. RAB at 22-23. Respondent and the Dissent rely on *California Dental*'s statement that "the relevant output for antitrust purposes here is presumably not information or advertising, but dental services themselves" so that "the question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of [the product being advertised]." RAB at 22 (quoting *California Dental*, 526 U.S. at 776).

But the Court's concern in *California Dental* was that the normal linkage between advertising restrictions and price/output effects in the underlying product market was attenuated in the context of professional services because consumers may not be able to make valid assessments regarding advertising claims about the quality, comfort, or other non-price aspects of dentists' services. *See, e.g.*, 526 U.S. at 778 (citing the "plausibility of competing claims about the effects of the professional advertising restrictions" as the basis for concluding that "[t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown").

We find Respondent's and the Dissent's reliance on *California Dental* misplaced because there is no similar concern that consumers may be unable to assess the information contained in advertising for the sale of contact lenses. The record shows a focus on price advertising by many of 1-800 Contacts' online rivals. *See* IDF 587, 591, 603, 611, 646; Holbrook, Tr. 1904. When consumers have a prescription and are shopping for contact lenses, the lenses they purchase are identical—by prescription, brand name, and even type (*e.g.*, daily or biweekly)—regardless of the retailer. IDF 24-25. For such commodity products, consumers can comparison shop. In fact, the Fairness to Contact Lens Consumers Act, which requires prescribers to provide a patient

with a portable copy of his or her prescription, "promotes competition in retail sales of contact lenses by facilitating consumers' ability to comparison shop for contact lenses." FTC Contact Lens Rule, 81 Fed. Reg. 88526 (Dec. 7, 2016) (review of Rule). Congress apparently had no concern that consumers would be unable to assess competing offers and prices for contact lenses.

Restricting the availability of truthful information that guides consumer decisions in the marketplace is a competitive harm. As the Supreme Court explained in *IFD*, "a concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or . . . the purchase of higher priced services than would occur in its absence." *IFD*, 476 U.S. at 461-62. We similarly found direct evidence of competitive harm from a showing that there were "significantly fewer discount [residential real estate] listings" available to consumers after an association of real estate brokers adopted rules that limited consumers' access to information about the availability of lower-priced real estate services. *See Realcomp*, 2007 WL 6936319.

The record demonstrates that the settlement agreements were effective in restricting advertisements from 1-800 Contacts' rivals. As already described, parties to the agreements consistently testified they would bid on 1-800 Contacts' trademark terms or remove the negative keywords if the agreements were not in place. *See* IDF 590, 595, 616, 630, 634-35, 650. Yet, data provided by Google covering the period January 2002 to September 2016 show that the competitors who had been bidding on 1-800 Contacts' trademark terms ceased doing so almost entirely after entering the Challenged Agreements. IDF 687, 689 (citing CX8006 (Evans Expert Report) at 061-062). Similarly, the use of negative keywords by 1-800 Contacts' competitors required by the Challenged Agreements prevented ads from being shown to consumers even when the competitor did not bid on 1-800 Contacts' trademark terms; a second Google data set covering the period from January 1, 2010 to November 2016 showed a substantial decline in advertisements displayed in response to a search that includes a 1-800 Contacts' trademark term through phrase match to a generic term such as "contacts." IDF 655, 688, 690 (citing CX8006 (Evans Expert Report) at 056-057). Here, the negative keyword requirement forces 1-800 Contacts' rivals to override the search engines' determination that the rivals' ads are relevant and valuable to consumers. *See* [redacted].

Two models presented by Complaint Counsel's experts predicted the but-for world without the advertising restrictions. Similar to the Google data, they show that the advertising restrictions here substantially reduce truthful advertising provided to consumers. Professor Susan Athey constructed a two-stage model of the but-for world. In the first stage, based on data from the current, actual world, a multinomial logistic regression model predicts consumer click behavior when a consumer conducts a Google search related to contact lenses. The model considers variables for the consumer appeal of the advertised brand, the position of the ad on the SERP, whether the ad is for the seller searched for by the consumer, whether the ad is for 1-800 Contacts, and the propensity of the consumer to click on any ad. Athey, Tr. 766-72. In the second stage, Dr. Athey constructed the ad layout that a consumer would be likely to see in response to a search for 1-800 Contacts if rivals were free to bid on such search terms. That ad

layout assumes that, without the advertising restraints in the Challenged Agreements, the SERP triggered by a search for 1-800 Contacts would be similar to the SERP triggered by queries such as "contact lenses" or "contacts." Dr. Athey then applied the model of consumer click behavior from the first stage to the ad layout in stage 2. Dr. Athey's model predicted that, absent the Challenged Agreements, the number of competitors' ads appearing on a SERP would increase from 0.54 to 1.85 per search, IDF 749, and consumer clicks on those ads would increase by 3.5 clicks per 100 searches. IDF 750.[46]

Complaint Counsel's expert, Professor David Evans constructed a model using a different data set and different methodology that produced results consistent with Dr. Athey's findings. One of Dr. Evans' empirical studies relies on the bidding experience of Memorial Eye, an online retailer that offered prices significantly lower than those of 1-800 Contacts. *See* IDF 693. Its advertisements to consumers heavily promoted its low pricing. Holbrook, Tr. 1904. Unlike most online competitors, Memorial Eye continued to advertise against 1-800 Contacts for several years after it was contacted by 1-800 Contacts and later sued. Thus, there is a data set showing the extent to which Memorial Eye ads appeared on SERPs generated by search queries for 1-800 Contacts' trademark terms[47] and whether those ad impressions led to consumer clicks for Memorial Eye. *See* CX8006 (Evans Expert Report) at 091-092. Based on the data for Memorial Eye, Dr. Evans projected the number of ads and clicks that would have resulted for the complete set of online rivals that were subject to the advertising restrictions. Dr. Evans' model estimated

46 The Initial Decision lists criticisms of Dr. Athey's model by Respondent's expert, Dr. Anindya Ghose, ID at 158-59, and, without substantive discussion, summarily concludes, "Although Respondent has identified some valid concerns regarding the underlying assumptions of . . . the Athey model . . . Respondent's criticisms do not warrant the conclusion that the model [is] so faulty that [it] should be rejected entirely as unreliable." ID at 160. The Initial Decision gives no indication which criticisms were valid and does not address Dr. Athey's responses to the criticisms. We reject the ALJ's conclusory statement.

Our substantive review of Dr. Ghose's criticisms reveals that the concerns are not valid. Dr. Ghose criticized the model for using searches for generic terms as a proxy when creating ad layouts in the counterfactual world. In response to the criticism, Dr. Athey conducted reasonableness and robustness checks on modified ad layouts. Those checks show that the results Dr. Athey reported are robust, and actually are conservative. *See* CX8010 (Athey Rebuttal Report) at 033-035. Dr. Ghose also claims the appearance of ads by non-settling retailers in the counterfactual shows faulty assumptions. Dr. Athey explains that their appearance does not affect the results because the number of instances is not significant. *Id.* at 037-038. Dr. Ghose contends Dr. Athey's model does not consider whether the settling parties increased advertising spending on generic searches when they could not bid on 1-800 Contacts' trademark terms. Dr. Ghose's suggestion is contrary to the evidence in this case; advertisers indicated that they bid based on the return on investment for each keyword rather than spending a fixed amount on search advertising regardless of the keywords that were permitted. *See, e.g.*, CX9039 (Clarkson Dep.) at 176; [redacted]. Finally, Dr. Ghose criticizes the model for failing to include an analysis of additional conversions in the counterfactual world. A model need not estimate everything in order to be valuable; in particular, it need not quantify the number of additional conversions when it estimates the number of additional ad impressions. In any case, the record clearly demonstrates that online sellers obtain sales when they advertise on searches for 1-800 Contacts' trademark terms. IDF 605, 611, 619, 644-46, 714-16, 720.

47 Memorial Eye did not bid on 1-800 Contacts' trademark terms; its ads were displayed in response to search queries for 1-800 Contacts' trademark terms as a result of Memorial Eye bidding on generic terms such as "contacts" in broad match or phrase match. IDF 617.

that, absent the Challenged Agreements, between January 2010 and June 2015, 114 million additional ads for competitors would have been displayed in response to queries containing 1-800 Contacts' trademark terms. IDF 755. The model also estimated that, absent the Challenged Agreements for the same period, clicks for 1-800 Contacts' competitors' ads would have increased by 145,000 and sales for the competitors would have increased by 12.3 percent. IDF 756.[48]

We find that this evidence directly shows that the Challenged Agreements were effective in restricting truthful advertising from being presented to consumers. The Google data showed that competitors largely ceased bidding on 1-800 Contacts' trademark terms, and the but-for models from Drs. Athey and Evans predict the substantial number of ads that were not displayed. In addition, the models show that information those advertisements would have conveyed was valued by consumers who would have clicked on the ads and made additional purchases. Together, this evidence directly shows the Challenged Agreements cut off advertising in a way that interfered with the operation of competitive forces in the online sale of contact lenses and disrupted consumers' mechanisms for comparing and selecting between alternative online sources.

Respondent and the Dissent also dispute that *IFD* finds that a restriction on truthful advertising is sufficient as evidence of actual anticompetitive effects. According to Respondent, in that case, the withholding of x-rays from insurance companies was an express restriction on output because x-rays were a service customers wanted. *See* RAB at 23. We disagree. X-rays were taken to assess the need for, and to guide the provision of dental treatment. X-rays were not offered as a separate product independent of dental treatment. Moreover, the Supreme Court's analysis focused on the informational role of x-rays and the harm to market mechanisms

---

48 The ALJ's assessment of Dr. Evans' model was comparable to his assessment of Dr. Athey's model. The Initial Decision lists critiques by Respondent's expert, Dr. Ghose, but provides no substantive discussion or evaluation of those critiques and ignores Dr. Evans' responses. The ALJ again summarily stated, "Although Respondent has identified some valid concerns regarding the assumptions of . . . the . . . model, Respondent's criticisms do not warrant the conclusion that the model[] [is] so faulty that [it] should be rejected entirely as unreliable." ID at 160.

Again, we reject the Initial Decision's conclusory analysis. A substantive review of the model and the critiques reveals that the criticisms provide no basis for finding the model unreliable. Dr. Ghose argues that [redacted] is not representative of other online sellers and it therefore was improper to extrapolate data for [redacted] to other online sellers. *See* RX0733 (Ghose Expert Report) at ¶¶ 161-64. Dr. Evans responds that the difference between Memorial Eye and other online sellers is that Memorial Eye did not implement negative keywords when it was threatened with litigation by 1-800 Contacts, whereas other online sellers did. Consequently, the differences between Memorial Eye and other online sellers identified by Dr. Ghose reflect this fact. The increased number of ads for Memorial Eye displayed by search engines compared to other sellers actually provides the basis for the analysis; it is not evidence that Memorial Eye is unrepresentative. *See* CX8009 (Evans Rebuttal Report) at 073-075.

Dr. Ghose also claims the Evans model failed to account for ad activity found in the real world and, therefore, the model overstated the number of incremental impressions and clicks in the counterfactual world. We find there is insufficient evidence this occurred. Dr. Evans designed his methodology to estimate the activity of rival online sellers, and excluded ad impressions that were irrelevant, such as impressions from firms that do not sell contact lenses, *i.e.*, companies that bid on "1-800" because they sell contact information for people and businesses via 1-800 telephone numbers. *See* CX8009 (Evans Rebuttal Report) at 076-077.

that would flow from withholding that information. *See IFD*, 476 U.S. at 461-62 ("A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence.").

b. Increased Online Contact Lens Prices

In addition to evidence of reduced advertising, Complaint Counsel presented direct evidence of a price effect, which provides a persuasive, independent basis for Complaint Counsel's *prima facie* case.[49] As the ALJ found, "the evidence in this case proves . . . that at least some consumers have paid, or will pay, prices that are higher than they would otherwise be, absent the Challenged Agreements." ID at 153. As we previously discussed, the record contains evidence that the Challenged Agreements reduced the number of competitor ads, and increased sales for 1-800 Contacts while reducing the sales for its rivals. *E.g.*, IDF 710-11, 717-19, 723, 725, 727, 730, 749-50 (citing Athey model's results that without the Challenged Agreements, consumer clicks on competitor ads would increase by 3.5 clicks per 100 searches and clicks on 1-800 Contacts' ads would decrease by 2 clicks per 100 searches), IDF 756 (citing Evans model's result that absent the Challenged Agreements sales by competitors would have increased by 12.3 percent).

At the same time, prices charged by 1-800 Contacts were on average [redacted] higher than those of its online competitors. IDF 692 (citing CX0547 at 032, *in camera* (1-800 Contacts document showing that prices from three major online rivals were [redacted] lower than 1-800 Contacts' prices in 2006 and [redacted] lower than 1-800 Contacts' prices in 2011); CX0295 at 063, *in camera* (showing that in January 2014, 1-800 Contacts' prices were higher than other online contact lens retailers by [redacted] per box, [redacted] for a six-month supply and [redacted] for a twelve-month supply; RX1228 at 036 (2015 analysis showing that 1-800 Contacts' prices were higher than those of other online retailers; CX8007 (Athey Expert Report) at 013-014, 045-051, Exh. D-1 to D-7, *in camera* (calculating that 1-800 Contacts' prices were [redacted] percent higher than online competitors' prices, on average, for its top ten selling products for the period 2010 to 2016); s*ee also* CX8003 (Mitha Decl.) at ¶ 4 ("In general, 1-800 Contacts' prices are higher than Lens Discounters' by a significant amount. In the past, we have found that 1-800 Contacts' prices were almost double Lens Discounters' prices for some products.").

On the facts of this case, we find the evidence that the Challenged Agreements insulate 1-800 Contacts from normal competitive forces and divert sales from low-priced sellers to a high-

49 The Dissent avers that "actual, sustained, and substantial or significant price effects" are required to meet the burden of showing direct evidence of anticompetitive effects. Dissenting Statement at 30. The Dissent claims the direct evidence presented does not meet the legal standard and goes on to recount a list of ways in which a direct effects showing can be satisfied. The Dissent's view of direct effects evidence, however, is unduly cramped. Courts have recognized instances where parties colluded to withhold information (*see, e.g.*, *IFD*, 476 U.S. 447) and cases where an agreement prevents consumers from gaining access to lower-costing alternatives (*see, e.g.*, *Realcomp*, 635 F.3d at 831-34). The record here supplies more than enough evidence to clear that bar.

priced seller is direct evidence of an increase in price. The higher prices that consumers are paying do not reflect a producer selling a differentiated product, such as a product with new technology or additional features that offer more than the products of low-priced sellers. Instead, the higher prices are a consequence of 1-800 Contacts shielding itself from competitive pressure by preventing consumers from obtaining information that would enable comparison shopping. The economic principles and evidence regarding consumer search previously discussed, *see supra* Section V.A.1, provide the explanation. The record shows that many consumers are unaware of the price difference between 1-800 Contacts and its online competitors. IDF 694 (citing RX1228 at 36 (based on a consumer survey, AEA analysis stated, "Actual price variances [are] much more than perceived price variances")). Restricting the advertising presented to such consumers at the critical time when they are about to make a purchase impedes their ability to compare prices, which leaves them unaware of alternatives to 1-800 Contacts' higher-priced products.

Further evidence that the Challenged Agreements had actual price effects comes from 1-800 Contracts' price-matching policy, whereby it offered to meet or beat any price offered by online, or certain other, rivals. *See* IDF 436 (in 2011 1-800 Contacts' ad copy stated "We Beat Any Online Price"), 437 (referencing 1-800 Contacts' policy in 2014 to meet or beat rivals' prices), 438 (quoting 1-800 Contacts' 2016 policy stating, "We'll beat any price on every product we carry by 2%"). But to take advantage of the price matching policy, a customer had to contact 1-800 Contacts. IDF 439. By reducing rivals' ads and consumer clicks on those ads, the settlement agreements necessarily reduced access to the type of information that consumers needed to trigger 1-800 Contacts' price matches.[50] The Challenged Agreements thus directly interfered with consumers' ability to trigger discounts.

2. 1-800 Contacts' Response to the Direct Evidence of Anticompetitive Effects

Because Complaint Counsel have demonstrated anticompetitive effects, the burden now shifts to Respondent. 1-800 Contacts challenges the factual support for the direct evidence of anticompetitive effects and proffers procompetitive justifications for the restraints.

a. Respondent's Challenges to the Direct Evidence

Respondent and the Dissent challenge the direct evidence of anticompetitive effects on several grounds. First, Respondent argues that Complaint Counsel have presented only the theories of experts, not direct evidence of price effects. We reject this characterization. The opinions of Complaint Counsel's experts derive from the facts in the record and econometric

50 In fact, many 1-800 Contacts customers are unaware that other online contact lens sellers exist. *See* IDF 697 (citing RX0041 at 0019 (in consumer survey prepared for Berkshire Partners, which was considering acquisition of 1-800 Contacts in 2012, more than one-third of respondents said they initially purchased from 1-800 Contacts because it was the only online site the consumer was aware of), 698 (due diligence for Berkshire Partners in 2012 concluded, "1-800 likely benefits from a sizable segment of uninformed buyers who are simply unaware of the other (and growing) low-priced choices on the internet."). Display of rivals' search ads would tend to counter this ignorance.

analysis of those facts. The experts use known facts to quantify the impact of the advertising restrictions on the ads that would otherwise appear and on the consumer responses—including clicks and purchases—thereto. They provide empirical evidence, not economic theory isolated from facts, and the underlying facts are in the record.

Respondent and the Dissent next challenge the premise of higher prices, arguing that 1-800 Contacts offers a higher quality of service, so there is no reason to conclude that its prices are higher on a quality-adjusted basis. RAB at 25-26. Certainly, customer service can be a differentiating factor when a firm sells a commoditized product. *See* CX8007 (Athey Expert Report) at 015. But the record shows that without the Challenged Agreements, consumers would have shifted purchases from 1-800 Contacts to its rivals, which reveals customer preferences for the price/quality combination offered by rivals.[51] At least for these customers, 1-800 Contacts was offering a higher price, even after adjusting for quality.

Other aspects of the record show that 1-800 Contacts' service levels do not fully explain its higher prices. Professor Athey testified that "[D]irect facts and market data support that there is a price premium [for 1-800 Contacts] and that that price premium is not fully accounted for by service differentials." IDF 740 (quoting Athey, Tr. 797). This testimony reflects numerous market facts.

Other online sellers judge that they offer comparable service to 1-800 Contacts. *See, e.g.*, [redacted]; CX9039 (Clarkson Dep.) at 88 (AC Lens president testifying that AC Lens is "pretty fanatical about service, by trying very hard to make the process convenient and quick, . . . getting orders shipped the day they arrive" and having net promoter scores "consistent with the highest on the internet"). The competitors' view of service levels was shared by independent evaluators. The investment memorandum prepared by Berkshire Partners as part of the consideration of 1-800 Contacts stated, "[W]e are concerned that 1-800's premium pricing positioning versus its competitors is unsustainable in the medium- to long-term given the commodity-like nature of contact lenses and 1-800's insufficiently distinguishable service." CX1109 at 003.

Other evidence supports the conclusion that 1-800 Contacts' higher prices are not fully explained by the firm's service level. Some statements by 1-800 Contacts' employees express doubt that its service level is sufficient to justify the price premium. *See, e.g.*, CX1086 (email expressing concern that ads by lower priced competitors would lead to reduced 1-800 Contacts sales; comment in the email chain states, "The only other option I see is trying to convince customers that our existing prices are better than they really are or worth the cost. Tough challenge considering that we sell the exact same thing as everyone else."). Similarly, some of

51 Indeed, internal 1-800 Contacts documents suggest that once consumers make a purchase from another online retailer, they are unlikely to make their next purchase from 1-800 Contacts. Based on a small sample of 54 consumers whose most recent purchase was from another online retailer, 17 percent reported that they were likely to make their next purchase from 1-800 Contacts and 71 percent reported that they were not likely to do so. *See* CX1117 at 023. Thus, the customer service differential asserted by 1-800 Contacts did not support a return of customers who had purchased from another online contact lens retailer.

1-800 Contacts' documents question the firm's supposed quality advantage. *See* CX1117-022 ("Other online suppliers achieve satisfaction scores as high as us"). Finally, the need for 1-800 Contacts to offer a price-match policy suggests that the service differential is insufficient to offset the price premium.

Respondent and the Dissent also argue that Complaint Counsel have not shown that 1-800 Contacts' price was supracompetitive. RAB at 22. We find Complaint Counsel's showing sufficient. Proof of an anticompetitive effect does not require an econometric model to estimate a precise competitive price in order to establish that the existing price is supracompetitive. Complaint Counsel have, in fact, shown that the price consumers paid was higher with the Challenged Agreements than it would have been had the market been allowed to function without the advertising restraints. In addition to the direct evidence of actual price effects discussed above—the diversion of purchases from low-priced rivals to 1-800 Contacts and the withholding of information needed to trigger 1-800 Contacts' price match—Dr. Athey testified that "if consumers become more informed, it will be difficult [for 1-800 Contacts] to sustain a price premium and . . . they would thus face a choice, either lose market share in the online channel, and particularly in the search channel, or lower their price. . . . [M]ore likely than not, prices – prices would fall. It's also possible that [1-800 Contacts] could keep their prices high and – but consumers would use more price match, which would lead to a reduction in the effective price by 1-800 even if the list price stayed high." Athey, Tr. 797-98

Similarly, Respondent and the Dissent argue that because 1-800 Contacts' profit margins [redacted], even as the number of settlement agreements increased, the evidence contradicts an inference that the agreements raised prices to supracompetitive levels. RAB at 22, 26. We disagree. As an initial matter, measuring profit margins in an economically meaningful manner is difficult, and Respondent's assertion gives us no basis to conclude they were properly measured. Moreover, [redacted] margins do not necessarily mean prices did not rise; without competitive pressures, costs may have risen as prices increased, [redacted]. Finally, if 1-800 Contacts started with a profit margin reflecting supracompetitive prices, there is no reason to expect its margin to increase. In fact, 1-800 Contacts was the incumbent online seller, with a dominant share of online sales throughout this period. *See* IDF 69; CX0055-009 (2004 1-800 Contacts strategy memo identifying "Market Leadership" as a strength and stating that 1-800 Contacts "leads US phone/internet retail market" in "size" and has "20 x unaided brand awareness of online competitors"); CX0526-007; Coon, Tr. 2668-70. Consequently, 1-800 Contacts' [redacted] profit margin is consistent with a conclusion that the Challenged Agreements prevented the growth of online rivals when they entered the market, thus preventing the erosion of 1-800 Contacts' supracompetitive margins.

Consequently, we find that Complaint Counsel have established a *prima facie* case of anticompetitive harm through direct evidence of the restriction of truthful advertising and through direct evidence of price increases.

b. Respondent's Procompetitive Rationales for the Advertising Restraints

Respondent may rebut Complaint Counsel's *prima facie* case by establishing procompetitive justifications that outweigh the anticompetitive harms. Respondent has identified two justifications—the settlement of costly litigation and trademark protection—that we have found cognizable and facially plausible. *See supra* Section V.A.2. But, as discussed above in our analysis of the challenged restraints as inherently suspect, Respondent fails to sufficiently support its asserted justifications, and Complaint Counsel have demonstrated that the challenged advertising restraints are not reasonably necessary to achieve the asserted benefits. *See supra* Sections V.A.5 and V.A.3.a. In these circumstances, direct evidence of anticompetitive harm provides a second, independent basis for concluding that Respondent has engaged in unfair methods of competition in violation of Section 5 of the FTC Act.

C. Analysis of the Challenged Agreements for Effects on Search Engines

In addition to harm to consumers, the Complaint alleges that the Challenged Agreements harm search engines by, *inter alia*, unreasonably restraining price competition in certain search advertising auctions, preventing search engine companies from displaying to users the array of advertisements that are most responsive to a user's search, and impairing the quality of service provided to consumers by search engine companies. Compl. ¶ 31a-d. Despite the allegations in the Complaint and the presentation of evidence on the issue, and contrary to Commission rules,[52] Judge Chappell determined that the "Initial Decision need not, and does not, . . . determine whether or not the Challenged Agreements have anticompetitive effects in the form of harm to search engines."[53] ID at 166.

Our review of the record reveals that Complaint Counsel have presented a *prima facie* case of anticompetitive harm to search engines based on direct evidence of actual harm.[54]

---

52 Commission Rule of Practice 3.51(c) states "The initial decision shall include a statement of findings of fact . . . and conclusions of law, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . ." 16 C.F.R. §3.51(c).

53 The ALJ's decision not to address an independent theory of liability based on effects for search engines is particularly troubling because Judge Chappell omitted provisions from the proposed order that addressed "conduct, such as price-fixing and market allocation." The ALJ reasoned that the provisions are "too far removed from the unlawful conduct found to exist in this case to conclude that the provisions . . . are justified as reasonably related, fencing-in provisions." ID at 195-96. The deleted provisions addressed conduct related to the allegations regarding search engines. They are unrelated to the unlawful conduct found by the ALJ only because he failed to address all of the Complaint's allegations. Complaint Counsel have not requested restoration of the deleted provisions, and in any event, we believe the Order without those provisions provides an effective remedy to harm against search engines.

54 Alternatively, we could evaluate the Challenged Agreements under the inherently-suspect framework. For a restraint that "operates as an absolute ban on competitive bidding," "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978). Economic learning clearly shows that cooperative bidding strategies among rivals impair competition, by raising what they can charge for goods or services or reducing what they pay when bidding to buy from a third party. *See* CX8006 (Evans Expert Report) at 070 & n.167. Indeed, in many contexts, bid rigging may

Absent a valid procompetitive justification, this provides a third, independent basis to find liability in this case.

Under the terms of the Challenged Agreements, 1-800 Contacts and its online rivals agreed to refrain from bidding in particular search-advertising auctions. Online rivals agreed not to bid when the consumer's search is for 1-800 Contacts' trademark terms, and 1-800 Contacts reciprocally agreed not to bid on the trademark terms of its rivals. The Challenged Agreements thus reduce the number of bidders participating in the auctions because the parties have agreed not to compete.

The record shows that the Challenged Agreements resulted in actual harm to search engines. Witnesses from both Google and Bing explained that a reduction in the number of search-advertising auction participants offering relevant ads[55] reduces the price paid by the auction winners and reduces the revenue for the search engine. Google's Director for Ads Quality testified that when advertisers that previously appeared on the SERP stop appearing, [redacted] Juda, Tr. 1157, *in camera*. Bing's partner scientist in charge of Bing Ads similarly stated,

[redacted]

---

be condemned as a *per se* offense. *See, e.g.*, *United States v. MMR Corp.*, 907 F.2d 489, 496 (5th Cir. 1990) (finding no conceptual distinction between bidding high and "backing away from bidding" as means for carrying out a potentially *per se* illegal agreement to rig bids); *COMPACT v. Metro. Gov't*, 594 F. Supp. 1566, 1575-77 (M.D. Tenn. 1984).

As we previously discussed, Respondent has advanced legitimate procompetitive justifications, which, under the inherently-suspect framework, trigger a need for consideration of less anticompetitive alternatives to achieve the proffered procompetitive justifications or further factual findings and analysis regarding the likelihood of anticompetitive effects in the particular context. Respondent also has the burden of showing that the restraints in fact have the asserted procompetitive virtues. We already have addressed the availability and workability of alternative settlement terms that would be less restrictive of competition, *see supra* Section V.A.3.a., as well as Respondent's failure to show that its asserted justifications are valid, not merely plausible. *See supra* Section V.A. 5. A further showing of the likelihood of anticompetitive effects in the particular context would involve assessing the evidence that we discuss in the text below. Consequently, both modes of analysis rely on the same evidence, and we limit our full exposition regarding anticompetitive effects for search engines to the latter mode of analysis.

55 Under the second-price auction used by search engines, if additional bidders enter the auction, but all of them have ads determined by the search engine algorithm not to be sufficiently relevant to consumers, then the increased number of bidders would not affect the price paid by the highest ranked advertiser. If some of the bidders have sufficient relevance (*i.e.*, a higher second highest AdWords score), the price paid by the advertiser with the first position would be higher. IDF 219.

[redacted]

CX8005 (Iyer Decl.) at 006, *in camera*; IDF 243.

Here, we know the ads are sufficiently relevant to affect prices. During the period from 2002 through 2016, Google served advertisements for nine of the fourteen online contact lens sellers who were parties to the Challenged Agreements based on those firms' bids on the 1-800 Contacts trademark terms before they entered into the Challenged Agreements. IDF 653. This demonstrates that Google determined the ads were sufficiently relevant to be displayed, which indicates the ads would have affected the cost-per-click prices charged to the advertisers. Juda, Tr. 1151, *in camera* [redacted]; s*ee also* IDF 219 (describing the price effect of an additional bidder in a second-price auction used by search engines).

The record contains direct evidence of these price and revenue effects. 1-800 Contacts' internal documents acknowledge that one effect of the Challenged Agreements was reduced search advertising costs. A 2009 email from 1-800 Contacts' former Senior Search Marketing Manager explained that one part of 1-800 Contacts' "[t]rademark keyword management process" was to "[e]nforce trademark policy to remove competitors which in turn drives down how much we pay per click." CX0935; *see also* CX0051 at 007 (Presentation on Search Overview describing bid management for trademarks: "• Keep competitors & affiliates off • Low competition = low price"); CX0658 at 001 (weekly marketing report stating, "Compared with recent weeks, we saw fewer competitors showing on our [trademark] keywords this week, which helped drop our spend for these terms."); CX0915 (July 28, 2008 email from 1-800 Contacts' Senior Search Marketing Manager stating, "TM CPCs [trademark costs-per-click] . . . jumped up by 18% from last week and pushed us to our most costly week yet for trademarks. There were more advertisers on our marks this week (both local and national retailers), which increased competition and CPCs [costs-per-click] for our top terms.").

Dr. Evans' model, which estimated the net change in the number of rival ad impressions that would have been shown without the advertising restrictions, showed that the bidding restrictions in the Challenged Agreements reduced 1-800 Contacts' cost-per-click on its trademark keywords. The model estimated that the agreements reduced the prices paid by 1-800 Contacts by [redacted] percent. CX8006 (Evans Expert Report) at 076 ¶ 168; Evans, Tr. 1648-50, *in camera*. Dr. Evans concluded that "[t]he empirical analysis of the impact of the agreements on 1-800 Contacts' costs of bidding on its [brand name keywords] confirms" that "agreements among competitors not to enter into auctions would have a material impact on

price." CX8006 (Evans Expert Report) at 077 ¶ 169. The lower prices paid by 1-800 Contacts are a result of agreements with its competitors not to bid at auctions, and cause a competitive injury to the search engine.[56]

The Challenged Agreements also harm both the search engines and consumers by removing advertisements that otherwise would have been displayed, thereby decreasing the quality of the search engines' product. Search engines seek to show the most relevant ads to consumers; after all, search engines receive payment only when a consumer clicks on an ad. Juda, Tr. 1072. Having access to a larger number of relevant ads allows search engines to better fill SERPs with relevant ads that are valued by consumers. Bing's partner scientist in charge of Bing Ads explained that reducing the number of bidders

[redacted]

CX8005 (Iyer Decl.) at 005 ¶¶ 31-32, *in camera*.

Dr. Evans's model estimated that without the Challenged Agreements, Google would have displayed more than 100 million additional ads between January 2010 and June 2015. CX8006 (Evans Expert Report) at 010. Dr. Evans concluded that this reduction in the number of relevant ads displayed reduced the quality of the product offered by search engines and diminished the value of search engine service to consumers. *Id.* at 078. Dr. Athey's model similarly showed that many additional ads would have been displayed to consumers if the Challenged Agreements were not in place—with the number of competitor ads per search on 1-800 Contacts' trademark terms more than tripling. IDF 749; CX8010 (Athey Rebuttal Report) at 072. Her model also showed that those additional ads were valued by consumers; the model showed that consumers would have increased their clicks on competitors' ads. *See* CX8007 (Athey Expert Report) at 029-034.

Consequently, we find that Complaint Counsel have satisfied their initial burden and established a *prima facie* case of anticompetitive harm to search engines through direct evidence of reduced auction prices and reduced quality of SERPs presented to consumers. The burden now shifts to Respondent. Here, Respondent challenges the factual basis underlying the direct

56 Contrary to Respondent's argument that Complaint Counsel failed to prove anticompetitive harm to search engines because Complaint Counsel failed to define a relevant antitrust market for paid search advertising, RRB at 18-19, proof of actual detrimental effects does not require market definition or proof of market power. *See IFD*, 476 U.S. at 460-61; *American Express*, 138 S. Ct. at 2285 n.7; *see also supra* Section V.B.

evidence of anticompetitive effects. In addition, Respondent again proffers its procompetitive justifications.

Respondent argues that the price effects for search engines occur only if "all other things [are] equal." RRB at 19. Respondent argues that Complaint Counsel failed to demonstrate any impact on search engines' revenue because the bidding restrictions would merely have caused advertisers to shift their bids to other keywords. Respondent would have us assume that denying advertisers access to their first-choice of keywords and forcing them to turn to what they consider less desirable alternatives has no effect on their search advertising spending and no effect on the quality of search engine results. The record contradicts Respondent's argument. 1-800 Contacts paid less per click as a result of the Challenged Agreements. *See, e.g.*, CX0935; CX0051 at 007; CX0658 at 001; CX0915. Also, advertisers indicated that they bid based on the return on investment for each keyword rather than spending a fixed amount on search advertising regardless of the keywords that were permitted. *See*, *e.g.*, CX9039 (Clarkson Dep.) at 176; [redacted]. Preventing 1-800 Contacts' online rivals from bidding on their first choices for keywords, leaving them to bid only for keywords that they value less, reduced those retailers' demand for search advertising, reduced their purchases of search advertising, and reduced the search engines' revenues.

While avoiding litigation costs through settlement and trademark protection are cognizable and facially plausible justifications, *see* Section V.A.2, reliance on those justifications falters for the reasons articulated above. *See supra* Sections V.A.3.a and V.A.5. Consequently, without an offsetting, valid procompetitive justification, the anticompetitive harm to search engines caused by the Challenged Agreements is a further, independent basis for concluding that Respondent has engaged in unfair methods of competition in violation of Section 5 of the FTC Act.

VI. REMEDY

The Commission is empowered to enter an appropriate order to prevent a recurrence of the violation. 15 U.S.C. § 45(a)(2); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) (the Commission is permitted "to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices" in the future). It has considerable discretion in fashioning an appropriate remedial order, so long as the order bears a reasonable relationship to the unlawful conduct found to exist. *See FTC v. Nat'l Lead Co.,* 352 U.S. 419, 428 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611, 613 (1946). "The Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past," but "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

To remedy Respondent's violation of Section 5, the ALJ issued an Order that bars 1-800 Contacts from agreeing with any seller of contact lens products to limit participation in online search advertising auctions (including restricting the use of keywords or requiring the use of negative keywords) or to limit online search advertising. ID at 203 (ALJ Order Paragraph II) . The ALJ's Order contains a carve-out clause regarding future litigation. The carve-out confirms that that Order does not prohibit Respondent from initiating or prosecuting a lawsuit;

communicating to any seller its intention to initiate or prosecute a lawsuit; or implementing or enforcing an order entered by any court of law, including an order approving a litigation settlement. *Id.* The ALJ's Order also requires Respondent to cease enforcing existing agreements that are inconsistent with the Order. ID at 203 (ALJ Order Paragraph III). The ALJ's Order contains a number of notification requirements in connection with Respondent's future litigation and settlements. ID at 203 (ALJ Order Paragraph IV).

Respondent argues that the ALJ's Order encroaches on Article III courts' authority to enforce the existing settlements. It asks the Commission to delete all restrictions in the ALJ's Order on continued judicial enforcement of the existing settlements, while only barring 1-800 Contacts from entering into similar agreements in the future without judicial approval. RAB at 42-43. Respondent also argues that the ALJ's Order violates 1-800 Contacts' Fifth Amendment rights by retroactively depriving it of the ability to enforce its trademark rights, in violation of the Due Process and Takings Clauses. RAB at 43-45.

Complaint Counsel also ask the Commission to modify the ALJ's Order. CCB at 47-50. They urge the Commission to restore the original language that they had proposed for the care-out and that the ALJ subsequently changed. Specifically, they would remove the language that provides that the ALJ's Order does not prohibit Respondent from implementing or enforcing the order entered by any court of law, "including an order approving a litigation settlement," and would replace this with language providing that the Commission's Order does not prevent Respondent from implementing or enforcing the order issued by any court of law "at the conclusion of a contested litigation." *Id.* at App. B ¶ II.A-B (emphasis omitted).

A. Enforcement of the Challenged Agreements

Respondent asserts that the ALJ's Order improperly trespasses on Article III courts' authority. We disagree. The ALJ's Order restricts *Respondent* from enforcing or attempting to enforce the requirements in an existing agreement or court order that are inconsistent with the remedial provisions imposed by the Commission.[57] This does not direct or limit a court; it only restrains 1-800 Contacts. Our challenge here has focused on 1-800 Contacts' conduct in entering and policing private agreements, and our remedy governs 1-800 Contacts' conduct in continuing to enforce those agreements. The fact that a small number of 1-800 Contacts' private agreements have been embodied in consent orders does not remove them from our administrative review; the private agreements they entail remain subject to antitrust scrutiny and the Commission's remedial authority. *Cf. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519-22 (1986) (distinguishing giving effect to an obligation created by litigants' private agreement from giving effect to the power of federal courts unilaterally to impose that obligation); *In re Lipitor Antitrust Litig.*, 868 F.3d 231, 264-66 (3d Cir. 2017) (incorporation into a consent order of a private settlement agreement did not inoculate it from antitrust scrutiny under *Noerr-Pennington* principles).

57 The Order also requires 1-800 Contacts to take whatever action is necessary to vacate or nullify the provisions in its existing agreements or court orders that are inconsistent with the Commission's remedial order.

Moreover, Respondent's proposed modification of the ALJ's Order would allow it to continue enforcing restrictions that already have been found unlawful under the FTC Act. Provisions that have been found to violate the antitrust laws are unenforceable. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 80 (1982) (defense to an action based on contract is appropriate "where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act") (quoting *Kelly v. Kosuga*, 358 U.S. 516, 520 (1959)). Moreover, under the FTC Act, the Commission "*is directed to prevent* persons, partnerships or corporations . . . from using unfair methods of competition in and affecting commerce," 15 U.S.C. § 45(a)(2) (emphasis added), and, upon finding a violation, "*shall* issue and cause to be served on [the respondent] an order requiring such person, partnership or corporation to cease and desist from using such method of competition . . . ." 15 U.S.C. § 45(b) (emphasis added). Given that the Commission has found that Respondent's agreements violate the FTC Act, an order directing Respondent to cease enforcing the unlawful provisions is consonant with, and indeed integral to, the governing statutory scheme.

Respondent also claims that the Order violates its Fifth Amendment rights. Specifically, Respondent asserts that condemnation of the Challenged Agreements establishes a new trademark rule, and retroactive application of that rule to 1-800 Contacts' settled lawsuits is inequitable and violates the Due Process and Takings Clauses. There are a number of problems with this argument.

First, we are not establishing a new trademark rule; indeed, we make no ruling on any trademark issue at all. We hold only that, based on our assessment of existing trademark case law, Respondent has not presented sufficient evidence to establish the validity of a procompetitive benefit that might outweigh the anticompetitive harm of the Challenged Agreements, and that any such benefit could have been achieved by less anticompetitive means.

Second, the Order does not apply retroactively. It does not levy fines, determine damages, or impose any other sanctions for Respondent's entry into and prior enforcement of the Challenged Agreements. Rather, the Order prohibits 1-800 Contacts from enforcing existing settlements in the future and from entering into new agreements containing the unlawful terms. Injunctive relief is inherently forward-looking. That it arises from past conduct does not render it retroactive. *See Landgraf v. USI Film Prods., Inc*., 511 U.S. 244, 273–74 (1994) ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. . . . [R]elief by injunction operates *in futuro*.") (quotation marks omitted); *Russell v. Dunston*, 896 F.2d 664, 668 (2d Cir. 1990) (the fact that prospective relief arises out of a past injury does not render an otherwise forward-looking injunction retroactive).[58]

Third, the Order is not novel, either in substance or in effect. It should not surprise Respondent that its agreements with competitors to restrict advertising and bidding were subject to an antitrust challenge. Antitrust has long barred rivals' agreements regarding advertising and

58 Even as to the future, the Order preserves 1-800 Contacts' ability to defend its trademark rights. The Order states, "[N]othing in [Paragraphs II.A or II.B] shall prohibit Respondent from . . . initiating or prosecuting a lawsuit . . . ." Final Order ¶¶ II. A-B.

bidding restrictions. *See supra* Sections V.A.1.a and V.A.3. In fact, the District Court that rejected 1-800 Contacts' trademark claims against Lens.com gave Respondent a clear warning in 2010: "Were this actually an agreement entered into by the parties, the court questions whether it would survive an antitrust challenge." *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d at 1188.[59] Moreover, remedies requiring defendants to reverse an unlawful course of conduct, even if the defendant's circumstances have changed, are common. *See, e.g.*, *ProMedica Health Sys., Inc.*, 2012 WL 2450574, at *66-67 (F.T.C. June 25, 2012) (ordering divestiture after consummated merger notwithstanding the costs of unwinding already-consolidated services), *petition for review denied*, 749 F.3d 559 (6th Cir. 2014). Indeed, the Supreme Court confirms that "both within the settlement context and without, the Court has struck down overly restrictive . . . agreements." *Actavis*, 570 U.S. at 150.

Respondent asserts, in effect, that it has a constitutional right to continue to enforce illegal agreements in perpetuity. It does not. As the Supreme Court stated:

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts.

Fleming v. Rhodes, 331 U.S. 100, 107 (1947). We reject Respondent's arguments that the Order violates the Fifth Amendment.

B. Enforcement of Future Court Orders

As initially proposed by Complaint Counsel, the remedial order included a provision specifying that nothing in the subparagraph that bars 1-800 Contacts from agreeing with any seller of contact lens products to limit online search advertising prohibits Respondent from "implementing or enforcing the order entered by any court of law at the conclusion of a contested litigation." The ALJ changed this carve-out to specify that nothing in the subparagraph prohibits Respondent from "implementing or enforcing the order entered by any court of law, including an order approving a litigation settlement."[60] Complaint Counsel contend that this modification permits recurrence of the very conduct found in this proceeding to be unlawful: "1-800 can file lawsuits, exact the same agreements with rivals, and place them before a court—where they will likely be approved." CCB at 48. Respondent argued to the ALJ that the original language—limiting the exemption to court orders entered at the conclusion of

59 Respondent was aware even earlier that antitrust considerations might preclude enforceability of its settlements. In a letter dated January 7, 2008, Vision Direct's counsel wrote to 1-800 Contacts' trademark counsel to express "serious concerns regarding the enforceability of the Agreement, particularly as it relates to the implementation of negative key words" because such an agreement "creates an unacceptable risk of violating . . . Section 1 of the Sherman Act." CX0141-001.

60 The ALJ also attached the same proviso to Subparagraph II.A, which bars 1-800 Contacts from agreeing with any seller of contact lens products to limit participation in search advertising auctions.

contested litigation—would interfere with the ability of Article III courts to issue orders approving settlements and dismissing litigation. ID at 193.

We find Complaint Counsel's concerns overstated. The ALJ's carve-out allows "implementing or enforcing court orders." It does not detract from the Order's prohibition against *entering agreements* with sellers of contact lens products to limit participation in search advertising auctions or to limit search advertising. Moreover, the ALJ modified the proposed order in a second way, designed to mitigate concerns that courts will issue anticompetitive decrees: he added a provision requiring Respondent to "[p]rovide a copy of this Order to any court evaluating a request that a litigation settlement agreement relating to Search Advertising be approved by the court and/or incorporated into a court order." ID at 203 (ALJ Order Paragraph IV.B.5). The ALJ's Order thus preserves Respondent's ability to implement court orders while ensuring that courts are made aware of the possible anticompetitive consequences before their orders are entered. Nevertheless, in addition to the ALJ's modification, we also require Respondent to notify the Commission ten days before entering any stipulated order with a court and submitting a copy of the order at the time of notification. Such a notification provision will enable the Commission to intervene and apprise the court of any anticompetitive harm arising out of any stipulated order entered into by the Respondent. We find that the ALJ's Order in conjunction with our notification provision confers adequate protection.[61]

VII. CHALLENGES TO THE LEGITIMACY OF THE FTC'S ENFORCEMENT PROCEEDING

Finally, Respondent advances two arguments that contend that aspects of this enforcement proceeding lack legitimacy. One contention is that the Commission lacks a quorum. RAB at 46. That argument was advanced during a period when the FTC had two sitting Commissioners. Subsequently, however, additional Commissioners have joined the Commission, and the FTC currently has its full complement of five Commissioners to address this appeal. Respondent's quorum arguments are therefore moot.

Respondent also maintains that this proceeding is unconstitutional because "it was conducted by an ALJ, an 'inferior Officer[]' of the United States that Congress has improperly insulated from control by the executive branch by making Commissioners removable only for cause and authorizing them to remove ALJs only for cause." RAB at 45 (citations omitted). Respondent did not raise this issue in its pleadings or while the matter was pending before the ALJ, but rather waited until the ALJ had ruled against it before first challenging the constitutionality of his functions in a single sentence on appeal. By waiting until this late date, Respondent has waived this claim. *See In re LabMD, Inc.*, 2015 WL 5608167, at *2 (F.T.C. Sept. 14, 2015). By compressing its presentation of this broad issue into a single sentence, Respondent has failed to present a complete showing of constitutional harm. *See Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1392-93 (7th Cir. 1986) (refusing to consider the merits of a for-

61 We do make one small additional change. The ALJ's Order prohibits Respondent from entering into any agreement with a seller of contact lens products to "regulate" any search advertising. Lest this be interpreted to prohibit agreements to disclose the identity of the rival seller or to disclaim its affiliation with 1-800 Contacts, we have included an additional provision expressly permitting use of such less restrictive alternatives.

cause termination claim when the hospital raising the constitutional challenge had "not laid a proper foundation for its assault" on the FTC's structure).

Such issues aside, the FTC's ALJ occupies a different role than the Public Company Accounting Oversight Board (PCAOB) found to be improperly insulated from presidential control in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492-98 (2010), relied upon by Respondent. The FTC's ALJ performs adjudicative rather than enforcement or policymaking functions, is subject to more Commission oversight, and is part of a well-established statutory structure that has been in place for more than 70 years. In addition, if the Administrative Procedure Act's "good cause" standard for removal is properly construed—*i.e.*, to allow removal of an ALJ for failure to perform adequately or to follow agency policies, and to limit the Merit Systems Protection Board's role to determining whether a factual basis exists for the agency's proffered grounds for removal—the APA gives the President a constitutionally adequate degree of control over ALJs. *See* Brief for Respondent Supporting Petitioners at 48-53, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130). Moreover, unlike in *Lucia v. SEC*, where the Court found that the ALJ was unconstitutionally appointed by SEC staff members, the FTC's ALJ was appointed by the Commission, which is a "Head[] of Department[]." *Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018).

****

In this opinion, we have evaluated traditional concerns of antitrust law—the anticompetitive harms that flow when rivals agree to restrict truthful advertising and to limit their participation in auctions—in a contemporary context involving online shopping and advertising via internet search engines. Our analysis has accounted for and given weight to justifications based on trademark protection as well as the benefits of settling costly litigation. We hold that Complaint Counsel have shown competitive harm by demonstrating the inherently suspect nature of the restraints at issue. We have determined that Respondent has asserted cognizable and plausible procompetitive justifications, requiring Complaint Counsel to make a further showing. Complaint Counsel have made that showing, both by demonstrating the availability of less anticompetitive alternatives to the challenged restraints and by showing in greater detail that those restraints are indeed likely in the particular context to harm competition. In contrast, Respondent has failed to establish that its justifications are not merely plausible, but in fact valid. We also hold that Complaint Counsel have shown competitive harm by providing direct evidence that the challenged agreements resulted in actual anticompetitive effects. Respondent, however, failed to rebut Complaint Counsel's direct evidence and could not provide sufficient efficiency justifications that would outweigh the evidence of anticompetitive effects. Consequently, we conclude that the advertising restrictions in the Challenged Agreements between Respondent and 14 of its rival online sellers of contact lenses constitute unfair methods of competition, in violation of Section 5 of the FTC Act, and we require Respondent to cease and desist from enforcing the unlawful provisions in its existing agreements and from entering into similar agreements in the future.

FINAL ORDER

The Commission has heard this matter upon the appeal of Respondent from the Initial Decision, and upon briefs and oral argument in support thereof and in opposition thereto. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to sustain the Initial Decision with certain modifications.

IT IS ORDERED that the Initial Decision of the administrative law judge be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission, to the extent not inconsistent with the findings of fact and conclusions contained in the accompanying Opinion. Other findings of fact and conclusions of law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order to cease and desist be, and it hereby is, entered:

I.

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

A. "1-800 Contacts" means 1-800 Contacts, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and any joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by 1-800 Contacts, and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "Communicate," "Communicating," or "Communication" means the exchange, transfer, or dissemination of any information, without regard to the manner or means by which it is accomplished.

D. "Entering Into" means entering into, adhering to, participating in, maintaining, implementing, enforcing, inviting, offering or soliciting.

E. "Keyword" means a word or phrase used to instruct a Search Engine to display specified Search Advertising.

F. "Negative Keyword" means a word or phrase used to instruct a Search Engine not to display specified Search Advertising.

G. "Person" means both natural persons and artificial persons, including, but not limited to, corporations and unincorporated entities.

H. "Search Advertising" means online advertisements displayed on a Search Engine Results Page in response to a user query.

I. "Search Engine" means a computer program, available to the public, that enables Persons to search for and identify websites and sources of information on the World Wide Web.

J. "Search Engine Results Page" means a web page displayed by a Search Engine in response to a user query.

K. "Seller" means any Person that markets or sells any contact lens product and includes its employees, agents, and representatives.

L. "Trademark Infringement Claim" means a lawsuit threatened or filed in the United States of America purporting to enforce rights under a trademark.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the advertising, marketing, sale, or distribution of contact lenses in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall cease and desist from:

A. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on the ability of a Seller to participate in a Search Advertising auction, or to provide instructions to a Search Engine regarding the nature and extent of a Seller's participation, including but not limited to, prohibiting or restricting the use of a Keyword or requiring the use of a Negative Keyword.

Provided that nothing in this Paragraph II.A shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent's intention to initiate or prosecute a lawsuit, or (c) implementing or enforcing an order entered by any court of law, including an order approving a litigation settlement.

B. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on any Search Advertising; *provided, however,* that nothing in this Paragraph II.B shall prohibit Respondent from entering into or complying with a written agreement providing that a:

1. Seller shall not include in the text of any Search Advertising (a) a false or deceptive claim, (b) a representation that Respondent is the source of the goods or services advertised therein, (c) a representation that the Seller is affiliated with or sponsored by Respondent, or (d) a name that is identical to or confusingly similar to any trademark owned by Respondent; or

2. Seller's Search Advertising shall clearly identify the Seller (for the avoidance of doubt, including the name of the Seller in the URL, website

address, or domain name shall constitute clear identification of the Seller); and

Provided further that nothing in this Paragraph II.B shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent's intention to initiate or prosecute a lawsuit, or (c) implementing or enforcing the order entered by any court of law, including an order approving a litigation settlement.

C. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place any limitation on truthful, non-deceptive, and non-infringing advertising or promotion.

D. Attempting to engage in any conduct that is prohibited by Paragraph II of this Order.

Provided, however, that nothing in this Paragraph II shall prohibit Respondent from entering into or complying with a written agreement with a Seller to require that Search Advertising disclose the Seller's identity and/or lack of affiliation with Respondent or disclose that the Search Advertising is not sponsored by Respondent.

III.

IT IS FURTHER ORDERED that Respondent shall:

A. Cease and desist from enforcing or attempting to enforce any and all provisions, terms, or requirements in an existing agreement or court order that impose a condition on a Seller that is not consistent with Paragraph II of this Order.

B. Within sixty (60) days after the date this Order is issued, take whatever action is necessary to vacate or nullify any and all provisions, terms, or requirements in any court order or agreement that impose a condition on a Seller that is not consistent with Paragraph II of this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall:

A. Within thirty (30) days from the date this Order is issued:

1. Distribute by first-class mail, return receipt requested or by electronic mail with return confirmation, a copy of this Order and the Complaint to each of its officers, directors, and managers;

2. Send by first-class mail, return receipt requested or by electronic mail with return confirmation, on Respondent's official letterhead, the statement attached to this Order as Appendix A to each Person:

   (a) To whom Respondent communicated regarding that Person's involvement as a plaintiff or defendant in any actual or potential Trademark Infringement Claim; and

   (b) With whom Respondent entered into any agreement prohibited by Paragraph II of this Order.

B. For a period of five (5) years from the date this Order is issued:

1. Provide to Commission staff a copy of any Communication by Respondent with any Person regarding that Person's suspected trademark infringement no later than ten (10) days after Communicating with such Person;

2. Send by first-class mail, return receipt requested or by electronic mail with return confirmation, on Respondent's official letterhead, the statement attached to this Order as Appendix A to each Person referenced in Paragraph IV.B.1. of this Order no later than the time Respondent initially Communicates with such Person;

3. Provide to Commission staff a copy of any agreement (or description, if the agreement is not in writing) that Respondent enters into with a Seller relating to Search Advertising, no later than thirty (30) days after it enters into such agreement;

4. Provide to Commission staff notice and a copy of any proposed stipulated order to settle litigation with provisions that prohibit, restrict, regulate, or otherwise place a limitation on any Search Advertising or on the ability of a Seller to participate in a Search Advertising auction, no later than ten (10) days before requesting entry of that order;

5. Distribute by first-class mail, return receipt requested or by electronic mail with return confirmation, a copy of this Order and the Complaint to each Person who becomes an officer, director, or manager and who did not previously receive a copy of this Order and Complaint, no later than ten (10) days after the date such Person assumes his or her position; and,

6. Provide a copy of this Order to any court evaluating a request that a litigation settlement agreement relating to Search Advertising be approved by the court and/or incorporated into a court order.

C. Retain documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph IV.

V.

IT IS FURTHER ORDERED that Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:

A. No later than ninety (90) days from the date this Order is issued, and

B. One (1) year from the date this Order is issued and annually thereafter for four (4) years on the anniversary of the date on which this Order is issued, and at such other times as the Commission may request.

VI.

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

A. Any proposed dissolution of Respondent;

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

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

VII.

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

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

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on November 7, 2038.

By the Commission, Commissioner Phillips dissenting and Commissioner Wilson not participating.

Appendix A

[Letterhead of 1-800 Contacts]

[Name and Address of the Recipient]

Dear (Recipient):

As you may know, the Federal Trade Commission issued an administrative complaint in 2016 against 1-800 Contacts, Inc. ("1-800 Contacts") challenging several agreements between 1-800 Contacts and other contact lens sellers that restrict the ability of such sellers to purchase trademark keywords in search advertising auctions, or to place search advertising triggered by those keywords on internet search engine results pages.

The Federal Trade Commission has issued a Decision and Order ("Order") against 1-800 Contacts in connection with its complaint. This Order provides, in part, that 1-800 Contacts may not prohibit competing sellers of contact lenses from engaging in truthful, non-deceptive advertising or solicitation through the display of search advertising. Specifically, 1-800 Contacts may not:

1. Enter into, enforce, or attempt to enforce any agreement between or among 1-800 Contacts and a contact lens seller to restrict the ability of the seller to participate in any internet search advertising auction, including restricting the use of keywords or requiring the use of negative keywords; or

2. Enter into, enforce, or attempt to enforce any agreement with a contact lens seller that otherwise places any limitation on any search advertising.

The Order further requires 1-800 Contacts to take whatever action is necessary to have vacated all court orders or other restraints related to trademark infringement claims initiated to accomplish any of the above-listed prohibited activities.

The Order does not prohibit 1-800 Contacts from entering into an agreement with a seller of contact lenses that requires certain disclosures in the *text* of an advertisement, including a clear identification of the seller placing the advertisement.

For more specific information, you should refer to the FTC order itself. The Federal Trade Commission's Complaint and Decision and Order are available on the Commission's website, http:\\www.ftc.gov.

DISSENTING STATEMENT OF COMMISSIONER NOAH JOSHUA PHILLIPS

The majority's decision in this case deems "inherently suspect" and then condemns agreements to settle legitimate trademark infringement litigation. Applicable precedent requires the more thorough rule of reason analysis, with more credence given to the intellectual property at the heart of the case. The majority make a separate holding that the settlements are anticompetitive based on a showing of direct effects, but the evidence upon which they rely fails, both as a matter of law and as a matter of fact, to meet the legal requirement that such effects must be actual, sustained, and significant or substantial. I fear the majority's approach will foster uncertainty and undermine trademark policy, and so I respectfully dissent.

Neither the necessary judicial experience nor economic learning exist to apply a truncated antitrust analysis to the facts of this case. A fair reading of relevant case law makes clear that the full rule of reason should apply to the trademark settlement agreements between 1-800 Contacts and thirteen alleged trademark infringers (the "Trademark Settlements").[1] In supporting their choice of analytical framework, the majority avoid entirely the fact that the agreements at issue settle intellectual property claims. They then judge and discard entirely the value of those claims, a methodological error with a result that judicial experience and economic learning have taught us for decades to avoid—i.e., an unclear rule that is difficult to administer and harder still to predict, and that may capture and will chill procompetitive behavior.

The majority couch their holding as a limited one dealing with restraints on the opportunity to make price comparisons—an overstated conclusion—but their decision not to grapple fairly with the trademark context of the agreements results in a rule that appears to be one of the following:

---

1 I use the phrase "Trademark Settlements" to refer to the agreements settling trademark infringement litigation between 1-800 Contacts and the following thirteen contact lens retailers: (1) AC Lens, (2) Coastal Contacts, (3) Contact Lens King, (4) Empire Vision, (5) EZ Contacts, (6) Lenses for Less, (7) Lensfast, (8) Memorial Eye, (9) Standard Optical, (10) Tram Data, (11) Vision Direct, (12) Walgreens, and (13) Web Eye Care. The phrase "Trademark Settlements" does not include the sourcing and services agreement between 1-800 Contacts and Luxottica (the "Luxottica Agreement") because that agreement did not resolve trademark infringement litigation and, therefore, should be analyzed separately. *See* Section 0, *infra*.

- all advertising restrictions are inherently suspect, regardless whether they protect intellectual property rights, a rule supported by the logic of the opinion but which the majority disclaim expressly; or

- a standard of review under which the Commission will review as inherently suspect settlements of what it considers weak trademark infringement claims, leaving open the question of how it will analyze infringement claims that the Commission adjudges to be strong.

The former rule will treat clearly pro-competitive conduct as presumptively unlawful. The latter will require the Commission and federal courts to litigate (or re-litigate) inherently fact-specific intellectual property infringement claims in every antitrust challenge to a settlement agreement, a difficult process we have long eschewed. It will also create uncertainty for parties considering settlement, deterring enforcement and, in the case of trademarks, reducing the incentive to build brands.

Precedent offers—indeed, requires—a better approach: apply the full rule of reason to antitrust challenges to trademark settlement agreements like those at issue here, giving appropriate credence to the fact that the conduct at issue is the settlement of legitimate (i.e., non-sham) trademark infringement claims. Such a rule would provide guidance to the market, increase certainty, encourage brand investment, and enhance competition.

I. Background

Jonathan Coon started the business that would become 1-800 Contacts in 1992 from his college dormitory room with just $50 to his name, seeking to reduce prices, improve service, and provide a better customer experience for contact lens consumers. IDF 30-33, 43;[2] Coon, Tr. 2649:9-12, 2651:12-20. Over the next 26 years he would succeed, building a company (and a brand) from essentially nothing to one of the largest contact lens retailers in the country, while introducing American consumers to mail-order contact lenses (and later ordering contacts online), driving down prices, and attracting competition from small and large companies alike. That growth required a combination of a massive investment in advertising and a constant quest to improve the customer experience. That is the type of conduct that antitrust and trademark law should, and do, encourage.

---

2 For the sake of convenience and consistency, I use the same abbreviations as the majority for the following documents:

Compl.:	Complaint
ID:	Initial Decision
IDF:	Initial Decision Finding of Fact
Stip.:	Joint Stipulation Regarding Search Engine Mechanics and Glossary of Terms
RAB:	Respondent's Brief on Appeal

I also use the following abbreviations in citations:

Op.:	Opinion of the Commission
IH:	Investigational Hearing

A. 1-800 Contacts Invested a Tremendous Amount to Build Its Brand.

Trademarks encourage innovation and brand investment, giving more information to customers and attracting competition. *See* Section 0(A)(4)(b), *infra*. 1-800 Contacts has a long history of taking risks to invest in its brand. In July 1995, when Mr. Coon and his business partner John Nichols renamed their company 1-800 Contacts and obtained the associated telephone number, the company's sales more than doubled in the first month. IDF 36-37; Coon, Tr. 2654:13-19, 2658:19-25, 2661:20-2662:16. It cost Mr. Coon and Mr. Nichols approximately $163,500 to obtain the telephone number "1-800-CONTACTS", but they only had $10,000 in the bank at the time, so they used that entire sum to make an upfront payment and agreed to pay the remainder in monthly installments of approximately 10% of the company's total monthly revenue. Coon, Tr. 2658:19-2660:25.

After it started marketing itself as 1-800 Contacts, the company saw an increase of 20% to 25% in customer acquisition and retention. IDF 51. The initial advertising campaign was in print, but shortly thereafter the company started advertising on television. IDF 50, 52. Television advertising had an immediate and significant impact, growing the business by approximately 50% in just a few months. IDF 53. Ever since, television has generally been the largest category of marketing spend in 1-800 Contacts' advertising budget. *See* RX0739 (Murphy Expert Report) at 092.

1-800 Contacts' approach to promoting itself was—and continues to be—designed to generate brand awareness and new orders through "a multichannel integrated marketing" strategy. IDF 60-61. This strategy has included "print advertising, television advertising, radio advertising, internet display advertising, affiliate marketing, social media advertising, and search engine optimization, in addition to internet search advertising." IDF 62.

Of particular relevance to this case, there is a positive correlation between 1-800 Contacts' television advertisements and traffic to 1-800 Contacts' website via searches for its trademarked terms. IDF 63; CX9017 at 045 (Blackwood Dep. 176:2-12); CX9032 at 063 (L. Schmidt Dep. 246:25-247:13); RX0736 (Goodstein Expert Report) at 008; *see also* CX9031 at 025-026 (C. Schmidt Dep. 95:25-97:15) (testifying that 1-800 Contacts saw an increase in the amount of paid search advertising on its trademarked terms in response to broad scale advertising, such as television and radio). Research conducted by 1-800 Contacts found that 40 percent of the traffic to its website from paid trademark search was directly related to television advertising. CX9017 at 059 (Blackwood Dep. 230:1-23).

1-800 Contacts has spent hundreds of millions of dollars to generate brand awareness and new orders. From 2002 to 2014 (just 13 of the 26 years the company has existed), 1-800 Contacts spent more than [redacted] on advertising, of which [redacted] (or more than [redacted]%) went to television advertising and almost [redacted] (or [redacted]%) to all internet advertising (not just paid search advertising). IDF 64-65; RX0739 (Murphy Expert Report) at 092. In 2014 alone (the most recent year for which data is available), 1-800 Contacts' marketing budget was [redacted]; [redacted] (or [redacted]%) of that total budget went to television advertising and [redacted] (or [redacted]%) to all internet advertising (not just paid search advertising). IDF 64-66; RX0739 (Murphy Expert Report) at 092. As these numbers show,

television is 1-800 Contacts' principal means of advertising because it drives growth in terms of brand awareness and identifying and finding customers. *See* CX9001 at 016-017 (Bethers IH 60:15-61:3). Other online contact lens retailers generally have not invested in broad scale (e.g., television) advertising. CX9029 at 004 (Bethers Dep. 10:3-11:13); CX9035 at 023 (Coon Dep. 88:2-6); RX0736 (Goodstein Expert Report) at 009; *see also* Bethers, Tr. 3614:15-24 ("[W]e don't see anyone that invests in broad-scale advertising like us [1-800 Contacts]").

Paid internet search advertising through Google comprised between [redacted]% and [redacted]% of 1-800 Contacts' total advertising budget between 2004 and 2014.[3] *See* IDF 66; RX0739 (Murphy Expert Report) at 027-028, 092, 140. Paid search advertising through Google using

1-800 Contact's trademarked terms constituted no more than [redacted]% of 1-800 Contacts' total advertising budget and no more than [redacted]% of 1-800 Contacts' paid search advertising expenses in any year between 2004 and 2014.[4] RX0739 (Murphy Expert Report) at 027-028, 092, 140. In 2014 (the most recent year for which data is available), paid search advertising through Google constituted [redacted]% of 1-800 Contacts' total advertising budget of [redacted] and paid search advertising through Google on its trademarked terms accounted for [redacted]% of that total budget (and only [redacted]% of 1-800 Contacts' expenses on paid search advertising). RX0739 (Murphy Expert Report) at 027-028, 092, 140.

This massive endeavor—the kind of conduct trademark law is intended to foster—did more than benefit 1-800 Contacts: it pioneered the mail-order contact lens business and then the online contact lens business to the direct benefit of consumers in the form of reduced prices and increased convenience and choice.

B. 1-800 Contacts Has Been Committed to Improving the Customer Experience Since Its Founding.

As Administrative Law Judge D. Michael Chappell (the "ALJ" or "Judge Chappell") found in the Initial Decision, "1-800 Contacts' business objective from the company's inception was to make the process of buying contact lenses simple and it tries to distinguish itself from other contact lens retailers by making it faster, easier, and more convenient to get contact lenses." IDF 43; *see also* Coon, Tr. 2712:11-2713:7 (testifying that the company's strategy of distinguishing itself on service stemmed from a recognition that it would be easy for another retailer to match prices but it is very difficult to "create a brand and provide great service"). This contrasts with other online contact lens retailers, which generally do not seek to distinguish themselves on the basis of customer experience, customer service, or simplicity. *See* CX9029 at 004 (Bethers Dep. 9:12-11:13). 1-800 Contacts did not limit itself to competing on price because it found that many customers valued speed and convenience just as much as price. Coon, Tr. 2705:16 -2708:1; *see also* RX1117 at 028 [redacted]

3 1-800 Contacts either did not spend money on paid search advertising in 2002 and 2003, or that data is unavailable. *See* RX0739 (Murphy Expert Report) at 092.

4 As with paid search advertising, 1-800 Contacts either did not spend money on paid search advertising using its own trademarked terms in 2002 and 2003, or that data is unavailable. *See* RX0739 (Murphy Expert Report) at 092.

[redacted].

1-800 Contacts has made significant investments in providing high quality service to customers, including a dedicated call center, prompt shipping within two business days, quality control measures in inventory, prescription verification, and a 100% guaranteed return policy. CX9031 at 024 (C. Schmidt Dep. 90:2-92:3); Coon, Tr. 2690:20-2692:15. 1-800 Contacts stocks more contact lenses in inventory than any other contact lens retailer, which allows it to fill 98% of all orders from inventory on hand; answers most calls with a live person by the third ring and most emails within 10 minutes; has live customer support personnel available to answer text messages; offers click-to-chat customer service; and replaces torn lenses for free. IDF 44-46; Coon, Tr. 2690:20-2692:15; RX0904 at 016.

In addition, 1-800 Contacts designed its website with the same goals as Mr. Coons founded the company: to make the contact lens buying experience better for customers. *See* IDF 39. The website was as simple and efficient as possible, minimizing "the amount of time spent on the website and the number of clicks a consumer had to make to purchase contact lenses." *Id*. Over time, the company continued to improve its website and developed a mobile application to ensure that customers could purchase contact lenses as quickly and easily as possible. *See, e.g.*, IDF 40-42.

1-800 Contacts' relentless investment in its brand and in improving its customer service are recognized. Many third parties—including J.D. Power and Associates, StellaService Elite, and Foresee—have recognized or given awards to 1-800 Contacts for its customer service. IDF 47; *see also* RX0736 (Goodstein Expert Report) at 016, Table 2 (listing other awards received by 1-800 Contacts, including awards for its customer service). But that has not stopped 1-800 Contacts from continuing to invest in improving its service to enhance the customer experience. *See, e.g.*, IDF 48.

The service and brand investments made by 1-800 Contacts have resulted in millions of consumers purchasing contact lenses from 1-800 Contacts over the phone and online. They are precisely the types of investments that trademark law exists to protect and encourage. And, according to multiple witnesses, they created precisely the value that other retailers sought to derive by bidding on 1-800 Contacts' trademarked terms. *See, e.g.*, CX9033 at 017 (Mohan Dep. 61:9-12) (Walmart executive testifying that 1-800 Contacts' trademarks were more valuable as search terms "[b]ecause a lot more people know the brand."); CX9039 at 040 (Clarkson Dep. 155:25-156:8) (AC Lens executive testifying that the value it receives from paid trademark search advertising depends on the strength of the competitors' brand); *id*. at 026 (97:20-98:3) (noting 1-800 Contacts "unmatched brand awareness").

C. The Trademark Settlements Resolved Legitimate and Contested Trademark Infringement Claims.

1. The Context Surrounding the Trademark Settlements.

The Trademark Settlements resolved trademark infringement claims brought by 1-800 Contacts against certain other online contact lens sellers, which bought advertisements using 1-800 Contacts' trademarks as keywords—i.e., when consumers searched for "1-800 Contacts", the search engine would display advertisements for the other sellers. As early as 2002, online retailers of contact lenses expressed concern that bidding for advertisements using third parties' trademarks might be illegal. *See, e.g.*, IDF 583 ("In 2002, AC Lens decided not to use 1-800 Contacts' trademarks as keywords for paid search advertising because of legal concerns."); Clarkson, Tr. 325:6-23 (AC Lens executive testifying that "it was unclear to me what the legal situation was relative to advertising on other companies' trademarks" and that he had a concern about advertising on other companies' trademarks "for a long time"); CX9003 at 024 (Clarkson Dep. 90:21-91:10) ("I think I had a general sort of concern that [paid trademark search advertising] may not be legal anyway."). 1-800 Contacts itself had a policy that pre-dated the Trademark Settlements not to use other companies' trademarked terms as keywords to trigger paid search advertisements, in part attributable to a concern about the propriety of using other companies' trademarks as keywords. CX9031 at 016 (C. Schmidt Dep. 57:7-59:1); CX9001 at 027-028 (Bethers IH 104:4-105:20).

Prior to April 2004, Google—the largest search engine since before the first Trademark Settlements—did not permit advertisers to bid on keywords that contained a trademark owned by a third party. *See* IDF 137, 287. Microsoft, which owns Bing—the second-largest online search engine after Google—had the same policy until 2011. *See* IDF 298.

1-800 Contacts executives met with Google representatives in April 2004, the same month that Google changed its policy and began allowing advertisers to bid on the trademarks of other companies. *See* Schmidt, Tr. 2900:12-2901:1. At this meeting, 1-800 Contacts understood Google's position to be that while Google would no longer resolve trademark disputes directly, it offered negative keywords as an effective tool to prevent or inhibit future trademark infringement. Schmidt, Tr. 2904:2-16, 2905:16-25; CX9031 at 010 (C. Schmidt Dep. 33:20-34:21). Negative keywords prevent an advertisement from being triggered by the words or phrases comprising the negative keywords. Stip. at 2. According to 1-800 Contacts, Google representatives specifically suggested that 1-800 Contacts resolve its disputes directly with its competitors by telling them to implement 1-800 Contacts' trademarks as negative keywords. CX9031 at 010-011 (C. Schmidt Dep. 33:20-34:20, 36:13-37:3); CX9013 at 044-045 (Aston Dep. 170:8-20, 171:10-172:3, 173:5-20).

Following Google's policy change in April 2004, 1-800 Contacts continued to protect its trademarks vigorously because, among other things, failure to police a trademark could render a trademark unenforceable. Hogan, Tr. 3265:4-3266:9; *see also* RX0734 (Hogan Expert Report) at 013 (citing *Malaco Leaf, AB v. Promotion In Motion, Inc.*, 287 F. Supp. 2d 355, 364-65 (S.D.N.Y. 2003) ("[T]rade dress may become generic, meaning commonly used and not entitled to protection, as a result of the trademark owner's failure to police it") (citation, brackets, and

quotation marks omitted); *Bachellerie v. Z. Cavaricci, Inc.*, 762 F. Supp. 1070, 1077 (S.D.N.Y. 1991) (failure of plaintiff to enforce its mark against third-party users "diminishes the strength of the mark")). Other trademark owners acted in a similar manner. *See* RX0734 (Hogan Expert Report) at 083-086; RX0926 at 001 (listing cases involving the "purchase of another party's trademark as a keyword for internet advertising"). Some of these attempts by trademark owners to protect their marks ultimately led to litigation.

In the initial years of paid search advertising litigation, between 2004 and 2009, it was unclear whether courts would recognize a cause of action under a theory that bidding on trademarked terms as keywords constituted a "use in commerce" under the Lanham Act, a critical predicate to establishing a trademark infringement claim. IDF 333; RX0734 (Hogan Expert Report) at 059-060. Only three of the Trademark Settlements were signed during this period: Vision Direct (executed in June 2004), Coastal Contacts (executed in October 2004), and EZ Contacts (executed in May 2008). *See* IDF 306, 314, 344.

On April 3, 2009, however, the legality of 1-800 Contacts' competitors' bidding on advertisements with 1-800 Contacts' trademarks as keywords—precisely the conduct ended by the Trademark Settlements—became even more dubious when the Second Circuit issued an opinion holding that using trademarks as keywords in paid search advertising "fits literally within the terms specified by [the Lanham Act,] 15 U.S.C. § 1127" as a "use in commerce". *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 129-30 (2d Cir. 2009); *see also id*. at 127 ("The allegations of Rescuecom's complaint adequately plead a use in commerce.").

Following *Rescuecom*, federal circuit courts came to agree that bidding on trademarked terms as keywords for paid search advertising constituted a "use in commerce" for the purposes of trademark law, *see* IDF 333, eliminating a threshold defense in trademark infringement litigation. For advertisers bidding on other companies' trademarks, this shifted the focus to whether, in particular cases, the use was likely to cause confusion among customers, *see* IDF 333; Hogan, Tr. 3256:11-19, a highly fact-specific inquiry necessitating litigation. *See* Section 0(A)(4)(a), *infra*. The legal risks rose, increasing the incentive for alleged trademark infringers to settle rather than endure a full trial on the merits, given the fact-specific nature of the inquiry into trademark confusion. *See, e.g.*, Hogan, Tr. 3260:21-3261:4.

In the wake of the *Rescuecom* decision and the resulting change in legal exposure, 1-800 Contacts entered nine of the thirteen Trademark Settlements between December 2009 and February 2011. IDF 348; CX0315 (Lensfast, Dec. 2009); RX0028 (AC Lens, Mar. 2010); CX0323 (Contact Lens King, Mar. 2010); CX0320 (Lenses for Less, Mar. 2010); CX0319 (Empire Vision, May 2010); CX0321 (Tram Data, May 2010); CX0322 (Walgreens, June 2010); CX0324 (Web Eye Care, Sept. 2010); RX0408 (Standard Optical, Feb. 2011).

One month after *Rescuecom*, 1-800 Contacts entered a second settlement agreement with Vision Direct to address Vision Direct's alleged violations of the 2004 settlement agreement for failing to implement negative keywords. *See* IDF 345-347; CX0314 at 004 ("The 2004 Settlement Agreement shall remain in full force and effect except that the Parties' sole obligations with respect to the use of negative keywords shall be to comply with the terms of this Settlement Agreement."); *see also* CX0316 (Order of Permanent Injunction, *1-800 Contacts, Inc.*

v. Vision Direct, Inc., No. 08-cv-1949 (S.D.N.Y May 15, 2009)). Only one Trademark Settlement came after the initial wave of settlements following *Rescuecom*: Memorial Eye settled in November 2013, principally because of the legal uncertainty about its failure to implement negative keywords on 1-800 Contacts' trademarked terms. *See, e.g.*, IDF 349, 351; Holbrook, Tr. 1942:12-13 ("We knew that the [negative keyword] broad matching issue had not firmly been put to rest by the court."); CX9024 at 017 (Holbrook Dep. 63:13-18) ("We also knew that in the appellate court, I believe it was, that the appellate court had been silent on the [negative keyword] broad matching issue, which was to us the most important thing. It was a big deal. So there was a lot of legal uncertainty because of that still hanging out there."); *see also* IDF 617 (finding that Memorial Eye did not bid on 1-800 Contacts' trademarked terms as keywords in paid search advertising).

The Trademark Settlements resolved increasing legal risk for putative bidders on trademarked keywords. No one, even today, contends that the trademark claims asserted by 1-800 Contracts were shams or legal claims asserted to achieve an otherwise anticompetitive end. *See* RX0680 at 013 ("Complaint Counsel therefore does not contend that the lawsuits constituted 'sham' litigation as defined by the Supreme Court in *PRE*.") (referring to *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993)); RX0678 at 008 ("Complaint Counsel does not contend that the lawsuit, *1-800 Contacts, Inc. v. Memorial Eye, P.A.*, was Sham Litigation."); *id*. ("Complaint Counsel does not contend that the lawsuit, *1-800 Contacts, Inc. v. Lens.com*, was Sham Litigation."); *see also 1-800 Contacts, Inc. v. Memorial Eye, P.A.*, No. 08-cv-983, 2010 WL 988524, at *6 (D. Utah Mar. 15, 2010) ("[T]he Court finds that Plaintiff's claim is not baseless"); *Lens.com, Inc. v. 1-800 Contacts, Inc.*, No. 12-cv-352, 2014 WL 12596493, at *1 (D. Utah Mar. 3, 2014) ("Because the district court and the Tenth Circuit agree that the underlying action was not baseless, this court agrees that Lens' claims, all of which center on the proposition that 1-800 engaged in sham litigation, should be dismissed with prejudice.").

2. The Relevant Terms Contained in the Trademark Settlements.

The Trademark Settlements resolved legitimate intellectual property infringement claims. They were bilateral: 1-800 Contacts entered each Trademark Settlement separately and with a single counterparty to protect each settling party's trademarks. No material amount of money changed hands.[5] Users who searched for 1-800 Contacts' trademarks would not see an advertisement for the other settling party (although they might see an "organic" search result,

5 Certain Trademark Settlements contained token amounts of monetary consideration, but nothing approaching the millions of dollars at issue in *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013), and always in the usual direction (i.e., from the defendant to the plaintiff). *See* CX0311 at 002 (Vision Direct paid $1 in monetary consideration in 2004); CX0313 at 002 (EZ Contacts paid $29,000 in monetary consideration); CX0314 at 001 (Vision Direct paid $475,000 in 2009 for "partial reimbursement of 1-800 Contacts' attorneys' fees"); CX0315 at 001 (Lensfast made a $20,000 payment); CX0323 at 001 ($8,000 payment by Contact Lens King); CX0324 at 001 ($2,000 payment by Web Eye Care); *cf. Actavis*, 570 U.S. at 145 ("[The branded manufacturer] agreed to pay millions of dollars to each generic"). None of the payments split monopoly rents, *cf. Actavis*, 570 U.S. at 154; indeed, the majority of Trademark Settlements had no monetary component. *See* CX0310 (Coastal Contacts); RX0028 (AC Lens); CX0320 at 002 (Lenses for Less); CX0319 (Empire Vision); CX0321 (Tram Data); CX0322 (Walgreens); RX0408 (Standard Optical); CX0326 (Memorial Eye).

depending on relevance, *see* Stip. at 5). The parties were adjusting to an evolving market and increased legal risk, achieving by contract (with implementing guidance from Google)[6] what had previously been the stated policy of the two most popular search engines.[7] *See* CX9031 at 010-011 (C. Schmidt Dep. 33:20-35:2, 35:23-36:2, 36:13-37:3); CX9013 at 044 (Aston Dep. 172:1-3) ("They [Google] instructed us [1-800 Contacts] to have the offenders add those specific trademarked terms into their negatives for their -- for their AdWords campaigns."); *id*. at 044-045 (Aston Dep. 170:8-20, 171:10-19, 173:5-20). First, the Trademark Settlements prohibited both 1-800 Contacts and the counterparty from bidding on each other's trademarked terms as keywords. IDF 363. Second, twelve of the thirteen Trademark Settlements required both parties to implement negative keywords to prevent their advertisements from appearing in response to searches for the other party's trademarked terms. IDF 364; ID at 1; Compl. ¶ 24.

It is important to keep in mind what the Trademark Settlements did *not* require. The Trademark Settlements did not prevent 1-800 Contacts or other online contact lens retailers from engaging in any form of non-infringing advertising. There were no restrictions on the settling parties' ability to advertise offline (e.g., through print, television, or radio); to advertise using other forms of electronic/online advertising (e.g., internet display advertising, affiliate marketing, social media advertising, and search engine optimization); or to engage in paid search advertising as long as the advertisement did not appear in response to a search for one of the settling parties' trademarks. Nothing prevented the parties from buying advertisements to respond to consumers' searches for generic terms or phrases, such as "contacts", "contact lenses", "cheap contacts", "inexpensive contacts", or "discount contacts". *See, e.g.*, IDF 367. And the parties to the Trademark Settlements did, in fact, engage in many of these other types of advertising. *See* IDF 497-561 (describing the importance of paid search advertising generally—i.e., not just for trademarked keywords—to contact lens retailers, and noting that most retailers advertise in forms other than paid search advertising); *see also* Op. at 6-7 (noting the importance of paid search advertising generally—i.e., not just for trademarked keywords—to contact lens retailers). Neither the majority's opinion nor the Initial Decision identifies what portion of the marketing budgets of the counterparties to the Trademark Settlements comprises trademark search advertising (as opposed to paid search advertising generally).

Most of the Trademark Settlements specifically permit non-infringing uses like comparative advertising and parodies. For example, the 2004 settlement agreement between Vision Direct and 1-800 Contacts stated that the acts prohibited by the agreement "shall not include (i) use of the other Party's Trademarks on the Internet in a manner that would not constitute an infringing use in an non-Internet context, e.g., the use on the Internet of comparative advertising, parodies, and similar non-Infringing uses . . . ." CX0311 at 004; *see also* IDF 369 (citing CX0311 at 004 (Vision Direct 2004); CX0313 at 004 (EZ Contacts); CX0315 at 004 (Lensfast); CX0319 at 002 (Empire Vision); CX0320 at 004 (Lenses for Less); CX0321 at 002 (Tram Data); CX0323 at 003 (Contact Lens King); CX0324 at 003 (Web Eye

6 The April 2004 meeting between 1-800 Contacts and Google predated all of the Trademark Settlements, the first of which was executed in June 2004. *See* CX0311 (Vision Direct Trademark Settlement, dated June 24, 2004).

7 All but one of the Trademark Settlements incorporated Google's advice to use negative keywords to ensure that the settling parties' trademarks were protected. *See* Compl. ¶ 24; CX0310 (1-800 Contacts' Trademark Settlement with Coastal Contacts did not include a provision requiring the implementation of negative keywords).

Care); RX0028 at 002 (AC Lens); RX0408 at 003 (Standard Optical)); *see also* Op. at 9 (citing IDF 369 for the proposition that ten of the thirteen Trademark Settlements contained a clause permitting non-infringing uses).

The Trademark Settlements likewise place no restrictions on the content that any of the settling parties may include in their advertisements. The settling parties are free to advertise lower prices and higher quality whenever and, in general, wherever they like. And, of course, the restrictions in the Trademark Settlements impact only those consumers who search specifically for 1-800 Contacts' trademarks, the vast majority of which searches are navigational, i.e., searches performed by the consumer with the intent to locate 1-800 Contacts' website. RX0733 (Ghose Expert Report) at 032, 050.

The Trademark Settlements sought to balance 1-800 Contacts' legitimate interests in protecting its trademarks with competitors' (and consumers') interests in truthful advertising.

II. The Majority Fail to Show That the Trademark Settlements Are Anticompetitive.

The majority deem the Trademark Settlements anticompetitive by applying the "inherently suspect" framework, which truncates the traditional rule of reason analysis, and, alternatively, by finding direct anticompetitive effects. Governing precedent supports neither approach on the facts adduced, and in neither analysis do the majority grapple adequately with the intellectual property rights at the heart of this case.

A. The Trademark Settlements Are Not Inherently Suspect.

1. Categorizing Conduct as Inherently Suspect Is a Drastic Step.

The Supreme Court has made clear time and again that "abandonment of the 'rule of reason' in favor of presumptive rules (or a 'quick-look' [i.e., inherently suspect] approach) is appropriate only where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'"[8] *FTC v. Actavis, Inc.*, 570 U.S. 136, 159 (2013) (quoting *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999)). The *per se* and inherently suspect "standards are exceptional . . . and their application is reserved for the most patently anticompetitive restraints." *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 387 (8th Cir. 2007), *cert. denied*, 552 U.S. 1040 (2007). "[T]he Supreme Court has cautioned that presumptions of anticompetitiveness should not be lightly invoked." *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1339 (Fed. Cir. 2010) (en banc) (citing *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.* ("*BMI*"), 441 U.S. 1, 8-9 (1979)), *cert. denied*, 563 U.S. 987 (2011); *see also id.* ("Quick-look analysis applies to 'naked restraint[s] on price and output'") (brackets in original) (quoting *Cal. Dental*, 526 U.S. at 769-70). In our rulings, the Commission has recognized as much. *See, e.g., In re N. Tex.*

8 "Quick look" is the federal judiciary's equivalent to the Commission's "inherently suspect" framework. *See, e.g., N. Tex. Specialty Physicians v. FTC* ("*NTSP*"), 528 F.3d 346, 360-61 (5th Cir. 2008) ("The 'inherently suspect' paradigm that the FTC employed in the present case is a 'quick-look' rule-of-reason analysis."), *cert. denied*, 555 U.S. 1170 (2009).

Specialty Physicians, 140 F.T.C. 715, 719, 733 (2005), *aff'd in relevant part sub nom.*, *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008), *cert. denied*, 555 U.S. 1170 (2009).[9]

The Trademark Settlements do not approximate conduct that the Commission or courts have previously found to be inherently suspect, much less *per se* illegal. Those precedents make abundantly clear that the Commission should not treat the Trademark Settlements as presumptively unlawful. That is especially so given the trademark rights involved, an issue that none of the cases on which the majority rely even consider.[10]

2. We Lack an Adequate Basis to Declare the Trademark Settlements Inherently Suspect.

In *California Dental*, the progenitor for the Commission's "inherently suspect" framework,[11] the Supreme Court outlined the test for when it is appropriate to truncate the rule of reason analysis: only "when the great likelihood of anticompetitive effects can easily be ascertained." *Cal. Dental*, 526 U.S. at 770 (citations omitted). "[W]here . . . any anticompetitive effects of given restraints are far from intuitively obvious," however, "the rule of reason demands a more thorough enquiry . . . ." *Id*. at 759. "The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *Id*. at 781.

Lower courts and the Commission have elaborated upon the market experience necessary to apply the "inherently suspect" framework. Interpreting *California Dental*, the D.C. Circuit held in *Polygram* that "[i]f, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful . . . ." *Polygram Holding, Inc. v. FTC* ("*Polygram II*"), 416 F.3d 29, 36 (D.C. Cir. 2005), *aff'g sub nom., In re Polygram Holding, Inc.* ("*Polygram I*"), 136 F.T.C. 310 (2003). We likewise stated that inherently suspect conduct "ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation." *Polygram I*, 136 F.T.C. at 344-45. That judicial experience and economic learning are absent here.

---

9 The majority apparently do not view application of the "inherently suspect" framework as exceptional. Their opinion suggests that as long as they consider the specific procompetitive justifications of the challenged conduct, it does not matter whether the "inherently suspect" label is applied. *See* Op. at 41. The majority's view not only discounts any value of trademarks generally and relies on assessments in each case of the value of the trademarks at issue, *see id*. at 38-41, it also gives short shrift to the precedent instructing that application of the "inherently suspect" label is exceptional. *See, e.g., Cal. Dental*, 526 U.S. at 769-81.

10 I disagree with the majority's attempts to distinguish the two relevant cases that involve intellectual property, *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997), and *Actavis*. *See* Section 0(A)(3), *infra* (discussing *Clorox*); Sections 0(A)(2)(a)(i), 0(A)(4)(a), 0(C), *infra* (discussing *Actavis*).

11 *See NTSP*, 528 F.3d at 361 ("The FTC formulated its 'inherently suspect' analysis after the issuance of *California Dental Association*") (citing *Polygram Holding, Inc. v. FTC* ("*Polygram II*"), 416 F.3d 29, 35-36 (D.C. Cir. 2005)).

a) We Lack Sufficient Judicial Experience to Presume the Trademark Settlements Are Unlawful.

The facts of this case do not fit neatly into the jurisprudence on advertising restraints. The cases upon which the majority rely involve complete advertising bans or limitations on the content that advertisements could contain, neither of which is present here. Such restraints prevent price signals from reaching the market, whereas the Trademark Settlements are alleged only to reduce the opportunity of certain consumers—specifically, those searching for 1-800 Contacts' trademarks—to see advertisements paid for by other sellers in response to those searches. In addition, none of the cases the majority cite implicate intellectual property rights, the presence of which necessarily changes the analysis because the Commission must account for a competing federal policy.

i. *California Dental* Supports the Application of the Traditional Rule of Reason Here.

The *California Dental* experience, sunny and painful though it must have been, makes clear that we should not truncate the traditional rule of reason here. In that case, the California Dental Association adopted a policy that "effectively prohibited members from advertising price discounts in most cases, and entirely precluded advertising regarding the quality of services." *In re Realcomp II Ltd.* ("*Realcomp I*"), Dkt. No. 9320, 2007 WL 6936319, at *20 (F.T.C. Oct. 30, 2009), *aff'd sub nom., Realcomp II, Ltd. v. FTC* ("*Realcomp II*"), 635 F.3d 815 (6th Cir. 2011), *cert. denied*, 565 U.S. 942 (2011). Limitations on price and quality advertising have a more obvious direct effect on the price setting mechanism of the market because they prevent information about price and quality from spreading. *See, e.g.*, *Cal. Dental*, 526 U.S. at 773 ("The explanation proffered by the Court of Appeals for the likely anticompetitive effect of the [California Dental Association]'s restrictions on discount advertising began with the unexceptionable statements that price advertising is fundamental to price competition, and that restrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price") (internal citations, quotation marks, and alterations omitted). Yet the Court applied the traditional rule of reason, because there was an insufficiently strong and obvious connection between the restraint and the price setting mechanism of the market for dental services. *See Cal. Dental,* 526 U.S. at 759, 774-78. The test, as the majority correctly note, is whether "the normal linkage between advertising restrictions and price/output effects in the underlying product market [i]s attenuated". Op. at 42.

The link between the restraints here and price or output effects is far more attenuated than that in *California Dental*. As a threshold matter, Complaint Counsel did not demonstrate any output effect. *See* ID at 153 n.36 ("Complaint Counsel does not contend that the Challenged Agreements reduced the output of contact lenses."). The Trademark Settlements permit advertising, including on price and quality. They do not restrict the content of advertisements that 1-800 Contacts or the counterparties can run in innumerable contexts, including in response to search queries. And, of course, the Trademark Settlements do not bind sellers of contact lenses that are not parties to those agreements. In all of these ways, information about prices continued to reach the market. For a subset of potential contact lens customers—who search specifically for

"1-800 Contacts"—the Trademark Settlements reduce one avenue for discovering products offered by certain other sellers of contact lenses. But, even for those customers not looking for

1-800 Contacts' website,[12] the cost of additional discovery is minimal: another search, a scroll down the results page, a moment's hesitation. Given that the *California Dental* Court applied the traditional rule of reason to analyze restraints with a more obvious anticompetitive impact, *a fortiori*, the restraints here should not be analyzed under a harsher standard.

Actavis supports this conclusion.[13] In that case, the Supreme Court rejected a "quick look" (i.e., inherently suspect) approach when analyzing three reverse payment settlements resolving Hatch-Waxman patent infringement litigation. *See Actavis*, 570 U.S. at 158-59. It did so even though the alleged conduct at issue was far more harmful to competition than anything at issue here, as well-established economic evidence demonstrated. In particular, the FTC alleged that Solvay, a maker of branded pharmaceuticals, paid millions of dollars to Actavis and other generic pharmaceutical manufacturers to delay their entry into the market for AndroGel (a transdermal gel formulation of testosterone). *Id*. at 145; *see also id*. at 154 (describing the settlement payments as potentially "a share of [the brand's] monopoly profits that would otherwise be lost in the competitive market"). The anticompetitive price effects caused by such settlements were well-established by studies conducted by the Commission. *See, e.g.*, Brief for the Petitioner at 8, *Actavis*, 570 U.S. 136 (No. 12-416); Fed. Trade Comm'n, *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions*, at 8 (2010). Compared to a limited restriction within one channel of advertising, the complete exclusion of generic competition from the market in exchange for a share of the brand's monopoly profits—keeping prices at supracompetitive levels—is clearly worse for consumers. While *Actavis* may not, as the majority contend, "stand for the proposition that no restriction in a settlement agreement . . . can be inherently suspect", Op. at 35, it clearly does not support treating less egregious restrictions as presumptively unlawful.

The majority attempt to distinguish *California Dental* by limiting its holding to professional services. *See id*. at 21-22, 42. But the Court did not do so, applying its rule to situations that "fail[ ] to present a situation in which the likelihood of anticompetitive effects is [ ] obvious". *Cal. Dental*, 526 U.S. at 771. It has continued to rely upon that case outside of the professional services context. In *Actavis*, the Court applied *California Dental* to find that reverse payment settlements did not meet the criteria necessary to abandon "the 'rule of reason' in favor

12 According to Respondent's expert, Dr. Anindya Ghose, "the academic literature and the data [ ] indicate that the vast majority of consumers searching for 1-800 Contacts' trademark do so with navigational intent." RX0733 (Ghose Expert Report) at 060.

13 I agree with the majority's conclusion that the Supreme Court's ruling in *Actavis* does not immunize the Trademark Settlements from liability. *See* Op. at 12-16. That said, I do not believe the majority opinion applies *Actavis* properly to the facts of this case. In *Actavis*, the Supreme Court rejected the "scope of the patent" test, which would have rendered all settlements of patent infringement claims immune to antitrust liability. *Actavis*, 570 U.S. at 147. There are four issues from *Actavis* worthy of note here: the Supreme Court (1) created an exception, (2) did not assess the underlying infringement claim, (3) called for traditional rule-of-reason treatment of the reverse payment settlement agreement at issue there, and (4) saw indicia of anticompetitive conduct in the reverse payment settlement that are not present here. For the reasons stated elsewhere in this dissenting statement, we should follow *Actavis* and (a) refrain from making a judgment on the underlying infringement claim and (b) apply the traditional rule of reason.

of presumptive rules (or a 'quick-look' approach)" because it was not the case that "'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'" *Actavis*, 570 U.S. at 159 (quoting *Cal. Dental*, 526 U.S. at 770). Other courts have similarly applied the logic of *California Dental* beyond the professional services context. *See, e.g.*, *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1137-39 (9th Cir. 2011) (en banc).

While the potential procompetitive benefits of the advertising restrictions in the context of professional services helped persuade the Court to apply the rule of reason, *see Cal. Dental*, 526 U.S. at 771-73, the broader takeaway is that grappling with countervailing considerations gave it pause before classifying as presumptively unlawful restraints more obviously problematic than those at issue here. *See, e.g.*, *Polygram I*, 136 F.T.C. at 340 ("The Court [in *California Dental*] concluded that . . . in the absence of any empirical evidence supporting the theoretical basis for a presumption of anticompetitive effects, [the defendant]'s identification of plausible procompetitive justifications precluded the 'indulgently abbreviated' review of the Ninth Circuit.") (citing *Cal. Dental*, 526 U.S. at 774-78). In this case, the plausibility of the benefits that the protection of intellectual property rights bring to competition "rules out the indulgently abbreviated review" provided by the majority. *Cal. Dental*, 526 U.S. at 778.[14] "The obvious anticompetitive effect that triggers abbreviated analysis has not been shown." *Id.*

ii. *Polygram* Does Not Support an "Inherently Suspect" Approach.

The majority rely on *Polygram* to support their categorization of the Trademark Settlements as inherently suspect. *Polygram* involved a worldwide and total ban on advertising. *See Polygram I*, 136 F.T.C. at 354-58, 372; *cf. id.* at 340 (distinguishing *California Dental* because the restrictions at issue in *California Dental* "did not ban advertising completely"). In addition to agreeing not to advertise at all, the *Polygram* defendants agreed not to discount the albums they were selling. *Polygram II*, 416 F.3d at 37. That is, they fixed prices—conduct long condemned as *per se* illegal. *Id.* Treating the price fixing agreement and the complete advertising ban together,[15] the D.C. Circuit focused on the former: "An agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture *looks suspiciously like a naked price fixing agreement between competitors*, which would ordinarily be

14 It is no answer at this stage in the analysis to say that 1-800 Contacts' underlying infringement claims were weak, a fact-specific judgment we should avoid for the reasons I discuss below. *See* Section 0(A)(4)(a), *infra*. Were it so, the analytical framework we apply, a legal question, would depend on a highly-factual inquiry.

15 Even if the advertising restrictions at issue in *Polygram* were treated separately from the price fixing agreement (contrary to the D.C. Circuit's approach), that case still does not support a finding that the Trademark Settlements are inherently suspect. In *Polygram*, the Commission and the D.C. Circuit found that both restraints (advertising and price fixing) were severable from the underlying joint venture. *See Polygram II*, 416 F.3d at 37; *Polygram I*, 136 F.T.C. at 359. This was a critical analytical step toward the finding that the agreement was inherently suspect because—without the underlying joint venture—the restraints became standalone (i.e., naked) agreements between direct competitors not to compete in significant ways. *See Polygram II*, 416 F.3d at 37; *Polygram I*, 136 F.T.C. at 359, 361, 363, 366. Nobody has suggested that the advertising limitations at issue here are somehow severable from the Trademark Settlements. Thus, even assuming that *Polygram* held that the advertising ban at issue there, standing alone, was inherently suspect (which the D.C. Circuit did not), the same logic cannot apply here because the alleged advertising restraint is not severable from the Trademark Settlements.

condemned as *per se* unlawful." *Id*. (emphasis added). It was precisely because the agreement looked like price fixing—"behavior that past judicial experience . . . ha[d] shown to warrant summary condemnation", *Polygram I*, 136 F.T.C. at 344-45—that the D.C. Circuit upheld the Commission's decision to find the agreement presumptively unlawful. *See Polygram II*, 416 F.3d at 37-38.

There is no price fixing here. Nor is there an advertising ban. 1-800 Contacts and the counterparties to the Trademark Settlements were free to engage in any type of advertising they saw fit, including paid keyword search advertising, as long as they did not implicate each other's trademarks. The Trademark Settlements do not look "suspiciously" like any *per se* illegal conduct,[16] so *Polygram* does not support applying the "inherently suspect" framework here.

iii. Other Case Law Supports Application of the Rule of Reason.

The remaining cases cited by the majority for our judicial experience likewise do not support an "inherently suspect" approach on the facts adduced here. Critically, none involve intellectual property. And all involve advertising restrictions that bear no resemblance to the Trademark Settlements because the restraints at issue were: (1) complete bans on advertising[17]; (2) restrictions on the *content* of advertisements (i.e., limitations or bans on the ability to advertise price or quality)[18]; or (3) restrictions akin to *per se* violations of the Sherman Act.[19] The distinction between the restrictions at issue in those cases and the Trademark Settlements is significant, because it is obvious how a complete ban on advertising (without implicating intellectual property rights) and these other types of restrictions could be anticompetitive. Far less obvious is how some consumers not seeing advertisements in response to searches for certain trademarked terms has the same effect. That is precisely the line drawn in *California Dental*, and there should be no doubt on which side the Trademark Settlements fall.

---

16 The majority apparently want to have it both ways with respect to whether they believe the Trademark Settlements are analogous to *per se* illegal conduct. In one breath, they suggest that the Trademark Settlements are analogous to *per se* illegal bid rigging, *see* Op. at 14, but in the next they analyze the Trademark Settlements' alleged harm to search engines under the rule of reason, *see id*. at 50-54. As discussed in more detail below, there is insufficient evidence to conclude that Trademark Settlements harmed search engines, much less constituted *per se* illegal bid rigging. *See* Section 0(E), *infra*.

17 *See, e.g., Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (state bar rule prohibiting all advertising by lawyers in newspapers or other media); *Polygram II*, 416 F.3d at 33 (agreement to prohibit discounts and advertising); *In re Am. Med. Ass'n*, 94 F.T.C. 701, 1979 WL 199033, at *231 (Oct. 12, 1979) ("[I]t is fair to say that almost all advertising and promotional activity is proscribed, with a few narrowly circumscribed exceptions.").

18 *See, e.g., Cal. Dental*, 526 U.S. at 762 (dental association rules effectively prohibited price advertising in most cases and entirely prohibited quality advertising); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388-89 (1992) (state restrictions on airlines fare (i.e., price) advertising); *In re Mass. Board of Registration in Optometry*, 110 F.T.C. 549, 1988 WL 1025476, at *27-*29 (June 13, 1988) (complete ban on truthful advertising of discount prices and other categories of advertising).

19 *See, e.g., BMI*, 441 U.S. at 4 (agreements to fix prices); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98-101 (1984) (horizontal price fixing and restrictions on output); *NTSP*, 528 F.3d at 352 (horizontal price fixing); *Blackburn v. Sweeney*, 53 F.3d 825, 828-29 (7th Cir. 1995) (horizontal agreement to allocate markets among competitors); *United States v. Gasoline Retailers Ass'n, Inc.*, 285 F.2d 688, 689-91 (7th Cir. 1961) (criminal prosecution for conspiracy to fix prices).

b) We Lack Sufficient Economic Learning to Presume the Trademark Settlements Are Unlawful.

The economic studies cited by the majority do not examine paid search advertising, *see* Op. at 20-21, much less how restraints upon it interact with the trademark policies at issue here. The majority instead state that "the behavior of consumers and advertiser-sellers in response to this type of advertising is the same as for other types of advertising", *id.* at 35, an assertion that is both unsupported and inconsistent with the majority's position that "search-based keyword advertising" occurs in a "relatively new context", *id.* at 29; *see also id.* at 2 ("This phenomenon is comparatively recent"). The economic evidence upon which the majority rely is insufficient to expand the scope of what we consider "inherently suspect" to include the Trademark Settlements.[20]

3. The Majority Should Not Have Truncated Their Rule of Reason Analysis.

Applicable precedent makes clear that the Trademark Settlements should be analyzed under the traditional rule of reason. And the cases on which the majority rely fail to provide support for truncating that analysis by applying the "inherently suspect" framework. As noted, those cases do not involve trademarks, or intellectual property of any kind. That is relevant—indeed, decisive—because trademarks often limit advertising in one way or another, and the logic of the majority's analysis would support a rule that stigmatizes conduct protecting those rights, which is clearly procompetitive, as presumptively unlawful.

Consider a situation in which a company uses a competitor's trademark in an advertisement in a way that clearly creates confusion and, thus, infringes on a valid trademark. The mark owner sues and the parties settle, barring the conduct in question. The settlement restrains advertising. Some consumers are deprived of the opportunity to see an advertisement for a lower-priced competing product, the nub of the majority's theory in this case. And the alleged infringer, which sells that competing product, reaches fewer customers because it is unable to use the more desirable advertising scheme. While the majority eschew the result, *see* Op. at 40, their logic would treat this settlement agreement as "inherently suspect" (i.e., presumptively illegal).

The answer is to follow the one case cited by the parties that considers a trademark settlement in the context of antitrust law: the Second Circuit's decision in *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997). *Clorox*, the only truly analogous case, and far more so than any case upon which the majority rely, makes clear that the Trademark Settlements should be evaluated using a traditional rule of reason analysis with appropriate recognition of trademark policy.

20 The majority also appear to require 1-800 Contacts to prove that paid search advertising is different from other types of advertising. *See* Op. at 34-35. This places the burden of proof on the wrong party; it is Complaint Counsel's burden to show that paid search advertising operates the same as other types of advertising.

a) Summary of *Clorox*.

Clorox involved an antitrust challenge brought by Clorox (the then-current owner of the Pine-Sol trademark) against Reckitt (the then-current owner of the Lysol trademark) regarding a trademark settlement agreement executed by the parties' predecessors-in-interest. *See Clorox*, 117 F.3d at 52. The agreement restricted how Clorox could advertise Pine-Sol products and what products Clorox could sell under the Pine-Sol brand. *Id*. at 53-54. After acquiring the Pine-Sol mark, Clorox sued Reckitt claiming that the settlement agreement was anticompetitive because it restricted Clorox's ability to compete using the Pine-Sol mark and served no legitimate trademark purpose because there was no longer a likelihood of consumer confusion between the marks. *Id*. at 54.

The Second Circuit started its analysis with the proposition that trademark settlements are "common, and favored, under the law." *Id*. at 55 (citing J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 18:25 (4th ed. 1996) [hereinafter "McCarthy 4th Edition"]) (other citations omitted).[21] The court presumed that "arms-length [trademark settlement] agreements are pro-competitive", *id*. at 60, and that "[e]fforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies", *id*. at 61.

The rule declared by the Second Circuit was not absolute and would not apply where a trademark settlement was a pretext for a *per se* violation of the antitrust laws.[22] *Id*. at 55-56 ("Unlike trademark agreements that in reality serve to divide markets and thus have been condemned as illegal *per se* under the antitrust laws, the agreement at issue here merely regulates the way a competitor can use a competing mark. Contrary to Clorox's argument, the agreement does not effect any of the types of restraints that have historically been condemned as illegal *per se*, such as price fixing, market divisions, tying arrangements, or boycotts.") (internal citations omitted); *see also id*. at 60 ("[I]n the absence of any evidence that the provisions relating to trademark protection are auxiliary to an underlying illegal agreement between competitors . . . and absent exceptional circumstances, we believe the parties' determination of the scope of needed trademark protections is entitled to substantial weight.").

Determining that the trademark settlement at issue there "must" be examined under the rule of reason, *id*. at 56, the *Clorox* court gave appropriate weight to the value of trademark policy. It held that plaintiffs challenging trademark settlements under antitrust law face a "difficult task" of proving harm to competition. *Id*. at 56. That is so, the Second Circuit held, even when the underlying trademark settlement agreement "only marginally advances trademark policies". *Id*. at 57. "[R]egardless of whether the agreement is entirely necessary to protect [the

21 *See also Clorox*, 117 F.3d at 60 ("[T]rademark agreements are favored in the law as a means by which parties agree to market products in a way that reduces the likelihood of consumer confusion and avoids time-consuming litigation.").

22 The Second Circuit's finding that the rule of reason applies unless the challenged conduct is "auxiliary to an underlying illegal agreement between competitors", *Clorox*, 117 F.3d at 60, is reminiscent of *Polygram*, where then-Chief Judge Douglas H. Ginsburg found that "under the Commission's own framework, the rebuttable presumption of illegality arises not necessarily from anything 'inherent' in a business practice but from the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare." *Polygram II*, 416 F.3d at 37.

defendant's] trademark rights", the Second Circuit held that a plaintiff still was required to show that an alleged anticompetitive restraint "may *significantly* harm competition as a whole". *Id*. at 57 (emphasis added) (citation omitted). After performing a rule of reason analysis, the Second Circuit held that the trademark settlement agreement at issue there did not violate the antitrust laws. *Id*. at 60-61.

b) Applying *Clorox* to the Trademark Settlements.

Clorox is on all fours with this case: an *ex post* antitrust challenge to an agreement that settled trademark infringement litigation.[23] And the restraint at issue here does not involve a settlement that is a pretext for a *per se* violation of the antitrust laws, so it does not fall into the exception to the rule of reason described by the Second Circuit. *See Id*. at 55-56, 60. As a result, the Commission should analyze the Trademark Settlements under the traditional rule of reason—without treating the Trademark Settlements as inherently suspect—as the Second Circuit did in *Clorox*.

Complaint Counsel "faces a difficult task" to show that the Trademark Settlements "*significantly* harm competition as a whole", *see id*. at 56, 57 (emphasis added), a burden they have not met here.[24] The inquiry is not simply whether the Trademark Settlements limited competition; some impact on competition is acceptable as a predictable result of the trademark policy, as the *Clorox* court addressed directly:

> It may well be that the restrictions in the [trademark settlement] agreement prevent Clorox from competing as effectively as it otherwise might. . . . The antitrust laws do not guarantee competitors the right to compete free of encumbrances, however, so long as competition as a whole is not significantly affected. . . . [T]he fact that Clorox can still compete despite the [trademark settlement] Agreement, and that numerous other companies are also capable of competing against Reckitt, seriously undermines Clorox's [antitrust] claim.

---

23 As discussed below, *see* Section 0(A)(4)(a), *infra*, I disagree with the majority's characterization of the Trademark Settlements as "unusual". *See* Op. at 13-14. The Trademark Settlements, much like the agreement at issue in *Clorox*, "merely regulate[ ] the way a competitor can use a competing mark." *Clorox*, 117 F.3d at 55-56. The majority do not dispute that bidding on a trademarked keyword constitutes a "use" under the Lanham Act. In addition, the Second Circuit in *Clorox* held that courts should give "substantial weight" to the scope of agreements settling trademark infringement litigation. *Id*. at 60.

24 Even if the majority were correct that the Trademark Settlements constitute a naked restraint of trade, they still may not be anticompetitive. As a leading antitrust treatise noted, "even a 'naked' horizontal market-division agreement is competitively harmless if it occurs in a competitive market in which the defendants are merely a few among several serious players *or* if the restraint does not suggest a significant potential for reducing marketwide output." PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 2046(b)(4) (emphasis added) (discussing *Clorox* as an example that fits this general statement). The market for the retail sale of contact lenses is clearly competitive and, according to Judge Chappell, "Complaint Counsel does not contend that the Challenged Agreements reduced the output of contact lenses." ID at 153 n.36.

Id. at 59 (citations omitted). The limited advertising restrictions contained in the Trademark Settlements may well prevent 1-800 Contacts and the counterparties to the Trademark Settlements from competing free of encumbrances. The record reflects that competitors' advertisements may be less effective without the use of 1-800 Contacts' trademarks. But these restrictions do not *significantly* affect competition as a whole because the counterparties to the Trademark Settlements are still capable of competing against 1-800 Contacts—including by selling to whomever they wish, advertising aggressively, and even buying advertisements on search engines, just not all advertisements—as are numerous other sellers of contact lenses, including other online retailers (e.g., Lens.com), independent eye care professionals ("ECPs"), optical retail chains (e.g., Visionworks), mass merchants (e.g., JCPenny), and club stores (e.g., Costco).[25] To paraphrase the *Clorox* court, the fact that the counterparties can still compete despite the Trademark Settlements, and that numerous other companies are also capable of competing against 1-800 Contacts, seriously undermines Complaint Counsel's claim.

c) The Majority Fail to Distinguish *Clorox*.

Clorox is the most directly applicable precedent, and the majority's attempts to distinguish it are not convincing. They point to the purported strength of the trademark infringement claim in *Clorox*, contrasting it with what they believe were weak claims asserted by 1-800 Contacts. *See* Op. at 26-27. As discussed below (*see* Section 0(A)(4)(a), *infra*), precedent, both parties in this case, the ALJ, and good policy all counsel against the Commission substituting its own view of the quality of non-sham intellectual property infringement claims for the business judgment of the contracting parties.[26] Even if the majority's assessment of 1-800 Contacts' infringement claims were accurate, *Clorox* remains applicable for at least two reasons. First, the *Clorox* court made clear that its rule applied even to weak trademark claims. *Clorox*, 117 F.3d at 57 (noting that its analysis should apply "[e]ven if [a settlement] agreement only marginally advances trademark policies"). Second, as authoritative antitrust commentators have noted, the trademark claims at issue in *Clorox* were, in fact, not strong at all. The authors of one prominent treatise questioned "whether the Pine-Sol name manifested a confusing similarity to the older Lysol name", noting that the Patent and Trademark Office examiner's conclusion that the marks were similar was "somewhat dubious". PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 2046(b)(4) (2018).

The majority also distinguish *Clorox* as involving only two competitors, whereas the "Challenged Agreements covered 14 different online contact-lens retailers that account for 79 percent of online contact lenses in the United States" and "cover the landscape of online contact-

25 The majority have not defined a relevant product market (*see* Section 0(D), *infra*), so they cannot claim that competition from companies other than the pure play online retailers do not compete directly with 1-800 Contacts.

26 Consider the converse: a trademark infringement claim that everyone agrees is strong. Would *Clorox* then apply? If so, then the majority appears willing to put the factual cart (claim strength) before the analytical horse (inherently suspect). And, if *Clorox* still would not apply, would the majority deem "inherently suspect" a settlement of an unquestionably strong trademark infringement claim?

lens retailers".[27] Op. at 33. In the absence of a properly defined relevant product market (*see* Section 0(D), *infra*), however, neither the numerosity of the Trademark Settlements nor what portion of "online contact-lens retailers" they cover is meaningful—it is far from clear, in other words, that settlements with fourteen companies here are meaningfully different from the one settlement involving two companies at issue in *Clorox*. The record reflects that sales by online retailers account for only 17% of total contact lens sales in the United States, IDF 491, and the Trademark Settlements do not include certain large online sellers, such as Lens.com, that account for at least 21 percent of online sales. *See* Op. at 8, 33. If the majority believe that there is some smaller relevant market in which 1-800 Contacts has market power, they should define that market.

The majority go on to argue that "[p]redictably, Clorox was unable to muster much evidence of consumer harm." *Id*. at 33. But they focus on the wrong reason that the lack of such evidence was predictable. The Second Circuit in *Clorox* noted the consensus that "trademarks are by their nature non-exclusionary" because "unlike other intellectual property rights, [a trademark] does not confer a legal monopoly on any good or idea". *Clorox*, 117 F.3d at 56. Trademark owners cannot prevent others from manufacturing and selling identical goods under a different mark and, as a result, "the opportunity for effective antitrust misuse of a trademark, as distinguished from collateral anti-competitive activities on the part of the manufacturer or seller of the goods bearing the mark, is so limited that it poses a far less serious threat to the economic health of the nation." *Id*. (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 298 F. Supp. 1309, 1314 (S.D.N.Y. 1969), *aff'd in relevant part*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971); and citing McCarthy 4th Edition, § 31:96). Thus, the difficulty of showing harm was not specific to *Clorox* and it is not specific to this case;[28] rather, it applies to trademark cases generally.

Contrary to *Clorox*, and citing *Actavis*, the majority believe that the Commission should second guess the form and scope of all settlements of trademark infringement litigation. *See* Op. at 33-34. This approach misses the mark in two important ways. First, the record reflects that non-use agreements are standard means of settling trademark disputes, *see* RX0734 (Hogan Expert Report) at 096, and bidding on trademark terms as keywords is a recognized "use in commerce" under the Lanham Act, *see, e.g.*, *Rescuecom*, 562 F.3d at 127, 129-30. Second, it was the form of the settlement in *Actavis*—namely the splitting of monopoly profits among the settling parties to the detriment of consumers—that led the Court to open the door to liability. *See Actavis*, 570 U.S. at 153-56. The Trademark Settlements include no splitting of monopoly profit—indeed, no material amount of money changed hands. *See* Section 0(0)(0), *supra*. Nor, again, are they associated with the kind of conduct—price fixing, etc.—that has raised the suspicion of courts. *See* Section 0(A)(2), *supra*.

---

27 This portion of the majority opinion is just one of the several instances in which the majority inappropriately group the Luxottica Agreement in with the Trademark Settlements. *See* Section 0, *infra*; *see also* Op. at 10 (defining the term "Challenged Agreements" to encompass the Trademark Settlements and the Luxottica Agreement).

28 As discussed below, I do not believe Complaint Counsel has met its burden to show direct anticompetitive effects in this case. *See* Section 0(B), *infra*.

According to the majority, *Clorox* involved labeling and, therefore, is not applicable here. *See* Op. at 14 (citing *Clorox*, 117 F.3d at 57); *see also* Draft Oral Arg. Tr. 43:19-44:6 (Complaint Counsel asserting that *Clorox* "was a case about labeling."). The majority cite no case for the proposition that, for trademark law purposes, labeling and advertising are categorically different, nor am I aware of any. Courts apply the same fact-specific test to determine the likelihood of customer confusion regardless of whether the use of the trademark was on a label or in an advertisement. *See, e.g.*, *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1125-31 & n.7 (9th Cir. 2014) (analyzing both "labels and advertising materials" under the eight-factor test for likelihood of customer confusion developed in *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979), *abrogated on other grounds by Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 810 n.19 (9th Cir. 2003)). Leaving aside the law and considering the facts, the non-use agreement in *Clorox* operated in a manner similar to the Trademark Settlements, which themselves are a type of non-use agreement. The non-use agreement at issue in *Clorox* did not restrict Clorox or other firms from producing and selling products in direct competition with the Lysol brand as long as Clorox did not put the name "Pine-Sol" on those products. Op. at 14. And, likewise, the Trademark Settlements do not "in any way restrict [the other online contact lens retailers] from producing and selling products that compete directly with the [1-800 Contacts] brand," so long as they do not advertise in response to searches for 1-800 Contacts' trademarks. *See Clorox*, 117 F.3d at 57. That is a critical distinction under *California Dental*, because it demonstrates how price signals can continue to reach the market, making the link between the restraints and any price effect attenuated.

It also bears repeating that the Second Circuit in *Clorox* stated that the form and scope of trademark settlement agreements deserve "substantial weight" because the settling parties "are in the best position to determine what protections are needed" and "it is usually unwise for courts to second-guess such decisions." *Id*. at 60. Thus, even if the form or effect of the Trademark Settlements differed substantially from those at issue in *Clorox*, the Commission should give the parties' desired means of settlement deference because of the property right at issue and the absence of an auxiliary illegal agreement. *Id*.

4. The Majority's Rule Will Have Negative Consequences.

Treating the Trademark Settlements as "inherently suspect" yields an unclear rule that, regardless of interpretation, will, I fear, create uncertainty, dilute trademark rights, and dampen inter-brand competition. The majority couch their holding as a limited one dealing with restraints on the opportunity to make price comparisons, but, by adopting an analytical framework without accounting for the intellectual property at issue, they produce one of the following rules: either all advertising restrictions are inherently suspect, regardless whether they protect intellectual property rights, or the level of scrutiny applied to a particular restraint will depend on the strength of the trademark holder's underlying infringement claim.

The majority make it clear that they do not intend to label all advertising restrictions "inherently suspect", *see* Op. at 22, but several parts of their analysis suggest precisely such a conclusion. First, their determination that the Trademark Settlements are "inherently suspect" avoids any mention whatsoever of trademarks. *See id*. at 18-22. The majority rely heavily upon

Polygram, but untether the advertising ban from the ban on discounting that led the D.C. Circuit to find liability. So the assertion stands alone, regardless of the existence of intellectual property. Second, the majority rely on precedents that do not involve trademarks, or intellectual property of any kind, and dismisses the one case—*Clorox*—that looks at a trademark settlement through the lens of antitrust law. In doing, they effectively declare that any advertising restraint is "inherently suspect", regardless whether such restraint is intended or necessary to protect intellectual property.[29] The majority cast this case as unique because the Trademark Settlements reduced the *opportunity* of some consumers to see some advertisements sometimes, but this description has no apparent limiting principle. Advertising is designed to grab attention, including through the use (or misuse) of trademarks. All of this raises a serious concern that the rule the majority today promulgates (i) is overbroad and (ii) will reach procompetitive conduct.

Because the majority explicitly eschew a rule condemning all advertising restrictions, regardless whether they protect intellectual property rights, their reasoning suggests a rule under which the standard of review depends on (the Commission's view of) the strength of the underlying trademark infringement claim. For infringement claims that the Commission deems weak or implausible, the challenged restraint will be deemed "inherently suspect". This approach leaves open the question of how the majority would treat infringement claims that they believe are strong. Such a rule would put the factual cart ahead of the analytical horse, is wrong as a matter of law, and will require the Commission to litigate (or re-litigate) the underlying infringement claim—in every case—to determine what standard of review it will apply. That is precisely what happened here.

a) The Commission Should Not Litigate Inherently Fact-Intensive Infringement Claims.

The majority claim that they are not evaluating the underlying infringement claims. *See* Op. at 40 ("We are neither deciding matters of trademark law nor suggesting that to determine whether the Challenged Agreements unreasonably restrain competition, we need to conduct a mini-trial on the merits of the underlying trademark litigations."). But that is not the approach reflected in their opinion. Instead of following *Clorox* and according trademarks their appropriate weight, the majority rest several key conclusions on the premise that 1-800 Contacts' underlying trademark infringement claims were weak. The majority:

- Ignore the presence of 1-800 Contacts' intellectual property in their "inherently suspect" analysis, *see id*. at 18-22;

- Opine that customer confusion—part of 1-800 Contacts' trademark infringement claims—is not at issue when evaluating 1-800 Contacts' procompetitive justifications, *see id*. at 27;

29 For instance, the majority assert that "[r]estricting the availability of truthful information that guides consumer decisions in the marketplace is a competitive harm." Op. at 43.

- Distinguish *Clorox* based on a value judgment that the trademark infringement claims at issue in that case were somehow stronger than 1-800 Contacts' infringement claims, *see id*. at 26-27;

- Dismiss 1-800 Contacts' trademark infringement claims based on an abbreviated evaluation of consumer confusion,[30] which is a deeply factual issue, *see id*. at 28-29; and

- Reject 1-800 Contacts' trademark-related procompetitive justification based on their view of the strength of the underlying infringement claims, *see id*. at 37-40 & n.42.

The majority do all of this notwithstanding the universal agreement (from the ALJ, Complaint Counsel, and Respondent) that evaluating the relative strength of 1-800 Contacts' infringement claims is unnecessary, improper, or both. ID at 171 ("[D]elving into the merits of 13 trademark lawsuits, after the fact, to determine whether or not 1-800 Contacts could ultimately have proven infringement, if even possible, would require unacceptable speculation and would constitute an unnecessary waste of judicial resources.") (citing *In re Schering-Plough Corp.* ("*Schering-Plough I*"), 136 F.T.C. 956, 997 (2003), *vacated on other grounds sub nom., Schering-Plough Corp. v. FTC* ("*Schering-Plough II*"), 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006)); Draft Oral Arg. Tr. 49:5-13 (Complaint Counsel stating that "[i]t does not make a whit of difference whether 1-800 Contacts would have lost or won every single case it brought."); *id*. at 59:14-23 (Complaint Counsel explaining why "we don't need to evaluate the merits of the trademark claim"); RAB at 37-38. The reason the parties agree on this is clear: both precedent and sound policy counsel against having antitrust liability turn on *ex post* fact-intensive inquiries into the validity of non-sham intellectual property infringement claims. *See Schering-Plough I*, 136 F.T.C. at 997 ("An after-the-fact inquiry by the Commission into the merits of the underlying litigation is not only unlikely to be particularly helpful, but also likely to be unreliable."). Complaint Counsel has taken a similar position in other litigation. *See, e.g.*, Reply Brief for the Petitioner at 6, *Actavis*, 570 U.S. 136 (No. 12-416) ("We agree that the antitrust analysis of a Hatch-Waxman [reverse payment] settlement should not turn on a judicial assessment of the strength or scope of the *particular* patent involved in the case.") (emphasis in original).

Actavis makes it clear that the Commission should not be in the business of evaluating the underlying infringement case when deciding an antitrust challenge; indeed, the *Actavis* Court explicitly declined do so. *See Actavis*, 570 U.S. at 159 ("To say this is not to require the courts to insist . . . that the Commission need litigate the patent's validity"); *id*. at 158 ("[A] court, by examining the size of the payment, may well be able to assess its likely anticompetitive effects along with its potential justifications *without litigating the validity of the patent*") (emphasis

30 The majority claim that their opinion does not hinge on the merits of the trademark infringement claim. Op. at 28 n.27. As this section demonstrates, the majority's view of the strength of 1-800 Contacts' infringement claims permeates their opinion. To the extent their opinion also applies to settlements of "strong" infringement claims, the majority do not answer the question of what standard would apply, or how that fact would bear on the analysis of a respondent's procompetitive justifications.

added); *id*. at 153 (recognizing "the patent litigation problem"). The Court's willingness to subject the reverse payment settlements to rule-of-reason analysis stemmed not from the underlying merits but from the "unusual" nature of the settlements, including large payments by the plaintiff-branded pharmaceutical manufacturer to the defendant-generic pharmaceutical manufacturer in exchange for the generic staying out of the market entirely, which kept prices high while the brand and generic manufacturers split the monopoly profits. *See id*. at 154. The Trademark Settlements are nothing like that: no material amount of money changed hands, so the settling parties did not divide monopoly profits at the expense of the consumer, and, most importantly for the present case, no supplier of contact lenses agreed to stay out of the market.[31]

The general rule of not evaluating the merits of non-sham intellectual property claims is particularly apropos in the trademark infringement context because the legal issues generally—and customer confusion in particular—involve fact-specific inquiries that should be decided by a judge or jury. As the Fourth Circuit held in a case that also involved alleged trademark infringement caused by paid keyword search advertising, "the likelihood of confusion issue . . . is 'an inherently factual issue that depends on the facts and circumstances in each case.'" *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 153 (4th Cir. 2012) (quoting *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 933 (4th Cir. 1995)); *see also Hearts on Fire Co., LLC v. Blue Nile, Inc.*, 603 F. Supp. 2d 274, 288 (D. Mass. 2009) (refusing to grant the defendant's motion to dismiss because where "a plaintiff has alleged a plausible likelihood of confusion based on the overall context in which a consumer performs his internet search, he has stated a claim for trademark infringement and may proceed on an initial interest theory.") (internal reference omitted); *Fair Isaac Corp. v. Experian Info. Solutions Inc.*, 645 F. Supp. 2d 734, 761 (D. Minn. 2009) (refusing to grant summary judgment because "genuine issues of material fact" remained regarding "whether Defendants' purchase of keywords including [Plaintiff]'s trademarks, which caused Defendants' websites to appear on the results page when a consumer ran an internet search consisting of those keywords, created a likelihood of confusion"), *aff'd on other grounds*, 650 F.3d 1139 (8th Cir. 2011); *Soilworks, LLC v. Midwest Indus. Supply, Inc.*, 575 F. Supp. 2d 1118, 1132 (D. Ariz. 2008) (granting summary judgment on mark owner's trademark infringement counterclaim because "the undisputed evidence in this case establishes that [the counterclaim-defendant] diverts the initial attention of potential Internet customers to its websites by using [the counterclaim-plaintiff's] trademark in keywords and metatags.").

Although the Commission should not evaluate the underlying infringement claim, the majority overstates the clarity of trademark law at the time of the Trademark Settlements. The record reflects that the parties entered the Trademark Settlements precisely because of the possibility that bidding on trademarked terms as keywords created liability for infringement, a reality exacerbated by the *Rescuecom* decision. *See, e.g.*, IDF 333, 349; Holbrook, Tr. 1942:12-13; CX9024 at 017 (Holbrook Dep. 63:13-18); Hogan, Tr. 3256:11-19, 3260:21-3261:4.

---

31 The majority claim that the Trademark Settlements are likewise "unusual" because they "reach[ ] farther than a cure based on rewording a label or an ad". Op. at 14. As *Clorox*—the case the majority cite for this proposition—makes clear, even aggressive assertions of trademark rights are procompetitive. *Clorox* 117 F.3d at 60-61. A standard non-use restriction that goes farther than an *ex post* proposed remedy does not take us out of that category, much less provide a basis for antitrust liability.

The majority also address *Soilworks* only in passing. *See* Op. at 38. In that case, a federal district court granted summary judgment because it found that the mark owner (Midwest) had met its burden to show that the use of its trademarks as keywords in paid search advertising and metatags by the alleged infringer (Soilworks) caused initial interest confusion.[32] *Soilworks*, 575 F. Supp. 2d at 1132. The *Soilworks* court considered, *inter alia*, the similarity between the keyword purchased by the alleged infringer and the trademark, the relatedness of the goods sold by the parties, and the marketing channels employed by the two companies.[33] *Id*. at 1131. *All* of these factors would weigh in favor of a finding for 1-800 Contacts on a claim for initial interest confusion. And the district court's holding in *Soilworks* could have applied equally to one of 1-800 Contacts' trademark infringement claims:

> A person typing "soil sement" into a search engine presumably would be somewhat familiar with Midwest's product and would be looking for the product or its maker, and yet would be directed by the keywords and metatags to Soilworks' websites. The confusion—thinking one would be connected to Midwest when in fact Soilworks' websites also appear in the search results—would entirely be caused by Soilworks' use of Midwest's mark.

Id. at 1132. The majority's dismissal of *Soilworks* as "a single district court summary judgment decision from over ten years ago", Op. at 38, fails to account for the fact that *Soilworks* was decided just ten months before the wave of Trademark Settlements that followed *Rescuecom* began, and was therefore precisely the type of case that the settling parties would have considered at the time they entered the Trademark Settlements.

Like *Rescuecom*, *Soilworks* predated almost all of the Trademark Settlements. Those cases and other developments fed the legal uncertainty surrounding paid search advertising using trademarked keywords. Allegations of infringement based on trademark keyword bidding withstood dispositive motions. *See id*. at 38 & n.40.[34] And a judge could have ordered the same

---

32 The district court in *Soilworks* distinguished initial interest confusion from source confusion:

> Although the core element of trademark infringement is whether the similarity of the marks is likely to confuse customers about the source of the products, the Ninth Circuit and other courts have recognized a variation of trademark infringement that does not require such confusion. Under the 'initial interest confusion' theory of trademark liability, 'source confusion' need not occur. Rather, initial interest confusion occurs when the defendant uses the plaintiff's mark in a manner calculated to capture initial consumer attention. . . . When accomplished through the use of key words or metatags on the Internet, this wrongful conduct may involve no deception of the consumer. The consumer is simply led to the defendant's website through the unseen keywords and metatags the defendant has purchased on the web.

Soilworks, 575 F. Supp. 2d at 1129-30, 1131 (internal quotation marks, alterations, citations, and footnotes omitted).

33 The district court also identified several other factors that other courts have used to evaluate consumer confusion, but found them "less relevant", "of little import", of "diminished importance", "not directly relevant", or "relatively unimportant" in the keyword/metatag context. *Soilworks*, 575 F. Supp. 2d at 1132 (citations omitted).

34 In addition to the cases cited by the majority, other infringement claims based on trademark keyword search advertising survived dispositive motions. *See, e.g.*, *Tokyo Broadcasting Sys. v. Am. Broadcasting Cos., Inc.*, No. 08-

relief that is contained in the Trademark Settlements. *See, e.g.*, RX0679 at 005. Indeed, multiple federal judges later did. IDF 337 ("The court's order prohibited LensWorld from purchasing

1-800 Contacts' federally registered trademarks as keywords for any search engine advertising program and required LensWorld to implement certain negative keywords . . . where possible.") (citation and internal quotation marks omitted); CX0144; CX0162; Pratt, Tr. 2558:5-2559:4 (discussing CX0162). The parties may not have taken as dim a view of 1-800 Contacts' trademark infringement claims as the Commission does today. Cases on the books at the time of the Trademark Settlements suggested that using trademarked terms as keywords could constitute infringement regardless of the content of the advertisement.[35] *See, e.g.*, *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1024-26 (9th Cir. 2004) (keywords and metatags); *see also Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1057 (9th Cir. 1999) (domain names and metatags).

At most, the majority have shown that the legal status of using trademarked terms as keywords in paid search advertising was uncertain. When the settling parties entered the Trademark Settlements, courts did not "consistently reject[ ] the notion that buying or creating internet search terms" did not constitute trademark infringement. *See* Op. at 38-39 (quoting *Tempur-Pedic N. Am., LLC v. Mattress Firm, Inc.*, No. 17-1068, 2017 WL 2957912, at *7 (S.D. Tex. July 11, 2017)). To the contrary, most courts viewed trademark infringement and customer confusion in the context of paid search advertising as fact specific inquiries that should be decided by judges and juries. *See, e.g.*, *Gov't Emps. Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700, 704 (E.D. Va. 2004). The risk of liability for trademark infringement became even more serious after the Second Circuit's decision in *Rescuecom*. *See* Section 0(0)(C), *supra*.

The complexity of the legal regime and the majority's *ex post* determination of an inherently fact-specific question underscore the general rule that the Commission should not be in the business of litigating (or re-litigating) the underlying trademark infringement claim.

---

cv-6550, 2009 WL 10668456, at *11 (C.D. Cal. Aug. 12, 2009); *Gov't Emps. Ins. Co. v. Google, Inc.* ("*GEICO*"), 330 F. Supp. 2d 700, 704 (E.D. Va. 2004).

35 In a footnote, the majority cite a bevy of cases to support their claim that courts have consistently held that buying trademarked terms as keywords, standing alone, is insufficient to prove trademark infringement. *See* Op. at 39-40 n.43. However, almost all of those cases postdated the Trademark Settlements, so they could not have factored into the parties' decision to settle 1-800 Contacts' trademark infringement claims. *See id.* The few cases cited by the majority that predated the Trademark Settlements show—at most—that the legal landscape was uncertain, and support the fundamental proposition that trademark infringement and customer confusion are inherently fact-specific. *See, e.g.*, *GEICO*, 330 F. Supp. 2d at 704 ("Whether defendant's [trademark] uses . . . create a likelihood of confusion [is a] fact-specific issue[ ] not properly resolved through a motion to dismiss."); *Gov't Emps. Ins. Co. v. Google, Inc.*, No. 04-cv-507, 2005 WL 1903128, at *4 (E.D. Va. Aug. 8, 2005) ("[T]he Fourth Circuit has emphasized that likelihood of confusion is a highly factual issue, the assessment of which depends largely on the particular circumstances of each case, . . . and that the likelihood of confusion standard does not require that a plaintiff prove actual confusion.") (citations omitted).

b) The Majority's Approach Will Reduce Brand Investment Incentives.

Predicating antitrust liability on an *ex post* judgement about the strength of intellectual property infringement claims—or ignoring the context of their protection entirely—not only will reduce clarity in the law, but also threatens to chill the procompetitive investment that is one of the hallmarks of trademark law. As Complaint Counsel's expert, Dr. Evans, put it:

> Trademarks help companies convey information to consumers about themselves and their products. They enable companies, for example, to use a brand name to signal to consumers that the company provides a high quality product or offers particular attributes that consumers care about. Protecting trademark rights encourages investment in this sort of brand-building activity, which in turn generates valuable market information, promotes competition and ultimately benefits consumers. Moreover, trademark policy prevents the spread of misinformation as when a company claims falsely that it produces the same brand of a competitor or tries to confuse consumers into thinking they do by using similar words.

CX8006 (Evans Expert Report) at 135. In other words, trademark protection gives companies an incentive to maintain their reputations and improve quality, which promotes competition. *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 193 (1985) ("[T]rademarks desirably promote competition and the maintenance of product quality"); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 269 (1987) ("[T]rademark protection encourages expenditures on quality"); J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 2:4 (5th ed. June 2018) [hereinafter "McCarthy 5th Edition"].

Competition is not the only benefit of trademark protection; by encouraging brand investment, it also fosters innovation and gives more information to customers. *See, e.g.*, Landes & Posner, *supra*, at 269 ("In short, a trademark conveys information that allows the consumer to say to himself, 'I need not investigate the attributes of the brand I am about to purchase because the trademark is a shorthand way of telling me that the attributes are the same as that of the brand I enjoyed earlier.'") (footnote omitted). "An important purpose underlying trademark law is the protection of the trademark owner's investment in the quality of the mark and the quality of the goods or services the mark identifies. . . . 'By contrast, if there were no trademarks . . . a manufacturer would gain little or nothing from improving his product's quality. . . . The result would be a race to produce inferior products, rather than competition to produce better ones.'" McCarthy 5th Edition, *supra,* § 2:4 (quoting Richard Craswell, *FTC Policy Planning Issues Paper: Trademarks, Consumer Information and Barriers to Competition,* at 7 (1979)).

The procompetitive benefits of trademarks are precisely why courts like the Second Circuit have encouraged zealous trademark enforcement, and declined to impose upon mark owners the fear of treble antitrust damages. *See, e.g.*, *Clorox*, 117 F.3d at 61 ("Efforts to protect

trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies."); *Drop Dead Co. v. S. C. Johnson & Son, Inc.*, 326 F.2d 87, 96 (9th Cir. 1963) ("[T]he bringing of infringement suits based on colorable similarity rather than on exact identity . . . constitute[s] the sort of aggressive competition and promotion that anti-trust law seeks to protect"), *cert. denied*, 377 U.S. 907 (1964); *see also Car-Freshner Corp. v. Auto Aid Mfg. Corp.*, 438 F. Supp. 82, 87 (N.D.N.Y. 1977) ("[T]he acts of the plaintiffs in registering and enforcing the trademark in issue . . . merely represent fair and aggressive competition which does not constitute a violation of the antitrust laws") (citation omitted). Zealous protection is precisely what 1-800 Contacts did here.

The crux of the majority's antitrust story underscores the point. The search engine results pages that appear in response to searches for "1-800 Contacts" were the supposed "critical battleground"[36] for competition precisely—and only—because of 1-800 Contacts' brand investment. *See, e.g.*, CX9033 at 017 (Mohan Dep. 61:9-12); CX9039 at 026, 040 (Clarkson Dep. 97:20-98:3, 155:25-156:8). In other words, 1-800 Contacts engaged in the type of brand investment envisioned by trademark policy, and, combined with its excellent service and constant efforts to improve the customer experience, built a brand that customers trust. The company then sought zealously to protect its brand.

Assigning liability—and the potential for treble damages, no less—to this conduct will not only chill brand investment, it will chill the very competition the majority seeks to protect.

c) The Policy Favoring Litigation Settlements Supports Application of the Traditional Rule of Reason.

Trademark policy is not the only one at stake. "Few public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute." *Am. Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986) (citations omitted); *accord Williams v. First Nat'l Bank of Pauls Valley*, 216 U.S. 582, 595 (1910); *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 656 (1898); *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982). That is because settlements of complex litigation allow the settling parties to avoid "a litany of direct and indirect costs". *Schering-Plough II*, 402 F.3d at 1075. Consistent with this precedent, both parties' experts agreed that settlements are economically efficient. *See* CX9042 at 050 (Evans Dep. 196:22-24); RX0739 (Murphy Expert Report) at 053; Murphy, Tr. 4207:22-4208:25; RX0737 (Landes Expert Report) at 017.

The majority's rule effectively makes non-use agreements—the most common means of settling trademark infringement litigation,[37] and favored in their own right on policy grounds[38]—"inherently suspect", opening the door to reviewing and/or litigating many more trademark

36 Draft Oral Arg. Tr. 39:20-22; *see also* Op. at 14, 30, 32, 34 (describing the search engine results pages displayed in response to searches for 1-800 Contacts' trademarked terms as the "key moment" or "crucial moment" of competition).

37 *See* RX0734 (Hogan Expert Report) at 096.

38 Trademark non-use agreements are "usually entered into to settle an infringement dispute", are "not against public policy", and "are routinely upheld and enforced." McCarthy 5th Edition, *supra*, § 18:82 (footnote omitted).

settlements. This will increase the risk of settling trademark infringement litigation, which is efficient in part because it reduces risk. This is particularly so where, as here, the real issue is the highly fact-specific question of confusion. The Second Circuit explained the point in *Clorox*:

> [T]rademark agreements are favored in the law as a means by which parties agree to market products in a way that reduces the likelihood of consumer confusion and avoids time-consuming litigation. Parties such as Clorox, Sterling, and their predecessors, are in a position to structure such agreements in the way that the parties believe best accommodates their interests in light of trademark law. Accordingly, in the absence of any evidence that the provisions relating to trademark protection are auxiliary to an underlying illegal agreement between competitors—such as the territorial market division condemned in *Timken* [*Roller Bearing Co. v. U.S.*, 341 U.S. 593 (1951)]—and absent exceptional circumstances, we believe the parties' determination of the scope of needed trademark protections is entitled to substantial weight. At the time of the execution of such an agreement, the parties are in the best position to determine what protections are needed and how to resolve disputes concerning earlier trademark agreements between themselves. . . . In the absence of evidence to the contrary it is reasonable to presume that such arms-length agreements are pro-competitive.

Clorox, 117 F.3d at 60.[39]

A rule requiring the *post hoc* evaluation of intellectual property infringement claims will be difficult for us to apply, but also, and more importantly, for private parties to self-administer. What level of infringement confidence is required? Are plaintiffs only allowed to settle trademark infringement claims that they know they are going to win? That certainly can't be the

---

39 The Ninth Circuit rejected a challenge to a trademark settlement agreement for similar reasons:

> If the merits of a cause of action underlying a [trademark] compromise agreement could, as a matter of course, be inquired into in an action to enforce the settlement, neither settlement nor the policies it promotes would be fostered. The parties would be subjected to the expense, delay, and uncertainty they sought to avoid through settlement; the court would be burdened with trial of the underlying dispute and the preparation which precedes it.

MWS Wire Indus., Inc. v. Cal. Fine Wire Co., Inc., 797 F.2d 799, 802 (9th Cir. 1986); *see also T & T Mfg. Co. v. A. T. Cross Co.*, 449 F. Supp. 813, 827 (D.R.I. 1978) ("[T]he Court must balance the public interest against confusion, one of the significant purposes of trademark law, against the interest in enforcing contracts and protecting the reliance they induce. [¶] The Court must also add into this balance the interest in encouraging extra-judicial settlement of trademark litigation. *Insisting that a court review a settlement to assure that no public confusion will result would make such agreements of little value to the parties.* Parties would sensibly conclude that they might better litigate the issue of confusion to conclusion rather than reach a settlement which might later be found to be unenforceable. Such a premium on litigation would lead to a further drain on judicial resources. Moreover, we note the advantage of allowing business persons to determine whether their self-interest is better served by making such contracts or not.") (emphasis added), *aff'd*, 587 F.2d 533 (1st Cir. 1978), *cert. denied*, 441 U.S. 908 (1979).

standard. Regardless, we are ill-equipped to judge. Clarity may only result from substantial litigation that follows the majority's opinion, animated by the prospect of treble damages.

B. The Evidence That the Trademark Settlements Had Direct Anticompetitive Effects Is Insufficient.

If the Trademark Settlements are not "inherently suspect", which they are not, Complaint Counsel can meet their initial burden of proof under the rule of reason in one of two ways: "an indirect showing based on a demonstration of defendant's market power" or "direct evidence of 'actual, sustained adverse effects on competition'". *Realcomp I*, 2007 WL 6936319, at *31 (quoting *FTC v. Indiana Federation of Dentists* ("*IFD*"), 476 U.S. 447, 461 (1986)) (other citations omitted). The majority take only the direct approach; they do not attempt an indirect showing of market power. *See* Section 0(D), *infra*. To meet the initial burden of proof with direct evidence, a plaintiff must show adverse effects on competition that are actual, sustained, and significant or substantial. *See Realcomp I*, 2007 WL 6936319, at *31; Op. at 17 ("[T]he plaintiff has the burden to prove that the challenged restraint has, or is likely to have, a substantial anticompetitive effect that harms consumers."); *Ohio v. Am. Express Co.* ("*AmEx*"), 138 S. Ct. 2274, 2284 (2018) ("Under [the rule of reason] framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers"); *Realcomp II*, 635 F.3d at 831-32 ("substantial consumer harm"); *Clorox*, 117 F.3d at 57 (requiring the plaintiff to show that the trademark settlement agreement "may significantly harm competition as a whole"). Complaint Counsel have not met that burden with its showing on direct effects.

1. In the Context of a Trademark Settlement Agreement, a Restriction on Advertising Is, by Itself, Insufficient to Show Direct Effects.

The majority first argue that Complaint Counsel established direct effects by showing that advertising was limited by the Trademark Settlements. But the Supreme Court held in *California Dental* that restrictions on advertising, by themselves, are insufficient to show anticompetitive harm.[40] *See Cal. Dental*, 526 U.S. at 776. The relevant inquiry is whether an advertising restriction limited output of the underlying product or service. *See id*. ("The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit [output of the underlying product or service].").

Other than *California Dental*, the only cases cited by the majority for the proposition that a reduction in advertising, by itself, is sufficient to show direct effects are *Indiana Federation of Dentists* ("*IFD*") and *Realcomp, see* Op. at 42-43, neither of which supports that proposition. Indeed, neither case involved advertising, a point the majority apparently concede. *See id*. at 43.

The majority rely on *IFD* for the proposition that a concerted effort to withhold "information"—a broad and nebulous category—constitutes a competitive harm and, therefore,

40 As discussed above, the majority's attempts to distinguish *California Dental* fail. *See* Section 0(A)(2)(a)(i), *supra*.

any limitation on "information" constitutes direct evidence of anticompetitive effects. *See id*. at 42-43, 46 n.49. They misread the case. In *IFD*, the Supreme Court considered "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire", specifically, providing x-rays to insurers. *IFD*, 476 U.S. at 459. Thus, *IFD* is a case about agreeing not to provide a service, not about information or advertising. The Commission and the D.C. Circuit recognized as much in *Polygram*. *See Polygram I*, 136 F.T.C. at 335 (describing the restraint at issue in *IFD* as "an agreement among dentists to withhold from their customers a desired service"); *Polygram II*, 416 F.3d at 36 ("[I]n *IFD*, the Supreme Court ruled a horizontal agreement to withhold services could not be sustained"). As did the Supreme Court in *California Dental*, *see Cal. Dental*, 526 U.S. at 770, and other courts in the years since *IFD*. *See, e.g.*, *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 317 (2d Cir. 2008); *Int'l Healthcare Mgmt. v. Hawaii Coal. for Health*, 332 F.3d 600, 606 (9th Cir. 2003). Even assuming the majority's categorization of *IFD* were accurate (which it is not), nothing in *IFD* supports a finding that all restrictions on information (much less advertising), standing alone, constitute direct evidence of anticompetitive effects.[41] The defendant in *IFD* implemented an outright ban on providing x-rays to dental insurers, whereas the Trademark Settlements merely raise the search costs (marginally) to a certain set of customers for information still very much available.

The majority's reliance on *Realcomp* as an "information" restraint case is similarly misplaced. *See* Op. at 43. The conduct at issue there was a policy that prohibited the dissemination of property listing information to competitors through Realcomp's multiple listing services ("MLS"). *Realcomp II*, 635 F.3d at 819. This prevented competing realtors from offering listings (i.e., their product) to their customers. *See id*. In other words, the restraint foreclosed access to a necessary input and directly reduced downstream output, *see Realcomp I*, 2007 WL 6936319 at *25, "restrict[ing] the ability of members to offer consumers products that create 'price pressure' on more expensive products", *id*. at *5. The restraint limited output, not advertising, so the anticompetitive effect (i.e., a reduction in output) was obvious. *See Realcomp II*, 635 F.3d at 829-30. *Realcomp* cannot support a finding that reductions in advertising or information, without a concomitant reduction in output, constitute direct anticompetitive effects.

According to the majority, any restriction on truthful advertising—indeed, even less, the restriction of truthful *information* that might impede a consumer's ability to discover a lower price—constitutes direct evidence of anticompetitive harm. *See, e.g.*, Op. at 43 ("Restricting the availability of truthful information that guides consumer decisions in the marketplace is a competitive harm."). If all a plaintiff need show to establish direct effects is the existence of a restriction on advertising—regardless of justification, size, or effect—then all limits on truthful

41 Even the portion of *IFD* quoted by the majority does not support their position. *See* Op. at 43 ("As the Supreme Court explained in *IFD*, 'a concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or . . . the purchase of higher priced services than would occur in its absence.'") (quoting *IFD*, 476 U.S. at 461-62). The x-rays at issue allowed insurers to assess the appropriateness of claims for benefits. *IFD*, 476 U.S. at 455. There is no similar category of information withheld here.

advertising are, effectively, inherently suspect, a result the majority specifically disclaim.[42] *See id*. at 22. And they must, as such a rule would inevitably treat conduct that would otherwise be considered competitively neutral or even procompetitive as presumptively illegal. *See, e.g.*, *Cal. Dental*, 526 U.S. at 771 ("[I]t seems to us that the [California Dental Association]'s advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."). A trademark non-use agreement that applies to advertising is just one example.

As a matter of law, then, the majority's attempt to establish direct effects by looking only at advertising fails. It also fails as a matter of fact. While advertisements in response to competitors' trademarked search terms were limited, the majority fail to establish that the amount of advertising was reduced. *See* Section 0(E), *infra*.

2. There Is Insufficient Evidence of Direct Price Effects.

While restrictions on advertising are not themselves enough, the majority are correct that a showing of actual, sustained, and substantial or significant price effects would suffice. *See, e.g.*, *AmEx*, 138 S. Ct. at 2284; *Realcomp II*, 635 F.3d at 831-32; *Clorox*, 117 F.3d at 57; *Realcomp I*, 2007 WL 6936319, at *31; Op. at 17. I disagree that Complaint Counsel have met that burden here.

The majority's finding of direct price effects rests almost entirely on the unremarkable fact that 1-800 Contacts' prices were higher than some of its competitors' prices. *See* Op. at 46-47. The majority find that "the higher prices are a consequence of 1-800 Contacts shielding itself from competitive pressure by preventing consumers from obtaining information that would enable comparison shopping." *Id*. at 47. But Complaint Counsel failed to prove that the Trademark Settlements caused the price differential.

First, the record is clear that that price differential predated the Trademark Settlements. *See, e.g.*, *id*. at 46; CX9001 at 021 (Bethers IH 79:23-80:8) ("[W]e were never trying to compete with our online competitors on price. We basically came back and said our online competitors are going to have lower prices than we do. And they did from the day I started with the company [in July 2003]. They were significantly below our retail price."); CX0535 at 010 (2006 business plan stating that 1-800 Contacts' "pricing strategy" was to "[p]rice below independent ECPs, close to retail chains, but above our online competitors and Costco"); *see also* Coon, Tr. 2708:22-2709:9 (noting that "[l]iterally from the beginning", 1-800 Contacts' strategy was to price at a discount from ECPs but slightly higher than other online contact lens retailers; that strategy has "never changed"); IDF 434 ("1-800 Contacts on average has retail prices for contact lenses below independent ECPs and retail optical chains, but higher than mass merchants, club stores, and other online retailers.") (citation omitted).

42 Analytically, categorizing conduct as "inherently suspect" has the same result as holding that direct effects inhere in it. If the Trademark Settlements are inherently suspect, then it is hard to imagine what advertising restrictions would not be inherently suspect.

Second, Complaint Counsel has put forward no evidence that the price gap increased as a result of the Trademark Settlements. There is no clear causal connection between the price gap and the Trademark Settlements, especially considering that the gap existed before the Trademark Settlements. And there are at least two innocuous and equally plausible reasons why 1-800 Contacts' prices are higher, including its superior service[43] and customers' preference for the 1-800 Contacts brand.[44] Both of these were likely facilitated and enhanced by 1-800 Contacts' ability to earn a return on its brand.[45]

Without observable direct effects, the majority and Complaint Counsel rely on the claim that prices would have gone down but for the Trademark Settlements. But Complaint Counsel failed to quantify the amount that prices would have gone down in their but-for world. *See, e.g.*, Evans, Tr. 1723:20-1724:3 (Complaint Counsel's economic expert confirming that he did not quantify the extent to which 1-800 Contacts or any other company's prices would have gone down in the absence of the Trademark Settlements); *see also* CX8007 (Athey Expert Report) at 036 (providing no empirical evidence for her conclusions). The law requires more: specifically, actual, sustained, and substantial or significant effects. Without quantification, we cannot know whether the harm meets that test.

The majority also claim that 1-800 Contacts maintained supracompetitive prices. *See* Op. at 49. But Complaint Counsel did not adduce legally sufficient proof. "[T]o support a claim that a defendant set supracompetitive prices through direct evidence, a plaintiff must often provide an

---

43 The majority assert that certain evidence counters a finding that the service differential explains the price gap. *See* Op. at 48. But superior service is just one of the reasons that 1-800 Contacts' prices may be higher than its competitors' prices. Regardless of how persuasive one may find the evidence on the service differential, it is insufficient to show that the price gap is the result of supracompetitive pricing. Also, the majority's reliance on competitor testimony claiming that they "offer comparable service to 1-800 Contacts" is remarkable. *See id.* What competitor is going to get on the stand and testify under oath that its service is inferior?

44 *See, e.g.*, McCarthy 5th Edition, *supra*, § 2:5 (noting that neither brand preference nor paying a premium for branded products is irrational); RX0739 (Murphy Expert Report) at 081 ("Economists studying price dispersion have shown that a variety of characteristics beyond access to information, such as consumer trust, retailer brand, market and category characteristics, can play an important role in explaining price dispersion.") (footnote omitted); Borden, Inc., Proposed Order Modification with Statement to Aid Public Comment, 48 Fed. Reg. 9023, 9025 (proposed Mar. 3, 1983) (to be codified at 16 C.F.R. pt.13) (noting consumers' willingness to pay a price premium as the result of a company's "familiar and successfully advertised trademark", which "reflected a marketplace judgment about interbrand competition, which 'is the primary concern of antitrust law.'") (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52 n.19 (1977)); Complaint at 7, *In re J.M. Smucker Co. & Conagra Brands, Inc.*, Dkt. No. 9381 (F.T.C. Mar. 5, 2018) ("Differences in shelf prices for branded and private label CV [i.e., canola and vegetable] 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.").

45 As the Supreme Court has noted:

> Many decisions a manufacturer makes and carries out through concerted action can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain better inputs that improve product quality. Or it might hire an advertising agency to promote awareness of its goods. Yet no one would think these actions violate the Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices.

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 896-97 (2007).

analysis of the defendant's costs, showing both that the defendant had an 'abnormally high price-cost margin' and that the defendant 'restricted output.'" *Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 434 (3d Cir. 2016) (quoting *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 500 (2d Cir. 2004)). As for the second prong of that test, Complaint Counsel does not contend that the Trademark Settlements reduced output. *See* ID at 153 n.36.

Returning to the first prong, the majority do not even attempt to show that 1-800 Contacts' price-cost margin was abnormally high—either before or after the Trademark Settlements.[46] Instead, they rely on inferences and arguments unsupported by proven facts to show that 1-800 Contacts charged supracompetitive prices. As an initial matter, it is obvious that Complaint Counsel failed to meet their burden here because they did not proffer any evidence on margins.[47] The only evidence in the record regarding 1-800 Contacts' margins was proffered by 1-800 Contacts, and that evidence showed that 1-800 Contacts' margins [redacted] from 2003 to 2016 despite the Trademark Settlements. RX0739 (Murphy Expert Report) at 064, 107. The majority claim that "[redacted] margins do not necessarily mean prices did not rise; without competitive pressures, costs *may* have risen as prices increased, [redacted]." Op. at 49 (italicized emphasis added). This argument substitutes conjecture for actual evidence by providing one possible theory for [redacted]. It is more likely that 1-800 Contacts' [redacted] margins were not affected by the Trademark Settlements. *See, e.g.*, RX0739 (Murphy Expert Report) at 064 (stating that 1-800 Contacts' margins have been "[redacted] over time" and did not increase as a result of the Trademark Settlements, which "tells us that the settlements [redacted]."). Indeed, the founder of 1-800 Contacts testified that the company has had the same pricing and margin strategy since 1992. *See* CX9035 at 023 (Coon Dep. 86:15-87:14). Regardless of which explanation is more plausible, it is Complaint Counsel's burden to prove direct effects, and they have provided no evidence on the topic of margins.

In an effort to show that 1-800 Contacts' [redacted] profit margins could be explained by 1-800 Contacts' pre-Trademark Settlement supracompetitive prices, the majority attempt to put forward indirect evidence of market power. *See* Op. at 49. They claim that—because it was "the incumbent online seller" and had a large share of online sales—1-800 Contacts had market power, which allowed it to charge supracompetitive prices prior to the Trademark Settlements. *See id*. at 49. This argument fails as a matter of law. First, this is not an argument based on direct evidence of anticompetitive effects; rather, it is an attempt to shoehorn an indirect showing of market power into a direct effects analysis. *See Geneva Pharm.*, 386 F.3d at 500 ("[The] plaintiffs' assertion with regard to [the defendant]'s continuing high percentage market share is not direct evidence, but rather requires that we engage in the sort of inference more appropriate for market share analysis."). Second, an indirect showing of market power based on market

46 The majority also fail to show that 1-800 Contacts' margins would have been lower but for the Trademark Settlements; indeed, the record is devoid of evidence of counterfactual margins.

47 Given that Complaint Counsel bears the burden of proof to show direct effects, it is odd for the majority to argue that 1-800 Contacts somehow calculated its margins incorrectly without requiring any affirmative evidence from Complaint Counsel or any critique of 1-800 Contacts' margin calculation itself. *See* Op. at 49. It appears that the majority shift the burden to disprove direct effects to 1-800 Contacts while relieving Complaint Counsel of its burden entirely.

shares requires a properly defined market, which is absent here. *See* AREEDA & HOVENKAMP, *supra*, ¶ 531 ("Market definition is the initial step in assessing a market's structure.") (footnote omitted); *see also id*. ¶ 532(a) ("Identifying a market and computing market shares provide an indirect means for estimating market power."). Without a properly defined market, showing that 1-800 Contacts had market power based on its share of online sales is impossible. And without a showing of market power, the inference that 1-800 Contacts could have been charging supracompetitive prices also fails. As a result, it is equally (if not more) plausible that 1-800 Contacts' [redacted] margin is consistent with a finding that the Trademark Settlements had [redacted] on 1-800 Contacts' margins, rather than supracompetitive prices as the majority claim. *Cf*. Op. at 49.

The majority also claim that "[p]roof of an anticompetitive effect does not require an econometric model to estimate a precise competitive price in order to establish that the existing price is supracompetitive." [48] *Id*. While we may not need a "precise competitive price", we do need evidence of substantial (or significant) anticompetitive harm to find that Complaint Counsel met its burden to show actual, sustained, and significant or substantial direct effects, especially in the presence of real efficiencies that would weigh against any such harm. If the econometrics are insufficient to quantify harm, there is always the option of showing market power indirectly; but the majority opt not to perform that analysis here. *See* Section 0(D), *infra*.

Finally, the majority argue that the 1-800 Contacts price match policy provides evidence that the Trademark Settlements "had actual price effects". Op. at 47. But the presence of a price match policy does not prove direct effects; it is equally consistent with a desire by 1-800 Contacts to price discriminate among its customers. And the mere existence of the policy itself signals to customers that they can buy their contact lenses from other suppliers at potentially lower prices.

C. The Majority Inappropriately Discount 1-800 Contacts' Procompetitive Justifications for the Trademark Settlements.

Given that Complaint Counsel did not meet their initial burden under the inherently suspect framework or by showing direct effects (and because the majority opt not to attempt an indirect showing of market power), 1-800 Contacts need not put forward procompetitive justifications. Nevertheless, the majority fail to give appropriate credit to 1-800 Contacts' proffered procompetitive justifications.

In their preliminary analysis of 1-800 Contacts' procompetitive justifications, the majority recognize that the avoidance of litigation costs through settlement is a "legitimate" justification that is "cognizable and, at least, facially plausible". Op. at 23. The majority also concede that avoidance of litigation costs is a well-recognized procompetitive justification. *See*

48 This claim contrasts markedly with the majority's defense of the model put forward by Complaint Counsel's expert to support the alleged advertising restrictions: "The opinions of Complaint Counsel's experts derive from the facts in the record and econometric analysis of those facts. The experts use known facts to quantify the impact of the advertising restrictions on the ads that would otherwise appear and on the consumer responses—including clicks and purchases—thereto. They provide empirical evidence, not economic theory isolated from facts, and the underlying facts are in the record." Op. at 48.

id. (citing *Actavis*, 570 U.S. at 153; *Schering-Plough I*, 136 F.T.C. at 1003; *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 202 (2d Cir. 2006)). Both sides' experts recognize that settling lawsuits is generally economically efficient. IDF 355 (citing RX0739 (Murphy Expert Rep.) at 053, CX9042 at 050 (Evans Dep. 196:22-24)). "There is no question that settlements provide a number of private and social benefits as opposed to the inveterate and costly effects of litigation." *Schering-Plough II*, 402 F.3d at 1075 (citation omitted).

Despite this clear precedent and their acknowledgement that avoiding litigation costs is procompetitive, the majority claim that, to be considered "valid", a respondent must show that any cost reduction achieved through settlement was passed on to customers. *See* Op. at 36-37. The majority cite no relevant case law for this proposition.[49] Economic theory cannot fill the precedential void for the majority's rule. Capital savings like reductions in litigation costs from settlements do not directly affect marginal costs, so it would be impossible to show that they were passed on directly to customers in the form of price reductions.[50] Thus, under the majority's analysis, savings resulting from settlements are "legitimate", "cognizable", and "facially plausible", but could never be "valid". *See* Op. at 23, 36-37. That cannot be the rule.

The FTC and Supreme Court in *Actavis* recognized that the litigation costs saved through a settlement could be an "offsetting or redeeming virtue[ ]". *Actavis*, 570 U.S. at 156. The Court explained that "[w]here a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement." *Id*. In other words, the Supreme Court considered avoided litigation costs as a procompetitive justification. *Id*. Nowhere did the Court require a showing that savings be passed on to customers in order to be "valid".

Regardless, the Trademark Settlements had the added benefit of protecting the settling parties' intellectual property rights. As discussed above (*see* Section 0(A)(4), *supra*), trademarks promote interbrand competition, which the Supreme Court has identified as "the primary concern of antitrust law". *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988) (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52 n.19 (1977)). The ability to

---

49 None of the cases cited by the majority for the proposition that settlement-related saved litigation costs must be passed through to consumers in order to be "valid" involved a settlement of any kind. *See* Op. at 37 (citing *Chicago Prof'l Sports LP v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992) (challenge to the NBA's rule that certain television channels could not carry more than 20 games per season), *cert. denied*, 506 U.S. 954 (1992); *Polygram I*, 136 F.T.C. at 345 (challenge to joint venture agreement between competitors not to discount or advertise); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 350 (3d Cir. 2016) (challenge to a proposed merger between competing hospitals); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1023 (10th Cir. 1998) (challenge to an NCAA rule limiting coaches' compensation), *cert. denied*, 525 U.S. 822 (1998)). As a result, I do not find any of those cases as persuasive or as directly applicable to the present case as *Actavis*.

50 *See, e.g.*, Dennis W. Carlton, *Does Antitrust Need to be Modernized?*, 21 J. ECON. PERSP. 155, 157 (2007) ("Under a consumer surplus standard, only the saving in marginal costs will carry weight because it will reduce prices, while the fixed-cost savings is not considered as a benefit to consumers. . . . Gains that lead to lower fixed costs today can encourage research and development, new products, and plants in the future. However, by focusing only on efficiencies that influence price over a short period, a government antitrust agency risks failing to credit the future efficiencies that will benefit consumers in the long run. To put it another way, the fixed-cost savings of today are the variable-cost savings in the future for new products.").

enforce and settle claims for infringement of those rights is essential to achieving their purpose. Thus, a reduction in—or elimination of—litigation costs as the result of a settlement is not just legitimate, it is also a valid procompetitive justification even without a showing that the specific reduction in litigation costs was passed on to consumers.

The majority's only rebuttal to 1-800 Contacts' argument that the trademark protections provided in the Trademark Settlements are procompetitive justifications is that 1-800 Contacts' trademark infringement claims were weak. *See* Op. at 37-41. Evaluating the merits of the underlying infringement claims is inappropriate for the reasons explained above. *See* Section 0(A)(4)(a), *supra*. The majority's concern about the merits of 1-800 Contacts' infringement claims causes them to miss the forest for the trees. Nowhere in their evaluation of the trademark-related procompetitive benefits of the Trademark Settlements do the majority recognize how trademark protections and the vigorous enforcement of trademarks encourage brand investment and promote competition. In fact, the majority dismiss the benefits of trademark policy entirely. This is inappropriate as a matter of law and ignores the facts of this case, including the tremendous amount of investment 1-800 Contacts has made in building its brand, lowering the price of contact lenses, and offering customers superior service. It also raises the question of what the majority's rule would mean for infringement claims they view as strong.

D. The Majority Forego an Indirect Showing of Market Power.

Because I do not believe that the majority have shown that the challenged conduct is inherently suspect or that Complaint Counsel have met their burden to show substantial direct anticompetitive effects, the only way for Complaint Counsel to meet its initial burden is through an indirect showing of market power.[51] But the majority opt not to take that route here, instead relying exclusively on their claim that the Trademark Settlements are inherently suspect or caused direct anticompetitive effects. Even though the majority do not establish a relevant market, assumptions about the market permeate their opinion, providing ballast to a number of their premises. Without a properly defined product market, each of these arguments fails.

For example, in their section on direct effects, the only support that the majority put forward for their claim that 1-800 Contacts charged supracompetitive prices prior to the Trademark Settlements was that "1-800 Contacts was the incumbent online seller, with a dominant share of online sales throughout this period." Op. at 49 (citations omitted). For the reasons discussed above, *see* Section 0(B)(2), *supra*, any attempt to show that 1-800 Contacts charged supracompetitive prices as the direct result of its "share of online sales" requires a properly defined relevant market in which market power can be inferred from a high share. *See* AREEDA & HOVENKAMP, *supra*, ¶¶ 531-532. In other words, market definition is a prerequisite to inferring that 1-800 Contacts charged supracompetitive prices from its share of the market.

51 *See, e.g.*, *Realcomp I*, 2007 WL 6936319, at *31 (stating that—absent a finding that a restraint is inherently suspect—a plaintiff can meet its initial burden "in either of two ways . . . an indirect showing based on a demonstration of defendant's market power . . . [or] direct evidence of 'actual, sustained adverse effects on competition'") (quoting *IFD*, 476 U.S. at 461; and citing *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998); *Law*, 134 F.3d at 1019; *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993)).

Without a relevant market, any claim that 1-800 Contacts had market power based on its "share of online sales" and, therefore, charged supracompetitive prices is unsupportable.

The majority also "find that the agreements harm consumers and competition for the *online sale of contact lenses*." Op. at 2 (emphasis added). It is impossible for the Trademark Settlements to harm competition in a limited line of commerce like "online sales" without a showing that such a limitation is appropriate. In other words, by failing to prove that "the online sale of contact lenses" is a properly defined antitrust market, the majority cannot claim that customers or competition in that market were harmed. Elsewhere, the majority use similar claims that 1-800 Contacts had a large share of "online sales" to imply that 1-800 Contacts was somehow a dominant seller of contact lenses online. *See, e.g.*, *id*. at 4 ("In 2015, 1-800 Contacts accounted for approximately 54 percent of online sales, which is more than four times the sales of the second-largest online retailer.") (citations omitted). However, because the majority opt not to define a relevant market, their attempts to show 1-800 Contacts was a dominant online seller—or even that they had a large share of contact lens sales—necessarily fail, as do any implications the majority would like to draw from those attempts.

The majority similarly assert that the Trademark Settlements are problematic because they cover a large number of online contact lens retailers that make up a large percentage of online contact lens sales. *See id*. at 33 ("Challenged Agreements covered 14 different online contact-lens retailers that account for 79 percent of online contact lenses in the United States. . . . [T]he challenged agreements here cover the landscape of online contact-lens retailers resulting in harm to competition overall.") (citations omitted). Because it relies on an indirect showing of market power, the majority's conclusion that the Trademark Settlements caused "harm to competition" requires proof of a relevant antitrust market comprised of the online sale of contact lenses in the United States. Absent a proper showing such a market exists, statements like these are irrelevant to the antitrust analysis and do not support the majority's assertion that the Trademark Settlements harmed competition.

Not only do these assumptions about the market support key aspects of the majority's analysis, while lacking support themselves, they elide difficult questions about the market in this case. Significant participants in the online sales of contact lenses were not party to the Trademark Settlements, and the record reflects that customers purchased the majority (83%) of their contact lenses from other kinds of retailers, including independent ECPs, optical retail chains, mass merchants, and club stores. *See* IDF 491. Some were more expensive; some cheaper. Competition from these other retailers cannot be ignored, especially without a properly defined relevant market.

E. The Majority Have Not Shown That the Trademark Settlements Have Anticompetitive Effects for Search Engines.

The majority also would condemn the Trademark Settlements as unlawful because of their effects on firms owning search engines, such as Google (the search engine owned by

Alphabet, Inc.) and Bing (owned by Microsoft Corp.).[52] This legal theory is novel; none of the cases cited by the majority as involving advertising restrictions (e.g., *California Dental* and *Polygram*) considered such harm. If the theory is novel, the evidence that search engines have been harmed is all but absent.[53] Microsoft [redacted] and its [redacted] testified that the company is "[redacted]." RX0704 at 007.

As to Google—the largest seller of paid search advertising (*see* Stip. at 5)—I am concerned this theory of liability fails adequately to take into account record evidence about the putative victim's role in the alleged harm. As noted above, until 2004 Google itself banned as a matter of company policy the same conduct later barred by the Trademark Settlements (i.e., permitting advertisements for third parties to appear in response to searches for trademarked keywords). *See* Section 0(0), *supra*. When it changed its policy, Google assisted trademark owners, including 1-800 Contacts, to address the threat to their marks, advising them specifically that negative keywords were an effective tool to prevent or limit the opportunities for trademark infringement. *See id*. There is some irony, then, in claiming that Google was harmed. At the very least, the fact that Google once required and, later, affirmatively encouraged the allegedly anticompetitive conduct suggests the Trademark Settlements do not harm Google, a sophisticated and aggressively competitive seller of search-based online advertising, in any material way.

In their analysis, the majority apply the rule of reason to consider the harm to search engines,[54] finding direct evidence of decreases in (1) search engine advertising revenue; and (2)

---

52 It is odd for the Commission to address this issue at all. Judge Chappell did not analyze the effect of the Trademark Settlements on search engines and Complaint Counsel did not appeal this portion of the Initial Decision. *See* Op. at 50 & n.52.

53 I disagree with the conclusion the majority reach on the facts here, as explained in the text, but note that condemning actual bid rigging is a critical component of any robust antitrust regime. The Commission has a dual mission to protect consumers and to promote competition. *What We Do*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/what-we-do. Promoting competition requires effective enforcement of the antitrust laws regardless of the identity of the harmed customer. *See, e.g.*, *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 117-22 (D.D.C. 2016) (enjoining merger between the two largest office supply companies in the country because of the potential harm to large businesses, including some of "the most powerful companies in the world") (citation omitted); *id*. at 126 ("Antitrust laws exist to protect competition, not a particular set of consumers"); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015) (enjoining merger between the two largest broadline foodservice distribution companies in the country primarily based on potential harm to businesses with a nationwide or multi-regional footprint); *see also FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2016) (reversing the district court's denial of a preliminary injunction because the merger was likely to harm competition in the market for "general acute care ('GAC') services sold to commercial payors [i.e., insurers]"); *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016) (same). And "there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) . . . can cause serious economic harm." Office of General Counsel, U.S. Sentencing Commission, Primer: Antitrust, at 1 (March 2018), https://www.ussc.gov/sites/default/files/pdf/training/primers/2017_Primer_Antitrust.pdf (footnote omitted).

54 In a footnote, the majority argue that the Trademark Settlements could also be evaluated in terms of their impact upon search engines under an "inherently suspect" framework. *See* Op. at 50-51 n.54. But the facts of this case do not meet the standard for applying that standard. The Trademark Settlements govern what kind of advertisements can be bought, not the amount of advertisements that a company can buy; and a rudimentary observer might very well conclude such conduct has no effect on search engines. What is more, the majority do not cite sufficient

the number of advertisements displayed, which the majority claim reduced both the total output of advertisements and the quality of the search engines' product, the search engine results page ("SERP"). *See* Op. at 50-54. Neither finding is sufficient to show direct effects under the Supreme Court's standard, recently reiterated in *AmEx*, that "[d]irect evidence of anticompetitive effects would be 'proof of actual detrimental effects [on competition],' such as reduced output, increased prices, or decreased quality in the relevant market". *AmEx*, 138 S. Ct. at 2284 (quoting *IFD*, 476 U.S. at 460) (other citations omitted); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("[A] firm is a monopolist if it can profitably raise prices substantially above the competitive level. Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear. Because such direct proof is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power.") (citations omitted).

The evidence does not support a finding of a direct price effect (here, a reduction in paid search advertising auction prices). The majority do not cite evidence of reductions in advertising budgets or the number of advertisements created or displayed by the contracting parties. Instead, the majority proffer a theory that "a reduction in the number of search-advertising auction participants offering relevant ads reduces the price paid by the auction winners and reduces the revenue for the search engine." Op. at 51 (footnote omitted). While this might be correct with respect to certain auctions and SERPs involving trademarked keywords, there is no evidence that this is true with respect to the purchases by the parties to the Trademark Settlements generally, including purchases of other paid search advertising, online advertising more broadly, or advertising as a whole.[55] But even accepting the specific auction as the relevant denominator, the

---

economic evidence or judicial experience that would justify the application of a truncated rule of reason analysis. *See id*. While bid rigging has indeed been condemned as violating the antitrust laws, the Trademark Settlements are categorically different from the types of conduct that the FTC and DOJ consider *per se* illegal bid rigging. *See Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For, An Antitrust Primer*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes [hereinafter "*DOJ Antitrust Primer*"]; *Bid Rigging*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/bid-rigging. They lack what almost all forms of bid rigging have in common: "an agreement among some or all of the bidders which predetermines the winning bidder". *DOJ Antitrust Primer*, *supra*, at 3. Nothing in the Trademark Settlements predetermined the winner of any auction. The Trademark Settlements also are not akin to *per se* illegal bid rigging because they were not intended to (and did not always) decrease auction prices, which happened (if at all) only incidentally as the result of the search engines' use of an auction algorithm. *Cf. Compact v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 594 F. Supp. 1567, 1575-76 (M.D. Tenn. 1984) (agreement to "fix the price of minority architect participation on public contracts" with the intent and "admitted purpose[ ]" of "eliminat[ing] competitive bidding between its members"). As a result, the Trademark Settlements do not bear the "close family resemblance" to classic bid rigging or rotation sufficient to apply "inherently suspect" analysis. *See Polygram II*, 416 F.3d at 36-37; *see also United States v. Heffernan*, 43 F.3d 1144, 1146-47 (7th Cir. 1994) (interpreting "bid rigging" as meaning "bid rotation", the latter of which "eliminate[s] all competition rather than just price competition") (citation omitted).

The majority also suggest that Complaint Counsel's initial burden under the inherently suspect and direct effects standards "rely on the same evidence". Op. at 50-51 n.54. Suggesting that both standards utilize precisely the same evidence and failing to explain how the two analytical frameworks differ, I fear, will only exacerbate confusion in the law. As an expert antitrust agency, the Commission has a duty to help clarify the law, and its decisions certainly endeavor not to obfuscate antitrust analysis further.

55 The majority do not articulate what the appropriate scope of an "advertising" market would be. The majority's analysis at best demonstrates a "direct effect" in the number of advertisements displayed in response to searches for

record shows that it is not always true that if fewer advertisers participate in an auction that the price paid by the auction winner goes down. *See, e.g.*, IDF 219 ("Under the second price auction used by Google, the number of bidders may or may not affect the actual [cost-per-click]."); Juda, Tr. 1205:5-10 (Google executive testifying that "[i]t is not always the case that more advertisers results in higher [cost-per-click]"); CX9019 at 015, 036 (Juda Dep. 55:9-13, 137:18-138:22) (Google executive testifying that, in certain circumstances, an "increase in [the number of] bidders would have zero influence on the price that that highest person was paying", and that an additional bidder may or may not affect the cost-per-click of another advertiser in the auction).

As [redacted] whom the majority cite for the proposition that reducing the number of search engine auction participants could reduce the prices paid by the auction winners (and thereby reduce search engine revenue), *see* Op. at 51-52, explained, "[redacted]" RX0704 at 006.

The majority also claim price effects on the theory that—because advertisements limited by the Trademark Settlements had a higher return on investment ("ROI")—advertisers would spend less in the absence of their availability. Op. at 53-54. That is a plausible assumption. But, especially given how important online advertising apparently was to the contracting parties, *see id.* at 6-7, 30-31, it is equally plausible they would have bought other advertisements, with no harm going to the owners of the search engines.

The majority's ROI theory also discounts the value of advertising purchased for brand-building (as opposed to only for sales) purposes. If advertisers viewed online search advertising as a branding opportunity, removing certain keywords from the available pool would most likely shift advertising purchases to other keywords, because brand building is more about appearing frequently than achieving a set ROI with each appearance. The record is replete with evidence that advertisers evaluated online search advertisements on a brand-building basis (in addition to ROI). One witness explained that his company built its brand "primarily through the online search advertising." CX9024 at 011 (Holbrook Dep. at 40:4-7); *see also* [redacted] at 048 ([redacted] at [redacted]) [redacted]; IDF 602 ("LensDirect believes there is value in showing an ad in

---

the trademarked terms covered by the Trademark Settlements. Such a market seems implausible. Courts have rejected "search engine advertising" as a viable antitrust market because it is too narrow, but even that is far broader than the handful of trademarked keywords within search engine advertising at issue here. *See, e.g.*, *Lasoff v. Amazon.com Inc.*, No. C16-151, 2017 WL 372948, at *9 (W.D. Wash. Jan. 26, 2017) ("Because there is no basis for distinguishing the 'search engine advertising' market from the larger market of all internet advertising, the former is simply too narrow to form a meaningful 'relevant market' for purposes of antitrust liability.") (quoting *Person v. Google, Inc.*, No. C06-7297, 2007 WL 832941, at *4 (N.D. Cal. Mar. 16, 2007) ("The Court finds no basis for distinguishing the Search Ad Market from the larger market for Internet advertising. Search-based advertising is reasonably interchangeable with other forms of Internet advertising.")); *see also* Statement of Commissioner Ohlhausen, Commissioner Wright, and Commissioner McSweeny Concerning Zillow, Inc. / Trulia, Inc., FTC File No. 141-0214 (Feb. 19, 2015), https://www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf.

response to a search for 1-800 Contacts, even if the ad is not clicked on, because it gives LensDirect brand visibility next to the larger players without any cost.") (citation omitted); ID at 144 ("As LensDirect's chief executive officer stated: '[T]he more times people see LensDirect, the better chance there is of them becoming a customer one day.'") (citation omitted). While removing certain keywords from the available pool would most likely shift advertisement purchases to other keywords, the necessity of brand building gives additional reason to assume the money would continue to go to online search advertising, even with a lower ROI.

Even if there were a reduction in advertising in response to searches for trademarked terms (which has not been proven), it is unclear that a reduction in the number of advertisements would negatively affect the quality of the search engine experience. As Complaint Counsel's expert testified, there is significant literature explaining that search engines, as multi-sided platforms, must balance the advertisers' desire to appear more frequently in SERPs and consumers' desire to be bombarded with fewer ads. CX8006 (Evans Expert Report) at 024-025. Purchased advertisements are how the search engines monetize their platforms; whereas organic results are where the search engines place the links they deem most relevant to consumers. Consistent with this notion, [redacted] testified that:

[redacted]

RX0704 at 003. Thus, from the search engines' perspective, it is not clear how the quality of the advertisements are lessened.[56]

F. The Trademark Settlements Were Appropriately Tailored.

The majority rest their liability theory, in part, on the claim that the Trademark Settlements could have been narrower. *See* Op. at 25-30. This substitutes the Commission's judgment for that of the parties, contrary to what *Clorox* requires. *See Clorox*, 117 F.3d at 60.

56 The majority assert that the Trademark Settlements prevented some consumers from clicking on advertisements that did not appear because of the agreements, presumably generating less value for the search engine. But it is not clear from the search engines' perspective (i.e., the theory of harm at issue here) why a consumer searching for "1-800 Contacts" is less likely to click through under the Trademark Settlements. They might be faced with a more obviously responsive advertisement (e.g., one for 1-800 Contacts), and thus more likely to click through on that advertisement than on an advertisement for another vendor. Indeed, record evidence indicates that most searches for the trademarked terms at issue were, in fact, navigational—that is, consumers typed in "1-800 contacts" because they wanted to reach 1-800 Contacts' website. RX0733 (Ghose Expert Report) at 007 ("[C]onsumers who searched for 1-800 Contacts' trademarks typically did so with a navigational intent."); *id*. at 060 ("[T]he academic literature and the data [ ] indicate that the vast majority of consumers searching for 1-800 Contacts' trademark do so with navigational intent.").

But the Trademark Settlements also were appropriately tailored to achieve their objective. The searches that the Trademark Settlements prohibit are precisely those searches that implicate 1-800 Contacts' trademarks. They are also the searches through which users are most likely attempting to reach the 1-800 Contacts website (i.e., searches for 1-800 Contacts' trademark). *See, e.g.*, RX0733 (Ghose Expert Report) at 060 ("[T]he academic literature and the data [ ] indicate that the vast majority of consumers searching for 1-800 Contacts' trademark do so with navigational intent."). Indeed, 1-800 Contacts considered navigational searches (i.e., paid searches for its trademarks) as "direct traffic" to its website (as opposed to indirect traffic). IDF 577. As a result, the settling parties structured the Trademark Settlements to prevent advertisements from appearing in response to searches for both parties' trademarks.

The settling parties included a negative keyword provision in response to Google's explicit encouragement for 1-800 Contacts to resolve its trademark disputes with competitors by having them implement 1-800 Contacts' trademarked terms as negative keywords. *See, e.g.*, Schmidt, Tr. 2904:2-16, 2905:16-25; CX9031 at 010-011 (C. Schmidt Dep. 33:20-35:2, 35:23-36:2, 36:13-37:3); CX9013 at 044 (Aston Dep. 172:1-3) ("They [Google] instructed us [1-800 Contacts] to have the offenders add those specific trademarked terms into their negatives for their -- for their AdWords campaigns."); *id*. at 044-045 (170:8-20, 171:10-19, 173:5-20). They did so because, without negative keywords, a settling party's advertisements could appear in response to searches for the counterparty's trademarked terms.

Almost all of the Trademark Settlements balanced these restrictions with a provision explicitly permitting a settling party to use the counterparty's trademarks in a manner that would not constitute infringement in the non-internet context, including comparative advertising. IDF 369 ("Ten of the thirteen Settlement Agreements provide that the prohibited acts 'shall not include (i) use of the other Party's trademarks on the Internet in a manner that would not constitute an infringing use in an non-Internet context, e.g., the use on the Internet of comparative advertising, parodies, and similar non-Infringing, uses.'") (citations omitted); *see also* IDF 305 (finding that 1-800 Contacts accepted changes to a draft settlement agreement with Vision Direct and stated that both parties should be able to engage in comparative advertising); IDF 309 (confirming that the 2004 Trademark Settlement between 1-800 Contacts and Vision Direct permitted non-infringing uses, such as comparative advertising, parodies, etc.).

As a result, in my view, the Trademark Settlements were appropriately tailored to achieve their goal of preventing trademark infringement while balancing the need to permit non-infringing advertising.

III. The Majority Fail to Analyze the Luxottica Sourcing and Services Agreement.

The majority do not analyze the sourcing and services agreement between Luxottica and 1-800 Contacts (the "Luxottica Agreement") correctly. Sourcing and services agreements, like trademark settlement agreements, are typically considered procompetitive. *See* Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, at 1 (Apr. 2000) [hereinafter "*Competitor Collaboration Guidelines*"]. As a result, courts typically analyze ancillary restraints accompanying sourcing and services agreements under the rule of reason. *See* AREEDA & HOVENKAMP, *supra*, ¶ 1908(c). The majority, however, treat the sourcing

and services agreement between Luxottica and 1-800 Contacts as "inherently suspect" by lumping it in with the Trademark Settlements. *See* Op. at 10. The only time the majority discuss the Luxottica Agreement is to note that certain procompetitive justifications that 1-800 Contacts proffered for the Trademark Settlements do not apply to the Luxottica Agreement. *See, e.g.*, *id*. at 12 n.14, 37. By ignoring its plain language and considering the Luxottica Agreement to be just another Trademark Settlement, the majority lay bare the broad scope of the rule they announce and fail to address additional procompetitive justifications that typically accompany supply and sourcing agreements.[57]

A. The Luxottica Sourcing and Services Agreement Is a Supply Agreement, Not a Trademark Settlement.

In December 2013, 1-800 Contacts entered a sourcing and services agreement with Luxottica. IDF 393. Luxottica operates chains of brick-and-mortar retail stores—such as LensCrafters, Pearle Vision, Sears Optical, and Target Optical—that sell, among other things, contact lenses. IDF 394. The Luxottica Agreement did not end any alleged trademark infringement; instead, it provides for a mutually beneficial vertical relationship between 1-800 Contacts and Luxottica. *See* CX0331. In particular, under the Luxottica Agreement, 1-800 Contacts provides (1) fulfillment services by shipping contact lenses to Luxottica's retail chain stores and (2) other services, including assistance with sourcing contact lenses from the four major contact lens manufacturers. IDF 394.

Judge Chappell made explicit the benefit of the Luxottica Agreement to 1-800 Contacts: "As a result of the agreement between 1-800 Contacts and Luxottica, 1-800 Contacts is [redacted]." IDF 395 (citations omitted). But there were also benefits to Luxottica. In particular, 1-800 Contacts managed and operated Luxottica's contact lens business. *See* CX0331 at 006. In effect, Luxottica outsourced its entire contact lens business, including negotiating with contact lens suppliers, to 1-800 Contacts.[58] *See id*. at 025 ("LUX shall use 1-800 *exclusively* to source Trial Lenses and Revenue Product in the Territory.") (emphasis added); *id*. at 014 (defining "Revenue Products" as "contact lenses for retail sale"); *id*. at 018 (defining "Territory" as "the United States of America, its territories, and Canada"); *id*. at 026 ("1-800 shall lead all negotiations with Suppliers").

57 The majority defend their approach by stating that Respondent did not carry its burden of establishing the procompetitive nature of the Luxottica Agreement. *See* Op. at 37 n.38. That does not justify ignoring the plain terms of the Luxottica Agreement, which clearly is not a settlement of any kind, much less one of the Trademark Settlements analyzed here.

58 Under the Luxottica Agreement, 1-800 Contacts maintained the inventory of contact lenses and shipped them directly to Luxottica's retail chain stores and directly to the homes of customers of Luxottica's retail stores. CX0331 at 029; Bethers, Tr. 3524:5-3525:6, 3694:14-3695:14. The packaging of all contact lenses shipped by 1-800 Contacts under the agreement bore Luxottica's labels and in no way indicated that 1-800 Contacts was involved. CX0331 at 029; Bethers, Tr. 3525:7-21, 3694:14-3695:14.

B. The Majority Ignore Procompetitive Justifications for the Luxottica Agreement.

The majority assert that certain justifications for the Trademark Settlements do not apply to the Luxottica Agreement, *see* Op. at 12 n.14, 37, but they simultaneously ignore procompetitive justifications for sourcing and services agreements. The Commission enumerated some of those justifications in guidelines jointly published with the U.S. Department of Justice. *See Competitor Collaboration Guidelines*. The Luxottica Agreement falls squarely within the agencies' definition of "competitor collaborations." *Id.* § 1.1 ("Competitor collaborations involve one or more business activities, such as research and development ('R&D'), production, marketing, distribution, *sales or purchasing*.") (emphasis added). The *Guidelines* recognize the Commission's view that agreements among competitors (or potential competitors)[59] can benefit customers in a variety of ways. *See id*. § 2.1. Among the many consumer benefits that could result from the Luxottica Agreement is the fact that 1-800 Contacts has the largest inventory of contact lenses in the industry, *see* IDF 44, and therefore may have a comparative advantage over Luxottica in negotiating with suppliers and delivering contact lenses to customers. As a direct result of its decision to outsource much of its contact lens business to 1-800 Contacts, Luxottica customers could receive lower prices and better service (e.g., faster delivery).

The majority opinion fails to analyze any of the foregoing (or any other potential) procompetitive justifications for the Luxottica Agreement.[60] Instead, they summarily condemn it as part-and-parcel of the Trademark Settlements. Given the seemingly apparent procompetitive justifications, I fear this omission speaks more to the breadth of the conduct the majority condemn.

IV. The Majority's Remedy

The remedy proposed by the majority is ineffective. The Order states that the only agreements that 1-800 Contacts can enter are those that, in effect, tell the counterparty that they cannot violate the trademark laws. *See* Final Order at 2-3. Such agreements resolve nothing and will only lead to more litigation to determine what conduct actually violates the trademark laws in the context of paid search advertising based on trademarked keywords. Because the Order only allows agreements that do not actually resolve the dispute in trademark infringement litigation, it will reduce the incentive to settle, which, in turn, will lead to either less trademark

59 I note that it is unclear from the majority opinion whether they view Luxottica (a brick-and-mortar retailer) and 1-800 Contacts (an online contact lens retailer) as direct horizontal competitors because the majority fail to define a relevant product market. Nevertheless, the same analysis is appropriate regardless of whether the two companies directly compete. *See Competitor Collaboration Guidelines*, § 1.1.

60 The majority also fail to analyze the advertising restrictions in the context of the Luxottica Agreement. For example, the restrictions on paid keyword search advertising may have been necessary for the parties to enter into the Luxottica Agreement in the first place. Given the potential procompetitive benefits surrounding competitor collaborations like the Luxottica Agreement, it is likely that any anticompetitive harm caused by the advertising restrictions would be outweighed by the procompetitive benefits of the agreement as a whole.

enforcement or more costly litigation for the same reasons discussed above. *See* Section 0(A)(4), *supra*.[61]

* * *

The Commission's mandate is to enforce the antitrust laws, but we cannot do so in a vacuum. We need to consider competing policies, including federal trademark policy, when

61 In the section discussing the remedy, the majority repeat at least two of their earlier claims that I believe are not supported by the facts, law, or both. First, they claim that they "are not establishing a new trademark rule" and even go so far as to say that they "make no ruling on any trademark issue at all." Op. at 56. For the reasons discussed more fully above, there is a trademark ruling implicit in the majority's decision to truncate their rule of reason analysis. *See* Section 0(A), *supra*. Second, they assert that the Order is not novel, in part, because "[a]ntitrust has long barred rivals' agreements regarding advertising and bidding restrictions." Op. at 56. This does not reflect a fair reading of the case law as applied to the Trademark Settlements, as I discuss above. *See* Section 0, *supra*.

analyzing allegedly anticompetitive conduct. And we should recognize that unclear rules may do more to harm both to that policy and to competition than the alleged conduct here. In the case of the Trademark Settlements, precedent offers a better way: the Commission should analyze such agreements under the full rule of reason, giving appropriate weight to the trademarks at issue and the value they protect. Such a rule will decrease uncertainty in the market, encourage brand investment, and increase competition.

CONCURRING OPINION OF COMMISSIONER REBECCA KELLY SLAUGHTER

I strongly support the Commission's decision and order. As explained in the Commission's Opinion, the agreements between 1-800 Contacts and its online rivals to restrict advertising on search engine result pages harmed consumers and competition. I write separately to explain why this case was a worthwhile expenditure of Commission resources. Specifically, this case merited the Commission's attention because of the importance of competition in online search bidding for both consumers and for competitive entry by online sellers of goods and services. The Commission's Opinion also addresses Complaint Counsel's allegation of harm to search engines in the form of depressed prices paid for search advertising. While I agree with the conclusion that the agreements at issue in this case constituted a type of illegal bid rigging, it was important for me to connect that conduct to consumer harm rather than harm to search engines alone.

Complaint Counsel successfully demonstrated that consumers were harmed by the agreements in this case. Those agreements not only deprived consumers of information about alternative sellers of contact lenses, which is sufficient on its own to establish a violation of Section 5, but the evidence shows that consumers paid more for contact lenses as a result of 1-800 Contacts' efforts to protect itself from lower-priced competitors. Consumers who searched online lost a critical opportunity to explore these alternative contact lenses sellers or take advantage of 1-800 Contacts' price match if they found such lower prices. These agreements increased the costs to consumers across the country who need contact lenses to correct their vision.

This case is important to competition and consumers – both because of the specific harm to contact lens purchasers and sellers and because of the precedent it sets as sponsored search results generated by bidding on a competitor's brand name becomes an increasingly important avenue for businesses to break into online sales markets.[1] Online search bidding restriction may be a new frontier in advertising restraints, but it is just as pernicious as traditional restraints in

1 See, e.g., Rani Molla, *Amazon is Stuffing Its Search Results Pages With Ads*, Recode, (Sept. 10, 2018), *available at* https://www.recode.net/2018/9/10/17797720/amazon-is-stuffing-its-search-results-pages-with-ads.

frustrating the role that advertising plays to benefit consumers in their search for the highest value products and services as recognized by the Supreme Court.[2]

A competitive marketplace should ensure that consumers get the best prices, choices, quality, and innovation. This case provides a good example of how the Commission should use its resources to attack conduct that robs consumers of competition that results in lower prices, and robs competitors of the ability to challenge a dominant player.

The Opinion also holds that the agreements consisted of a form of bid rigging that artificially depressed the price search engines received for online advertising. I agree with the legal conclusion, expressed in the Opinion, but I write separately to note that I would not have supported pursuing this case based on harm to search engines alone. The resources of the Commission are limited, and should generally be used to protect consumers, not large companies with substantial market share. Given the depth and precedential significance of the consumer-facing harm in this case, I support the Opinion and Order.

2 *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (explaining that advertising "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system.").

IN THE MATTER OF

MRESOURCE LLC
D/B/A
LOOP WORKS LLC

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

Docket No. C-4663; File No. 182 3143
Complaint, November 15, 2018 – Decision, November 15, 2018

This consent order addresses mResource LLC's representations concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union. The complaint alleges that the company has set forth on its website, http://www.loopworks.com, privacy policies and statements about its practices, including statements related to the status of its participation in the EU-U.S. Privacy Shield framework. The consent order prohibits the company from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Participants

For the *Commission*: *Ruth Yodaiken.*

For the *Respondent*: *John Hancock, CEO, pro se.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that mResource LLC, a corporation, doing business as Loop Works LLC, has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent mResource LLC is a Delaware corporation with its principal office or place of business at 660 W. Lake St., #350, Chicago, IL 60661.

2. Respondent offers recruitment and "talent management" services.

3. The acts and practices of Respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, https://www.loopworks.com, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

Complaint

Privacy Shield

5. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard. Any company that voluntarily withdraws or lets its self-certifications lapse must take steps to affirm to Commerce that it is continuing to protect the personal information it received while it participated in the program.

7. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield Principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

9. Through at least June 2018, Respondent has disseminated or caused to be disseminated privacy policies and statements on the https://www.loopworks.com/privacy-policy/ website, including, but not limited to, the following statements:

EU-U.S. Privacy Shield

> Loop is a participant in the U.S. Department of Commerce's EU-U.S. Privacy Shield and has certified that we adhere to the EU-U.S. Privacy Shield Principles. Loop is subject to the investigatory and enforcement powers of the Federal Trade Commission.

> For more information about the EU-U.S. Privacy Shield Framework, visit the U.S. Department of Commerce's Privacy Shield website at https://www.commerce.gov/privacyshield
>
> * * *
>
> In cases of onward transfer to third parties of data of EU individuals received pursuant to the EU-US Privacy Shield, Loop remains liable.

10. Although Respondent obtained Privacy Shield certification in December 2016, it did not complete the steps necessary to renew its participation in the EU-U.S. Privacy Shield framework after that certification expired in December 2017. After allowing its certification to lapse Respondent has continued to claim, as indicated in paragraph 9, that it participates in the Privacy Shield framework.

Count 1 – Privacy Misrepresentation

11. As described in Paragraph 9, Respondent represents, directly or indirectly, expressly or by implication, that it is a current participant in the EU-U.S. Privacy Shield.

12. In fact, as described in Paragraph 10, Respondent was not a current participant in the EU-U.S. Privacy Shield. Therefore, the representation set forth in Paragraph 11 is false or misleading.

Violation of Section 5 of the FTC Act

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

THEREFORE, the Federal Trade Commission this fifteenth day of November, 2018, has issued this complaint against Respondent.

By the Commission, Commissioner Wilson not participating.

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 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, 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 thirty (30) days for the receipt and consideration of public comments. Now, in further conformity with the procedure prescribed in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent mResource LLC is a Delaware corporation with its principal office or place of business at 660 W. Lake St., #350, Chicago, IL 60661.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

1. "Respondent" means mResource LLC, a corporation, also doing business as Loop Works LLC, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in Privacy or Security Programs

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy

or security program sponsored by a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

II. Acknowledgments of the Order

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

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For five (5) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all 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 ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

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

III. Compliance Report and Notices

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

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (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 fourteen (14) days of its filing.

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

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re mResource LLC, FTC File No. 1823143*.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

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

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each unique advertisement or other marketing material making a representation subject to this Order, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

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

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

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

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

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on November 15, 2038, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Provision in this Order that terminates in less than twenty (20) years;

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

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

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, Commissioner Wilson not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to mResource LLC, doing business as Loop Works LLC ("Loop Works" or "the company").

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

This matter concerns alleged false or misleading representations that Loop Works made to consumers concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield framework allows U.S. companies to transfer data outside the EU consistent with EU law. To join the EU-U.S. Privacy Shield framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens. Commerce reviews these applications for self-certification and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework and completed the requirements for certification. The listing of companies indicates whether their self-certification is current. Companies are required to re-certify every year in order to retain their status as current members of the EU-U.S. Privacy Shield framework.

Loop Works offers recruitment and "talent management" services. According to the Commission's complaint, the company has set forth on its website, http://www.loopworks.com, privacy policies and statements about its practices, including statements related to the status of its participation in the EU-U.S. Privacy Shield framework.

The Commission's complaint alleges that Loop Works deceptively represented that it was a current participant in the EU-U.S. Privacy Shield framework when, in fact, it was not.

Part I of the proposed order prohibits the company from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that the company submit an

initial compliance report to the FTC. Part IV requires the company to retain documents relating to its compliance with the order for a five-year period.

Part V mandates that the company make available to the FTC information or subsequent compliance reports, as requested. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

VENPATH, INC.

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

Docket No. C-4664; File No. 182 3144
Complaint, November 15, 2018 – Decision, November 15, 2018

This consent order addresses VenPath, Inc.'s representations concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union. The complaint alleges that the company has set forth on its website, https://www.venpath.net, privacy policies and statements about its practices, including statements related to the status of its participation in the EU-U.S. Privacy Shield framework. The consent order prohibits the company from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Participants

For the *Commission*: *Ruth Yodaiken.*

For the *Respondent*: *Barry M. Benjamin, Kilpatrick Townsend & Stockton LLP.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that VenPath Inc., a corporation, has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent VenPath, Inc. is a Delaware corporation with its principal office or place of business at 228 Park Ave S #37362, New York, New York 10003.

2. Respondent offers data analytics services related to mobile apps.

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.

4. Respondent has set forth on its website**,** https://www.venpath.net, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

Privacy Shield

5. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the

Directive sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard. Any company that voluntarily withdraws or lets its self-certifications lapse must take steps to affirm to Commerce that it is continuing to protect the personal information it received while it participated in the program.

7. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield Principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

9. Through at least June 2018, Respondent has disseminated or caused to be disseminated privacy policies and statements on the https://www.venpath.net/legal/privacy-policy/ website, including, but not limited to, the following statements in its September 2016 privacy policy:

> VenPath participates in and has certified its compliance with the EU-U.S. Privacy Shield Framework. VenPath is committed to subjecting all personal data received from European Union (EU) member countries, in reliance on the Privacy Shield Framework, to the Framework's applicable Principles. To learn more about the Privacy Shield Framework, visit the U.S. Department of Commerce's Privacy Shield List at https://www.privacyshield.gov/list.
>
> VenPath is responsible for the processing of personal data it receives, under the Privacy Shield Framework, and subsequently transfers to a third party acting as an agent on its behalf. VenPath complies with the Privacy Shield Principles for all onward transfers of personal data from the EU, including the onward transfer liability provisions.

> With respect to personal data received or transferred pursuant to the Privacy Shield Framework, VenPath is subject to the regulatory enforcement powers of the U.S. Federal Trade Commission.

10. Although Respondent obtained Privacy Shield certification in October 2016, it did not complete the steps necessary to renew its participation in the EU-U.S. Privacy Shield framework after that certification expired in October 2017, nor did it withdraw and affirm its commitment to protect any personal information it had acquired while in the program. After allowing its certification to lapse Respondent has continued to claim, as indicated in paragraph 9, that it participates in the Privacy Shield framework.

Count 1 – Privacy Misrepresentation

11. As described in Paragraph 9, Respondent represents, directly or indirectly, expressly or by implication, that it is a current participant in the EU-U.S. Privacy Shield framework.

12. In fact, as described in Paragraph 10, Respondent is not a current participant in the EU-U.S. Privacy Shield framework. Therefore, the representation set forth in Paragraph 11 is false or misleading.

Count 2 – Misrepresentation Regarding Continuing Obligations

13. As described in Paragraph 9, Respondent represented that it would abide by the EU-U.S. Privacy Shield framework principles. These principles include a requirement that if a company ceases to participate in the EU-U.S. Privacy Shield framework, it must affirm to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program.

14. In fact, as described in paragraph 10, Respondent has not affirmed to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program. Therefore, the representation set forth in Paragraph 13 is false or misleading.

Violations of Section 5 of the FTC Act

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

THEREFORE, the Federal Trade Commission this fifteenth day of November 2018, has issued this complaint against Respondent.

By the Commission, Commissioner Wilson not participating.

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 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, 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 thirty (30) days for the receipt and consideration of public comments. Now, in further conformity with the procedure prescribed in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent VenPath Inc. is a Delaware corporation with its principal office or place of business at 228 Park Ave S #37362, New York, New York 10003.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

1. "Respondent" means VenPath Inc., a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in Privacy or Security Programs

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual

notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

II. Requirement to Meet Continuing Obligations Under Privacy Shield

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, must:

A. affirm to the Department of Commerce, within ten (10) days after the effective date of this Order and on an annual basis thereafter for as long as it retains such information, that it will

   1. continue to apply the EU-U.S. Privacy Shield framework principles to the personal information it received while it participated in the Privacy Shield; or

   2. protect the information by another means authorized under EU (for the EU-U.S. Privacy Shield framework) or Swiss (for the Swiss-U.S. Privacy Shield framework) law, including by using a binding corporate rule or a contract that fully reflects the requirements of the relevant standard contractual clauses adopted by the European Commission; or

B. return or delete the information within ten (10) days after the effective date of this Order.

III. Acknowledgments of the Order

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

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For five (5) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents and representatives having managerial responsibilities for conduct related to the subject matter of the Order ; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days

after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within sixty (60) days, a signed and dated acknowledgment of receipt of this Order.

IV. Compliance Report and Notices

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

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (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 fourteen (14) days of its filing.

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

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal

Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re VenPath Inc., FTC File No. 1823144*.

V. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

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

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each unique advertisement or other marketing material making a representation subject to this Order, and all materials that were relied upon in making the representation.

VI. Compliance Monitoring

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

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

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

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

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 November 15, 2038, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Provision in this Order that terminates in less than twenty (20) years;

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

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

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, Commissioner Wilson not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to VenPath, Inc. ("VenPath" or "the company").

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

This matter concerns alleged false or misleading representations that VenPath made to consumers concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield framework allows U.S. companies to transfer data outside the EU consistent with EU law. To join the EU-U.S. Privacy Shield

framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens. Commerce reviews these applications for self-certification and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework and completed the requirements for certification. The listing of companies indicates whether their self-certification is current. Companies are required to re-certify every year in order to retain their status as current members of the EU-U.S. Privacy Shield framework.

VenPath offers data analytics services related to mobile apps. According to the Commission's complaint, the company has set forth on its website, https://www.venpath.net, privacy policies and statements about its practices, including statements related to the status of its participation in the EU-U.S. Privacy Shield framework.

The Commission's complaint alleges that VenPath deceptively represented that it was a current participant in the EU-U.S. Privacy Shield framework when, in fact, it was not. The complaint also alleges that the company deceptively represented that it would abide by the EU-U.S. Privacy Shield framework principles, but did not do so. The principles include a requirement that if a company ceases to participate in the EU-U.S. Privacy Shield framework, it must affirm to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program, but according to the complaint, VenPath did not make such an affirmation.

Part I of the proposed order prohibits the company from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework. Because the company had a certification that had lapsed, Part II requires the company to comply with the Privacy Shield requirement to continue to protect, on a going forward basis, personal information it had received while in the program, or return or delete the information.

Parts III through VII of the proposed order are reporting and compliance provisions. Part

III requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part V requires the company to retain documents relating to its compliance with the order for a five-year period.

Part VI mandates that the company make available to the FTC information or subsequent compliance reports, as requested. Part VII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

Analysis to Aid Public Comment

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

Complaint

IN THE MATTER OF

IDMISSION LLC

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

Docket No. C-4665; File No. 182 3150
Complaint, November 15, 2018 – Decision, November 15, 2018

This consent order addresses IDmission LLC's representations concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union. The complaint alleges that the company has set forth on its website, http://www.idmission.com/, privacy policies and statements about its practices, including statements related to the status of its participation in the EU-U.S. Privacy Shield framework. The consent order prohibits the company from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Participants

For the *Commission*: *Ruth Yodaiken.*

For the *Respondent*: *Elizabeth Harding, Polsinelli PC, Polsinelli LLP.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that IDmission LLC, a corporation, has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent IDmission LLC is a Delaware corporation with its principal office or place of business at 8445 Baseline Road, Boulder, CO 80303.

2. Respondent offers a cloud-based technology platform to help business clients engage with their customers.

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.

4. Respondent has set forth on its website**,** http://www.idmission.com, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

Privacy Shield

5. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a

mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield Principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

9. Through at least June 2018, Respondent has disseminated or caused to be disseminated privacy policies and statements on the http://www.idmission.com/company/privacy-policy/ website, including, but not limited to, the following statements:

> **IDmission, LLC** complies with the EU-U.S. Privacy Shield Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information transferred from the European Union to the United States. IDmission has certified to the Department of Commerce that it adheres to the Privacy Shield Principles. If there is any conflict between the terms in this privacy policy and the Privacy Shield Principles, the Privacy Shield Principles shall govern. To learn more about the Privacy Shield program, and to view our certification, please visit https://www.privacyshield.gov/

10. Although Respondent initiated an application to Commerce in October of 2017 for Privacy Shield certification, Respondent did not complete the steps necessary to participate in the EU-U.S. Privacy Shield framework and continued to make the statements described in Paragraph 9 in its privacy policy. After working with Respondent to address deficiencies in its application, Commerce warned the company to take down its claims that it participated in

Privacy Shield unless and until such time as it completed the certification process. Respondent did not do so.

Count 1-Privacy Misrepresentation

11. As described in Paragraph 9, Respondent represents, directly or indirectly, expressly or by implication, that it is a participant in the EU-U.S. Privacy Shield framework.

12. In fact, as described in Paragraph 10, although Respondent initiated an application to Commerce for Privacy Shield certification, it did not complete the steps necessary to participate in the EU-U.S. Privacy Shield framework. Therefore, the representation set forth in Paragraph 11 is false or misleading.

Violations of Section 5 of the FTC Act

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

THEREFORE, the Federal Trade Commission this fifteenth day of November 2018, has issued this complaint against Respondent.

By the Commission, Commissioner Wilson not participating.

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 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, 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 thirty (30) days for the receipt and consideration

of public comments. Now, in further conformity with the procedure prescribed in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent IDmission LLC is a Delaware corporation with its principal office or place of business at 8445 Baseline Road, Boulder, CO 80303.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

1. "Respondent" means IDmission LLC, a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in Privacy or Security Programs

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

II. Acknowledgments of the Order

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

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For twenty (20) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for

conduct related to the subject matter of the Order and all 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 ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

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

III. Compliance Report and Notices

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

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (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 fourteen (14) days of its filing.

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

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: In re IDmission LLC, FTC File No. 1823150.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

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

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each unique advertisement or other marketing material making a representation subject to this Order, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

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

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

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

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the

Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on November 15, 2038, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Provision in this Order that terminates in less than twenty (20) years;

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

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

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, Commissioner Wilson not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to IDmission LLC ("IDmission" or "the company").

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

This matter concerns alleged false or misleading representations that IDmission made to consumers concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield framework allows U.S. companies to

transfer data outside the EU consistent with EU law. To join the EU-U.S. Privacy Shield framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens. Commerce reviews these applications for self-certification and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework and completed the requirements for certification. The listing of companies indicates whether their self-certification is current. Companies are required to re-certify every year in order to retain their status as current members of the EU-U.S. Privacy Shield framework.

IDmission offers a cloud-based technology platform to help business clients engage with their customers. According to the Commission's complaint, the company has set forth on its website, http://www.idmission.com/, privacy policies and statements about its practices, including statements related to the status of its participation in the EU-U.S. Privacy Shield framework.

The Commission's complaint alleges that IDmission deceptively represented that it was a participant in the EU-U.S. Privacy Shield framework when, in fact, it did not complete the steps necessary to participate in the EU-U.S. Privacy Shield framework.

Part I of the proposed order prohibits the company from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part IV requires the company to retain documents relating to its compliance with the order for a five-year period.

Part V mandates that the company make available to the FTC information or subsequent compliance reports, as requested. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

SMARTSTART EMPLOYMENT SCREENING, INC.

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

Docket No. C-4666; File No. 182 3154
Complaint, November 15, 2018 – Decision, November 15, 2018

This consent order addresses SmartStart Employment Screening, Inc.'s representations concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union. The complaint alleges that the company has set forth on its website, http://www.smartstartemploymentscreeninginc.com, privacy policies and statements about its practices, including statements related to the status of its participation in the EU-U.S. Privacy Shield framework. The consent order prohibits the company from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Participants

For the *Commission*: *Ruth Yodaiken.*

For the *Respondent*: *Justin Raprager, Vice President of Integral Relationships, pro se.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that SmartStart Employment Screening, Inc., a corporation, has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent SmartStart Employment Screening, Inc. is a Delaware corporation with its principal office or place of business at 29399 US 19 N - Ste 350, Clearwater, FL 33761.

2. Respondent offers background and employment screening services.

3. The acts and practices of Respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, http://www.smartstartemployment screeninginc.com**,** privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

Privacy Shield

5. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard. Any company that voluntarily withdraws or lets its self-certifications lapse must take steps to affirm to Commerce that it is continuing to protect the personal information it received while it participated in the program.

7. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield Principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

9. Through at least June 2018, Respondent has disseminated or caused to be disseminated privacy policies and statements on the http://www.smartstartemployment screeninginc.com/EmploymentScreening/PrivacyStatement-BackgroundCheckEmployment Screening.asp website, including, but not limited to, the following statements:

Participation in the EU-US Privacy Shield

> SmartStart Employment Screening, Inc. complies with the EU-US Privacy Shield Framework as set forth by the US Department of Commerce regarding the collection, use, and retention of personal information from European Union member countries. SmartStart has certified that it adheres to the Privacy Shield Principles of Notice, Choice, Accountability for Onward Transfer, Security, Data Integrity and Purpose Limitation,

> Access, and Recourse, Enforcement and Liability. If there is any conflict between the policies in this privacy policy and the Privacy Shield Principles, the Privacy Shield Principles shall govern. To learn more about the Privacy Shield program, and to view our certification page, please visit https://www.privacyshield.gov/
>
> Smart Start has joined the EU Privacy Shield Program and complies with the EU – US Privacy Shield Principles as it relates to the collection, use and retention of personal information from European Union member countries. SmartStart adheres to each of the Privacy Shield Principles with respect data received from the EU in reliance of the Privacy Shield: Notice; Choice; Accountability for Onward Transfer; Security; Data Integrity and Purpose Limitation; Access; and Recourse, Enforcement and Liability as explained below.

10. Although Respondent obtained Privacy Shield certification in September 2016, it did not complete the steps necessary to renew its participation in the EU-U.S. Privacy Shield framework after that certification expired in September 2017, nor did it withdraw and affirm its commitment to protect any personal information it had acquired while in the program. After allowing its certification to lapse Respondent has continued to claim, as indicated in Paragraph 9, that it participates in the Privacy Shield program.

Count 1 – Privacy Misrepresentation

11. As described in Paragraph 9, Respondent represents, directly or indirectly, expressly or by implication, that it is a current participant in the EU-U.S. Privacy Shield Principles.

12. In fact, as described in Paragraph 10, Respondent is not a current participant in the EU-U.S. Privacy Shield Principles. Therefore, the representation set forth in Paragraph 11 is false or misleading.

Count 2 – Misrepresentation Regarding Continuing Obligations

13. As described in Paragraph 6, Respondent represented that it would abide by the EU-U.S. Privacy Shield framework principles. These principles include a requirement that if it ceased to participate in the EU-U.S. Privacy Shield framework, it must affirm to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program.

14. In fact, as described in Paragraph 10, Respondent has not affirmed to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program. Therefore, the representation set forth in Paragraph 13 is false or misleading.

Violations of Section 5 of the FTC Act

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

THEREFORE, the Federal Trade Commission this fifteenth day of November 2018, has issued this complaint against Respondent.

By the Commission, Commissioner Wilson not participating.

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 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, 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 thirty (30) days for the receipt and consideration of public comments. Now, in further conformity with the procedure prescribed in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent SmartStart Employment Screening, Inc. is a Delaware corporation with its principal office or place of business at 29399 US 19 N - Ste 350, Clearwater, FL 33761.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

1. "Respondent" means SmartStart Employment Screening, Inc., a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in Privacy or Security Programs

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

II. Requirement to Meet Continuing Obligations Under Privacy Shield

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, must:

A. affirm to the Department of Commerce, within ten (10) days after the effective date of this Order and on an annual basis thereafter for as long as it retains such information, that it will

   1. continue to apply the EU-U.S. Privacy Shield framework principles to the personal information it received while it participated in the Privacy Shield; or

   2. protect the information by another means authorized under EU (for the EU-U.S. Privacy Shield framework) or Swiss (for the Swiss-U.S. Privacy Shield framework) law, including by using a binding corporate rule or a

contract that fully reflects the requirements of the relevant standard contractual clauses adopted by the European Commission; or

B. return or delete the information within ten (10) days after the effective date of this Order.

III. Acknowledgments of the Order

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

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For twenty (20) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all 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 ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

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

IV. Compliance Report and Notices

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

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (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 fourteen (14) days of its filing.

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

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: In re SmartStart Employment Screening, Inc., FTC File No. _____.

V. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

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

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each unique advertisement or other marketing material making a representation subject to this Order, and all materials that were relied upon in making the representation.

VI. Compliance Monitoring

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

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

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

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

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 November 15, 2038, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Provision in this Order that terminates in less than twenty (20) years;

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

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

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, Commissioner Wilson not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to SmartStart Employment Screening, Inc. ("SmartStart" or "the company").

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

This matter concerns alleged false or misleading representations that SmartStart made to consumers concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield framework allows U.S. companies to transfer data outside the EU consistent with EU law. To join the EU-U.S. Privacy Shield framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens. Commerce reviews these applications for self-certification and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework and completed the requirements for certification. The listing of companies indicates whether their self-certification is current. Companies are required to re-certify every year in order to retain their status as current members of the EU-U.S. Privacy Shield framework.

SmartStart offers background and employment screening services. According to the Commission's complaint, the company has set forth on its website, http://www.smartstartemploymentscreeninginc.com, privacy policies and statements about its practices, including statements related to the status of its participation in the EU-U.S. Privacy Shield framework.

The Commission's complaint alleges that SmartStart deceptively represented that it was a current participant in the EU-U.S. Privacy Shield framework when, in fact, it was not. The complaint also alleges that the company deceptively represented that it would abide by the EU-

U.S. Privacy Shield framework principles, but did not do so. The principles include a requirement that if a company ceases to participate in the EU-U.S. Privacy Shield framework, it must affirm to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program, but according to the complaint, SmartStart did not make such an affirmation.

Part I of the proposed order prohibits the company from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework. Because the company had a certification that had lapsed, Part II requires the company to comply with the Privacy Shield requirement to continue to protect, on a going forward basis, personal information it had received while in the program, or return or delete the information.

Parts III through VII of the proposed order are reporting and compliance provisions. Part III requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part V requires the company to retain documents relating to its compliance with the order for a five-year period.

Part VI mandates that the company make available to the FTC information or subsequent compliance reports, as requested. Part VII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

TRONOX LIMITED, NATIONAL INDUSTRIALIZATION COMPANY (TASNEE), NATIONAL TITANIUM DIOXIDE COMPANY LIMITED (CRISTAL), AND CRISTAL USA INC.

COMPLAINT AND INITIAL DECISION IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9377; File No. 171 0085
Complaint, December 5, 2017 – Initial Decision, December 14, 2018

This case addresses the $1.325 billion acquisition by Tronox Limited of Cristal, which is the titanium dioxide business of Saudi Arabia based National Industrialization Company. The complaint alleges that the acquisition would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the market for titanium dioxide in North America. In his Initial Decision, the Administrative Law Judge ("ALJ") concluded that Complaint Counsel established a presumption of liability by showing that the acquisition will lead to undo concentration in the relevant market and provided substantial evidence demonstrating that the North American chloride TiO_2 market is vulnerable to coordinated conduct, which would be enhanced by the acquisition. The ALJ also found that Respondents' arguments regarding entry and efficiencies were unsupported by the evidence and ordered Respondents to terminate the Acquisition Agreement and cease and desist from taking any actions to consummate the Acquisition Agreement. The Respondents appealed the Initial Decision.

Participants

For the *Commission*: *Cem Akleman, Steven Dahm, Eric Elmore, Sean Hughto, Joonsuk Lee, Meredith Levert, Victoria Lippincott, Jon Nathan, Blake Risenmay, Kristian Rogers, Lily Rudy, Robert Tovsky,* and *Cecelia Waldeck.*

For the *Respondents*: *Matt Reilly, Kirkland & Ellis; Pete Levitas, Arnold & Porter Kaye Scholer*.

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 Tronox Limited ("Tronox") and National Titanium Dioxide Company Limited ("Cristal") have executed a merger agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I. NATURE OF THE CASE

1. Tronox's proposed acquisition of Cristal (the "Acquisition") would combine two of the three largest producers of titanium dioxide ("TiO2") manufactured through the chloride process ("chloride TiO2") in the United States and Canada ("North America"). TiO2 is an industrial chemical primarily used as a pigment to provide white color and opacity for architectural paints, industrial and automotive coatings, plastics, and other products. TiO2 is manufactured using either the chloride process, which comprises the vast majority of TiO2 produced and purchased in North America, or the sulfate process ("sulfate TiO2").

2. The U.S. Court of Appeals for the Third Circuit recently characterized the TiO2 industry as an "oligopoly" that is "dominated by a handful of firms" with "substantial barriers to entry." Absent injunctive relief, two firms, Tronox and The Chemours Company ("Chemours"), would control the vast majority of chloride TiO2 sales to North American customers and more than 80 percent of overall North American chloride TiO2 manufacturing capacity. The proposed Acquisition would substantially increase concentration in an already concentrated market and would result in post-Acquisition market concentration levels for the sale of chloride TiO2 to North American customers that exceed those presumed likely to result in anticompetitive effects under both the Federal Trade Commission and U.S. Department of Justice Horizontal Merger Guidelines ("Merger Guidelines") and the relevant case law.

3. The Acquisition would substantially lessen competition in the North American market for chloride TiO2 in at least two ways. First, the Acquisition would increase the likelihood of coordination in an already vulnerable oligopoly market with an extensive history of price-fixing litigation and settlements. It removes one of only a few remaining competitors; consolidates the overwhelming majority of North American chloride TiO2 sales and production capacity in the hands of two large and disciplined TiO2 companies, Tronox and Chemours; and enhances market transparency among the competitors that remain. Second, by doubling the size of Tronox's North American chloride TiO2 business, the Acquisition would increase the incentive and ability of Tronox—a company long focused on reducing or restricting supply as a means of stabilizing or propping up TiO2 prices—to discipline its output to influence North American chloride TiO2 supply and increase prices.

4. Following the announcement of the Acquisition in February 2017, market participants and observers recognized the potential anticompetitive impact of the Acquisition. Industry publication *ICIS Chemical Business* observed that "Tronox's proposed acquisition of Cristal is the latest example of market consolidation that should lead to more price discipline in titanium dioxide." Indeed, Tronox acknowledges that the Acquisition will prove beneficial to its competitors and the industry as a whole. Shortly after the transaction was announced, Tronox's then-CEO wrote to competitor Huntsman's CEO stating that "I am very happy that we are able to put [the Acquisition] together since I think it will be very good for [Tronox's] shareholders – and if today's market reaction is an indication, for yours, and Chemour's and Kronos' too." Other major TiO2 producers similarly acknowledged in investor presentations that the Acquisition is likely to lead to increased supply constraints and higher prices.

5. New entry or expansion by existing producers would not be timely, likely, or sufficient to counteract the anticompetitive effects of the Acquisition. In public statements, Tronox and other market participants consistently confirm the Third Circuit's conclusion that the TiO2 industry is characterized by "substantial barriers to entry." Proprietary technology and the massive investment required render de novo entry in the North American chloride TiO2 market unlikely. As Tronox noted during an earnings call, "running TiO2 plants is a capital-intensive undertaking" and mastering "complex, proprietary technology" remains a "major hurdle," particularly for chloride TiO2 plants. Expansion or repositioning by the remaining firms sufficient to offset the Acquisition's anticompetitive effects is also unlikely. Over the last decade, more North American TiO2 production capacity has been removed through plant and line closures than added by expansions. Nor are increases in TiO2 imports or other adjustments in global TiO2 trade flows likely to offset the anticompetitive effects of the Acquisition.

6. Respondents cannot show cognizable efficiencies that would offset the likely and substantial competitive harm from the Acquisition.

II. JURISDICTION AND VENUE

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

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

III. RESPONDENTS

9. Tronox is a publicly traded company incorporated in Australia and headquartered in Stamford, Connecticut. Tronox is a vertically integrated company that mines titanium ore and other minerals and manufactures and sells chloride TiO2 pigment. In 2016, Tronox's TiO2 business generated North American sales of approximately $410 million. Tronox operates one TiO2 pigment manufacturing plant in Hamilton, Mississippi, and two other plants in Botlek, the Netherlands, and Kwinana, Australia. All three plants produce exclusively chloride TiO2. Tronox also operates titanium feedstock facilities, including mines and mineral processing plants, in South Africa and Australia that provide the raw materials needed to produce TiO2 pigment.

10. TASNEE is a Saudi joint stock company headquartered in Riyadh, Saudi Arabia. It is the majority owner of Cristal and the ultimate parent entity of Cristal USA, Inc. TASNEE is the legal entity that filed, along with Tronox, a Premerger Notification and Report Form with the FTC and the Department of Justice for the Acquisition—pursuant to the Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. § 18a—and responded to the Request for Additional Information and Documentary Material from the FTC. Since a recent restructuring, TASNEE, through its Titanium Strategic Business Unit, has consistently supervised and intervened in the affairs of Cristal and Cristal USA.

11. Cristal, headquartered in Jeddah, Saudi Arabia, is a privately held company, owned 79% by TASNEE, 20% by Gulf Investment Corporation, and 1% by a private investor. Cristal USA is an agent and alter ego of Cristal. In 2016, Cristal, which produces and sells TiO2, generated North American TiO2 sales of approximately $300 million. Cristal produces TiO2 in Ashtabula, Ohio, and in the United Kingdom, Australia, Saudi Arabia, Brazil, China, and France. All of Cristal's TiO2 production in North America, and 80% of its TiO2 production overall, is chloride TiO2. Cristal's remaining TiO2 production is sulfate TiO2. Cristal also owns titanium feedstock facilities in Australia, Brazil, and Saudi Arabia. Cristal is a named party to the Acquisition agreement.

12. Cristal USA Inc., a Delaware corporation, operates a large chloride TiO2 manufacturing complex in Ashtabula, Ohio, and a research facility outside Baltimore, Maryland. Cristal USA's management, including strategy, sales and marketing, is fully integrated into the management and operation of Cristal.

IV. THE ACQUISITION

13. Pursuant to a February 21, 2017 agreement, Tronox seeks to acquire Cristal's TiO2 business for $1.67 billion in cash and a 24% stake in the combined entity.

V. BACKGROUND

A. Titanium Dioxide

14. TiO2 is an essential pigment used to add whiteness, brightness, and opacity to paints, industrial and automotive coatings, plastics, and other specialty products. Primary customers include paint and coatings manufacturers and plastic producers, which account for approximately 60% and 25% of the TiO2 consumed in North America, respectively. Paper and other specialty products, such as ink, food, cosmetics, and pharmaceuticals, use the remainder. For nearly all customers, there are no commercially reasonable substitutes for TiO2.

15. TiO2 is produced from titanium-containing ore through one of two manufacturing processes that extract the TiO2 from the ore: (1) the chloride process that uses chlorine; and (2) the sulfate process that uses sulfuric acid. The chloride process is environmentally cleaner but technically more difficult to master and operate. The chloride process also generally produces higher quality TiO2 with a bluer tint, compared to a yellower tint for TiO2 manufactured from the sulfate process. Chloride TiO2 is also more durable than sulfate TiO2. The vast majority of TiO2 sold to and consumed by North American customers, as well as produced in North America, is chloride TiO2.

16. TiO2 can also have two different crystal structures—rutile and anatase. Each has very different physical characteristics and applications and are not substitutes for each other for any use relevant to this matter. References in this Complaint to TiO2 are to rutile TiO2.

17. TiO2 is delivered to customers by rail or truck. In North America, customers purchase TiO2 either in a slurry form or a bagged dry powder form. TiO2 slurry is made by

dispersing TiO2 powder in water with other additives. TiO2 slurry is then delivered by rail cars or tank trucks and pumped directly to customers' storage tanks, which simplifies handling and manufacturing. TiO2 slurry demand is much higher in North America than in other regions. Large paint and coatings manufacturers in North America generally purchase the majority of their TiO2 in a slurry form while smaller coatings producers and plastics producers typically purchase TiO2 in a bagged dry powder form. North American slurry is entirely made from chloride TiO2.

B. Market Participants and Industry Dynamics

18. The North American TiO2 industry is an oligopoly dominated by five major producers: Tronox, Cristal, Chemours, Kronos, and Venator. These companies produce and sell TiO2 both in North America and in other regions. All North American production is chloride TiO2 with the exception of a small Kronos-owned sulfate TiO2 plant in Canada.

19. Chemours, a DuPont spin-off, is currently the largest TiO2 company in North America and globally. Chemours has two plants in the United States, one in DeLisle, Mississippi and the other in New Johnsonville, Tennessee. Chemours also has plants in Mexico and Asia. Chemours' plants produce only chloride TiO2.

20. The two other major North American TiO2 companies—Kronos and Venator—jointly own a 50-50 joint venture that operates a chloride TiO2 plant in Westlake, Louisiana. Kronos also operates a TiO2 plant in Canada and four plants in Europe. Venator, a Huntsman spin-off, operates six TiO2 plants in Europe and one plant in Asia. While Venator is the second largest TiO2 company in the world by capacity, its presence in North America—limited to half of the output of the joint venture plant in Louisiana—is the smallest among the five major North American producers. Outside of the United States, Kronos and Venator produce both chloride TiO2 (rutile) and sulfate TiO2 (rutile and anatase).

21. Beyond the major North American TiO2 producers, there are smaller regional manufacturers of TiO2, primarily located in Eastern Europe and Asia. The TiO2 produced by these fringe manufacturers is virtually all sulfate TiO2, is generally lower quality than that manufactured by the five major TiO2 companies, and is mostly sold in local or regional markets outside North America. Over the last decade, producers in China have increased their exports of TiO2, primarily into markets in Asia, South America, Europe, and the Middle East. Almost all Chinese TiO2 has been lower quality sulfate TiO2, and very little has been exported to North America. Similarly, although a few Chinese manufacturers have recently begun producing chloride TiO2, their production has been limited, and only a very small amount has been imported to North America.

22. Over the past several years, there have been several civil antitrust suits brought in the United States alleging price fixing by the five major TiO2 companies. Most recently, the Third Circuit Court of Appeals concluded that "[t]here is little doubt that this highly concentrated market for a commodity-like product with no viable substitutes and substantial barriers to entry was conducive to price fixing." The Court went on to state that the major TiO2 companies have already engaged in anticompetitive conduct, noting that "the market was primed for

anticompetitive interdependence and that it operated in that manner," and that such "oligopolistic conscious parallelism is by nature anticompetitive." In a separate proceeding, in 2013, a federal district court in Maryland denied summary judgment for defendants, holding that "[t]he record contains ample evidence for concluding that the Defendants agreed to raise prices and shared commercially sensitive information . . . to facilitate their conspiracy." That litigation concluded with the defendants paying a significant settlement.

23. Given relatively inelastic demand for chloride TiO2, the major North American TiO2 producers recognize that by limiting the supply of chloride TiO2 available in North America they are better able to stabilize or increase North American TiO2 prices. Several of these companies have curtailed or restricted their North American chloride TiO2 output over the past several years to prop up prices. Tronox publicly stated in an earnings call that it manages or restricts production to support higher TiO2 pricing and believes that the other major producers have done the same. Tronox and major North American chloride TiO2 producers have curtailed output by temporarily idling production lines, lowering production rates, or permanently closing plants. They have also allowed chloride TiO2 inventory to build up, exported North American production, and slowed or delayed production increases in an effort to increase or maintain higher prices.

24. In recent years, Tronox and Chemours have been particularly disciplined about their North American sales and production of TiO2. In 2015, Tronox reduced production at its Hamilton, Mississippi facility by temporarily shutting down a line, and Chemours closed its Edge Moor plant in Delaware and shut down a production line at its New Johnsonville, Tennessee plant.

VI. RELEVANT MARKETS

25. The sale of chloride TiO2 to North American customers is a relevant market. A hypothetical monopolist for the sale of chloride TiO2 to North American customers would find it profit-maximizing to impose at least a small but significant and non-transitory increase in price ("SSNIP"). Virtually all TiO2 customers have no viable substitutes for TiO2. While various products and technologies can be used to reduce the amount of TiO2 used by small percentages, they have limited applications and can degrade product performance.

A. Relevant Product Markets

26. The sale of chloride TiO2 is a relevant product market. TiO2 produced through the chloride process comprises the vast majority of TiO2 sold, consumed, and produced in North America. Most North American customers purchasing chloride TiO2, including virtually all of the largest customers, strongly prefer and buy chloride TiO2 for its distinct characteristics, including its brighter tint and improved coverage and durability. Tronox stated during an earnings call that major North American TiO2 customers' "ability to substitute sulfate for chloride [ ] is limited by their need to maintain the quality levels of their own products." Cristal recognizes that [redacted].

27. In order to switch to sulfate TiO2, North American customers currently purchasing chloride TiO2, including almost all coatings and plastics manufacturers, would need to reformulate their product lines and complete extensive testing to qualify the sulfate TiO2, a process that would be costly and could take several years to complete. Consequently, despite significantly higher chloride TiO2 prices in recent years, North American customers switching away from chloride to sulfate TiO2 has been limited. As Tronox's then-CEO told investors, "95%-98%, or some very, very high number [is] chloride in North America," and "that was true when [chloride] prices were over $4,000 per ton," substantially higher than sulfate prices at that time.

28. In addition to the TiO2 differences due to the manufacturing process, TiO2 also has two distinct crystal forms—rutile and anatase—that also impart different product characteristics to the TiO2 and make them suitable for different end uses. Rutile TiO2's crystal structure creates a pigment that is durable, opaque, bright, and very white. Given these characteristics, rutile TiO2 is used in architectural paints, industrial and automotive coatings, and plastics. Rutile TiO2 can be produced using either the chloride or sulfate process. Because all chloride TiO2 has a rutile crystal form, rutile TiO2 comprises the vast majority of the commercially available TiO2 in North America. In contrast, anatase TiO2 is softer and less abrasive than rutile TiO2, and is used for certain specialty applications such as ink, food, cosmetics, and pharmaceuticals. Anatase TiO2 can only be manufactured through the sulfate process. Because of these performance differences, North American customers purchasing rutile TiO2 do not consider anatase TiO2 to be a substitute for rutile TiO2, nor does the supply of anatase TiO2 constrain rutile TiO2 prices. Accordingly, the sale of rutile TiO2 also constitutes a relevant product market in which to consider the effects of the Acquisition.

29. The relevant competitive dynamics in the North American rutile TiO2 market are substantially similar to those in the North American chloride TiO2 market. As a result, the Acquisition's harmful impact on competition in a rutile TiO2 market would be substantially similar to the competitive harm likely to occur in the chloride TiO2 market.

B. Relevant Geographic Market

30. The relevant geographic market in which to assess the Acquisition's effects is the sale of the relevant products to North American customers. A hypothetical monopolist supplier of the relevant products to North American customers would find it profit-maximizing to impose at least a SSNIP.

31. Tronox and Cristal, like the other major North American TiO2 producers, analyze the industry by geographic regions—consistently treating North America as its own region—and engage in price discrimination, including by setting different prices for each geographic region. This reflects the market reality that supply and demand dynamics vary by region. For example, Tronox noted during an earnings call that there are "different prices in the regional markets in which [Tronox] do[es] business."

32. When TiO2 producers negotiate with a multinational customer, the customer's prices typically vary by region. For example, a Tronox sales executive reacted to a customer's

attempt to leverage lower pricing in one region to obtain a price reduction in another by commenting that the customer [redacted]

33. Competitive conditions differ by region, and TiO2 producers employ different pricing strategies for sales in the North American market than in other parts of the world. As a result, North American purchasers of TiO2 face different prices and terms than other regions. Over the past several years, North American prices and margins have generally been higher and more stable than other regions.

34. Beyond pricing differences, North American purchasers of TiO2 also have a number of distinct demand characteristics compared to TiO2 purchasers in other regions. For example, most North American customers buy and strongly favor chloride TiO2 for the vast majority of applications. In contrast, customer demand in other regions of the world is more split between sulfate and chloride. Shifting from chloride to sulfate TiO2 is not commercially feasible for most North American customers. Notably, after acquiring a sulfate TiO2 plant in 2000, Tronox's predecessor company closed it a few years later, specifically citing lack of North American demand for sulfate TiO2. Another demand characteristic largely unique to North America is North American customers' preference for TiO2 sold in slurry form. The vast majority of TiO2 sold in slurry form is consumed in North America by the large North American paint and coatings manufacturers.

35. North American customers facing a SSNIP from a hypothetical monopolist supplier of the relevant products would not be able to defeat the price increase through arbitrage (*i.e.*, by purchasing TiO2 outside of North America and shipping it to North America). Import duties, shipping and handling costs, and other logistical challenges would render such efforts both uneconomical and impractical.

36. Imported chloride or sulfate TiO2 from China or other countries does not meaningfully constrain prices to North American customers. As Tronox noted during an earnings call in 2015, "[w]e do not see that exports from China or from Europe are playing a material role in the competitive balance in the North American market."

VII. MARKET STRUCTURE AND THE ACQUISITION'S PRESUMPTIVE ILLEGALITY

37. Post-Acquisition, each of the relevant markets would be highly concentrated and would become significantly more concentrated as a result of the Acquisition.

38. The federal antitrust agencies, consistent with the Merger Guidelines and courts, measure concentration using the Herfindahl-Hirschman Index ("HHI"). The HHI is calculated by totaling the squares of the market shares of each 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.

39. In the market for the sale of chloride TiO2 to North American customers ("North American chloride TiO2 market"), the Acquisition would result in a post-Acquisition HHI exceeding 3,000, with an increase in the HHI of more than 700. Thus, the Acquisition would result in concentration that establishes a presumption of competitive harm in the North American chloride TiO2 market.

40. In the market for the sale of rutile TiO2 to North American customers ("North American rutile TiO2 market"), the Acquisition would result in a post-Acquisition HHI exceeding 2,500, with an increase in the HHI of more than 550. Thus, the Acquisition would result in concentration that establishes a presumption of competitive harm in the North American rutile TiO2 market.

41. Therefore, the Acquisition is presumptively unlawful under relevant case law and the Merger Guidelines.

VIII. ANTICOMPETITIVE EFFECTS

A. The Acquisition Would Increase the Likelihood of Anticompetitive Coordination

42. As the Third Circuit and the District Court in Maryland have observed, the TiO2 industry is "primed for anticompetitive interdependence" and "a text book example of an industry susceptible to efforts to maintain supracompetitive prices." This Acquisition would only exacerbate these market conditions, rendering anticompetitive coordination even more likely.

43. The North American chloride TiO2 industry already has a number of characteristics that make it vulnerable to coordination. Those include a commodity-like product; a highly concentrated market with limited competitors; significant transparency into the competitive and strategic decisions of rival firms; customers with long-term, stable supplier relationships allowing for easy detection of deviations from past practices; low elasticity of demand; and a history of strong interdependent behavior. Given those characteristics, it is not surprising that the industry has a history of price fixing allegations and settlements. Allowing Tronox to acquire Cristal would enhance that vulnerability and substantially increase the likelihood of anticompetitive coordination by eliminating a large, independent competitor and by placing more than 80% of North American TiO2 capacity in the hands of the two most disciplined competitors—Tronox and Chemours.

44. The major North American chloride TiO2 companies have considerable visibility into their competitors' businesses. Competitors track a wealth of information about each other—including plant-by-plant production capacities, costs, and strategic plans—by monitoring public statements such as earnings calls made by the other publicly traded TiO2 companies, gathering competitive information from customers, and by relying on insight provided by Wall Street analysts and industry consulting firms such as TZ Minerals International Pty Ltd. ("TZMI").

45. North American chloride TiO2 companies also have a strong awareness of their competitors' pricing. They all issue customer pricing letters and several make public price announcements. Moreover, because many customers have "meet or release" clauses in their

contracts, customers often relay competitors' customer-specific pricing information to their TiO2 suppliers.

46. This transparency will only grow with the Acquisition. Today Cristal, unlike the other major North American TiO2 companies, is not a publicly traded company and discloses less detail about its operations. By incorporating Cristal's entire TiO2 production into Tronox, the Acquisition would not only eliminate an important competitor, it would also make information regarding Cristal's operations significantly more accessible to the remaining North American TiO2 companies. Thus, the Acquisition would further enhance the likelihood for coordination by, among other aspects, increasing market transparency among the remaining competitors and making coordination easier to maintain.

47. Having competed against each other in an oligopolistic market environment for many years, the major North American TiO2 companies have recognized their mutual interdependence and aligned incentives. Tronox, along with the other publicly traded North American TiO2 producers, openly discuss these market dynamics during their public earnings calls. For example, during an earnings call in 2016, Tronox's then-CEO explained the industry's strategy to manage production to drive TiO2 prices higher as follows: "I can tell you that . . . last year, Huntsman, . . . Cristal, Chemours, and we all lowered our plant utilization rates. And we all talked about declining inventories which we had set as a goal. That is that we wanted to reduce inventories, clearly the way that one reduces inventories is one reduced production and continues to maintain sales which is what we have all tried to do." By eliminating a key competitor, especially an opaque one like Cristal, the Acquisition will exacerbate the anticompetitive effects of this interdependence.

48. Parallel pricing behavior has been commonplace in the North American chloride TiO2 market for years. The Third Circuit identified 31 separate instances of parallel price increase announcements over an eleven-year period, concluding that such "oligopolistic conscious parallelism is by nature anticompetitive." The District of Maryland described the pattern of parallel price increases in the TiO2 industry as "pervasive."

49. Additionally, Tronox and Cristal engage in other types of parallel accommodating conduct among North American TiO2 competitors, including refraining from competing aggressively to win a new contract or more business for fear of provoking a competitive response from a rival. As a Tronox sales executive instructed a subordinate when declining to bid on a potential account in 2016, [redacted] Likewise, Tronox's then-CEO explained during an earnings call in 2014 that "[Tronox] ha[s] not gained market share by trying to reduce price. We don't think that's the appropriate strategy going forward. Although obviously, we're competitors, so we compete where we have to. But it's not a price-driven market share accretion." [redacted] In a February 2016 presentation to Cristal, consulting firm McKinsey concluded that [redacted]

[redacted] The Acquisition is likely to increase the level of anticompetitive conscious parallelism in the North American chloride TiO2 market, resulting in higher chloride TiO2 prices for consumers.

B. The Acquisition Would Increase Tronox's Incentive and Ability to Curtail Output

50. Tronox has consistently acknowledged the tight link between North American chloride TiO2 prices and North American production. In a 2015 earnings call, Tronox's then-CEO stated that "by managing our production, so that inventories get reduced to normal or below normal levels; and when that happens, prices will rise." Indeed, Tronox built its 2016 budget based on [redacted] And Tronox reaffirmed its commitment to this strategy even after agreeing to purchase Cristal, stating that [redacted] Allowing Tronox to acquire Cristal, thereby doubling its size in North America, will increase Tronox's incentive and ability to decrease or restrict output intended for North American customers, thus leading to higher prices.

51. Tronox has a history of seeking to support North American chloride TiO2 prices by curtailing output in North America. These efforts include reducing production of both chloride TiO2 pigment and titanium feedstock—the input material that Tronox also manufactures as a vertically integrated producer. Over the past several years, Tronox has closed titanium feedstock facilities and shut down TiO2 pigment production lines. In 2015, Tronox's then-CEO publically stated that "[i]t is our view that an upward move in [TiO2 pigment] selling prices will be predicated on a reduction of supply in the pigment market relative to demand, and/or an upward move in feedstock selling prices and we expect to see both." That year, Tronox cut its TiO2 pigment production by approximately 15% and suspended operation of one of its titanium feedstock facilities.

52. In addition to North American production cuts, Tronox and the other major North American chloride TiO2 producers have also reduced North American supply in other ways in order to support the region's pricing. This includes temporarily building up inventory and increasing exports of North American production, despite lower prices abroad. Latin America is a common destination, and a 2015 Cristal report observed that [redacted]

53. The Acquisition would make Tronox the largest TiO2 producer in the world and double its TiO2 production capacity in North America. The combined firm, with its larger size, would have a stronger incentive to curtail output in order to support higher prices. Also, with more manufacturing facilities at its disposal, post-Acquisition Tronox would have more ability to increase North American chloride TiO2 prices by curtailing its production.

54. Consistent with Merger Guidelines Section 6.3, this Acquisition is likely to incentivize the combined firm to engage in output curtailment because:

- the combined firm would have a relatively high market share (the merger doubles Tronox's North American market share);
- the combined firm would have relatively little output already committed at prices unaffected by the output curtailment (contract volume is allocated each year and prices are generally negotiated quarterly);
- the margin on the curtailed output would be relatively low (the margin on the lost chloride TiO2 sales would be small relative to those retained);
- the supply responses of rivals would be relatively small (entry and expansion is slow, expensive, and unlikely); and
- the market elasticity of demand for chloride TiO2 is low (chloride TiO2 is an essential input for many products meaning that a small reduction in output results in a large price effect).

IX. LACK OF COUNTERVAILING FACTORS

55. 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.

56. The TiO2 industry is characterized by substantial barriers to entry. Building a new TiO2 plant would take multiple years and a large capital investment, and is unlikely to occur in response to an increase in North American chloride TiO2 prices post-Acquisition. Expansion or repositioning by the remaining firms that would defeat anticompetitive effects in the North American TiO2 market is also unlikely. During the last decade, substantially more TiO2 production capacity in North America has been taken out because of plant or line closures by Tronox, Cristal, and Chemours than added by expansions.

57. TiO2 imports into North America, mostly sulfate TiO2, manufactured by smaller TiO2 companies, primarily from China, are limited and unlikely to provide a meaningful competitive restraint in the near future. In 2016, Chinese TiO2 imports accounted for less than 1% of North American chloride TiO2 sales and less than 8% of North American rutile TiO2 sales. In their public statements, the major North American TiO2 companies have repeatedly minimized the significance of the competitive threat posed by Chinese TiO2 imports into North America. In 2016, Tronox stated that it does not view Chinese TiO2 as a competitive alternative to its product because of the inferior quality of the Chinese imports. Moreover, because of increased environmental enforcement by the Chinese government over the last two years, many sulfate TiO2 plants in China have been permanently or temporarily shut down. Those closures, coupled with rising domestic demand in China and elsewhere in Asia, have resulted in very tight TiO2 supply in China and recent prices that are even higher than those in North America. As a 2016 Tronox document observes, [redacted]

[redacted]

Consequently, Chinese exports to North America are unlikely to increase substantially for the foreseeable future.

58. Respondents also cannot demonstrate cognizable efficiencies that would be sufficient to rebut the strong presumption and evidence that the Acquisition likely would substantially lessen competition in the North American chloride TiO2 market and in the North American rutile TiO2 market.

X. VIOLATION

Count I—Illegal Agreement

59. The allegations of Paragraphs 1 through 58 above are incorporated by reference as though fully set forth.

60. 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

61. The allegations of Paragraphs 1 through 58 above are incorporated by reference as though fully set forth.

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

NOTICE

Notice is hereby given to the Respondents that the eighth day of May, 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 consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Merger challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the 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 markets, with the ability to offer such products and services as Tronox and Cristal were offering and planning to offer prior to the Acquisition.

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

3. A requirement that, for a period of time, Tronox and Cristal provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Cristal as a viable, independent competitor in the relevant markets.

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

By the Commission.

INITIAL DECISION

I. INTRODUCTION

A. Summary of the Case

This action, issued by the Federal Trade Commission ("FTC" or "Commission") on December 5, 2017, challenges a proposed acquisition by Respondent Tronox Limited ("Tronox") of the titanium dioxide business of The National Titanium Dioxide Company Limited ("Cristal")[1] (the "Acquisition" or "Transaction"). In summary, the Complaint alleges that the Acquisition may substantially lessen competition in the market for the sale of chloride process titanium dioxide ("chloride TiO2") in North America, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. Respondents deny that the Acquisition will substantially lessen competition and further assert that the Acquisition will be procompetitive because it will result in substantial synergies and efficiencies that outweigh any anticompetitive effects. Answer of

1 Respondent The National Industrialization Company ("TASNEE") is the majority owner of Respondent The National Titanium Dioxide Company and the ultimate parent of Respondent Cristal USA Inc. Both TASNEE and The National Titanium Dioxide Company are Saudi Arabian entities. Cristal USA Inc. is a Delaware corporation. Complaint ¶¶ 10-12; Answer of TASNEE and Cristal ¶¶ 10-12; Joint Stipulations of Jurisdiction, Law, and Fact ¶ 4. For ease of reference, the name "Cristal" is used herein to refer to the subject of the Acquisition, as well as to the three affiliated corporate entities, unless the context otherwise dictates.

Tronox ¶ 3 and affirmative defense ¶¶ 9-13; Answer of TASNEE and Cristal ¶ 3 and affirmative defense ¶ 10.

The FTC did not file an ancillary action for a preliminary injunction against the Acquisition in federal district court under Section 13(b) of the FTC Act at the time the Complaint was filed, as is customary in unconsummated merger cases. The reason provided by Complaint Counsel for not filing for a preliminary injunction at that time was that Tronox and Cristal were not in a position to close the Transaction until they received approval from the European Commission.

The evidentiary hearing in this matter, which commenced May 18, 2018, was conducted over 16 days and was completed on June 22, 2018. Thereafter, the parties submitted post-trial briefs, proposed findings of fact, and replies to each other's briefs and proposed findings of fact.[2]

The European Commission granted conditional approval of the Acquisition on July 4, 2018. *See* http://europa.eu/rapid/press-release_IP-18-4361_en.htm. On July 10, 2018, after completion of the evidentiary hearing and more than seven months after the administrative complaint was filed, the FTC filed an action for a preliminary injunction in federal district court. That action was submitted for decision based on the administrative record in this matter and an abbreviated court hearing. On September 5, 2018, the district court entered a preliminary injunction against the Acquisition, pending final agency action and conclusion of any appeals, finding, *inter alia*, that the FTC demonstrated a likelihood that the proposed transaction will substantially lessen competition for the sale of chloride TiO2 in North America. *FTC v. Tronox Ltd*., 2018 U.S. Dist. LEXIS 155127, at *3-4 (D.D.C. Sept. 12, 2018) ("Preliminary Injunction Opinion").

Upon full consideration of the entire record, and as more fully explained below, the evidence in this proceeding proves a strong prima facie case that the Acquisition may substantially lessen competition in the relevant market for the sale of chloride TiO2 in North America, by creating a highly concentrated market and increasing the likelihood of coordinated effects. Respondents have failed to rebut this proof, including by failing to demonstrate that entry or expansion would be timely, likely, and sufficient to counteract the likely anticompetitive effects of the Acquisition, or to demonstrate cognizable synergies or efficiencies that might justify the likely anticompetitive effects of the Acquisition. Accordingly, the evidence proves that the Acquisition may substantially lessen competition. Therefore, pursuant to Section 7 of the Clayton Act and Section 5 of the FTC Act, the Acquisition will be enjoined.

---

2 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 last reply proposed findings and conclusions and briefs were filed on September 7, 2018. Seventy days from the last filed reply proposed findings and conclusions and briefs was November 19, 2018, and, absent an order pursuant to Rule 3.51, the Initial Decision was to be filed on or before November 19, 2018. Based on the voluminous and complex record in this matter, an Order was issued on November 9, 2018, finding good cause for extending the time period for filing the Initial Decision by 30 days. Accordingly, issuance of this Initial Decision by December 19, 2018 is in compliance with Commission Rule 3.51(a).

B. Summary of Evidence Presented

The record in this matter consists of the testimony of a total of 63 witnesses, presented live or by deposition. Over 3,690 exhibits were also admitted into evidence. Individuals referenced in this Initial Decision include current and/or former employees of Tronox and Cristal, competing TiO2 producers, and TiO2 customers.

This Initial Decision is based on a consideration of the whole record relevant to the issues and addresses the material issues of fact and law. The briefs and proposed findings of fact and conclusions of law, and the replies thereto, submitted by the parties, and all contentions and arguments therein were thoroughly reviewed and considered. Proposed findings of fact submitted by the parties that were 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.[3] 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.

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."[4]

---

3 Ruling upon a decision of the Interstate Commerce Commission, and interpreting language in the Administrative Procedure Act ("APA") that is almost identical to language in 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 Administrative Law Judges are not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. *In re Amrep Corp.*, 102 F.T.C. 1362, 1670, 1983 FTC LEXIS 17, at *566-67 (Nov. 2, 1983).

4 References to the record are abbreviated as follows:

PX – Complaint Counsel's Exhibit
RX – Respondents' 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 – Respondents' Post-Trial Brief

Pursuant to Commission Rule 3.45(b), several orders were issued in this case granting *in camera* treatment to material, after finding, in accordance with the Rule, that its public disclosure would likely result in a clearly defined, serious injury to the entity requesting *in camera* treatment or that the material constituted "sensitive personal information," as that term is defined in Commission Rule 3.45(b). In addition, when the parties sought to elicit testimony at trial that revealed information that had been granted *in camera* treatment, the hearing went into an *in camera* session. Commission Rule 3.45(a) allows the Administrative Law Judge ("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*., 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*., 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 merit *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).

II. ANALYSIS

A. Background

1. TiO2 generally

Titanium dioxide, or TiO2, is an industrial chemical used primarily as a pigment.[5] F. 1. TiO2 is used to add whiteness, brightness, opacity and durability to paints, industrial and automotive coatings, plastics, and other specialty products. As discussed in more detail below, there are five major TiO2 producers. These are, in addition to Tronox and Cristal, Kronos Worldwide, Inc. ("Kronos"), the Chemours Company ("Chemours"), and Venator Materials PLC ("Venator"). F. 41-43, 192.

RRB – Respondents' Post-Trial Reply Brief
RFF – Respondents' Proposed Findings of Fact
RRCCFF – Respondents' Reply to Complaint Counsel's Proposed Findings of Fact

5 The terms "titanium dioxide" and "TiO2" are used interchangeably in this Initial Decision. Although TiO2 can have two different crystal structures – rutile and anatase – they have different characteristics and uses, and it is undisputed that anatase TiO2 is not in issue in this case. F. 2; RB at 4 n.1. Accordingly, references to titanium dioxide in this Initial Decision are intended to refer only to rutile TiO2.

TiO2 is produced by mining heavy materials that are concentrated in sand dunes, such as ilmenite, which is a combination of titanium oxide and iron oxide. F. 4, 338, 340. A smelting process separates the iron and converts the material into TiO2 "feedstock," or "slag," which is the raw material that gets transformed into TiO2 pigment. F. 4, 342. TiO2 can be manufactured from feedstock using either a chloride process ("chloride TiO2") or a sulfate process ("sulfate TiO2"). F. 4. In summary, the chloride process is a continuous process that uses chlorine gas, while in the sulfate process, feedstock is combined in batches with sulfuric acid. F. 4-5.

The primary customers of TiO2 are paint and coatings manufacturers and plastic producers. F. 6. These include paint and coatings manufacturers The Sherwin-Williams Company ("Sherwin-Williams"), which also includes the Valspar brand of paint (F. 47); PPG Industries ("PPG"), which manufactures paint (F. 46); Masco Coatings Corporation ("Masco"), which includes the Behr and Kilz brands (F. 45); and True Value Company ("True Value") (F. 48); and plastics manufacturer Deceuninck North America. F. 44. Approximately 60% of TiO2 is used in coatings applications, 25% in plastics, 10% in paper, and 5% in other uses, including inks, foods,[6] and pharmaceuticals. F. 6.

2. Respondents and the challenged transaction

Tronox is a corporation headquartered in Stamford, Connecticut. F. 8. Tronox owns and operates three chloride TiO2 plants, which are located in Hamilton, Mississippi; Botlek, Netherlands; and Kwinana, Australia. F. 12. In addition, Tronox owns and operates titanium feedstock mining and smelting assets in Australia and South Africa. F. 11. The only type of TiO2 that Tronox manufactures is chloride TiO2. F. 13.

Cristal consists of three legal entities. Cristal USA Inc. is a Delaware corporation and an indirectly owned subsidiary of Saudi Arabian companies The National Industrialization Company ("TASNEE") and The National Titanium Dioxide Company. F. 15. Cristal owns and operates a total of five chloride TiO2 plants, two of which are located in Ashtabula, Ohio; one in Yanbu, Saudi Arabia; one in Stallingborough, United Kingdom; and one in Bunbury, Australia. F. 19. Cristal also owns and operates three sulfate TiO2 plants, located in Thann, France; Bahia, Brazil; and Fuzhou, China. F. 18. While Cristal manufactures both chloride TiO2 and sulfate TiO2, Cristal's plants in the United States manufacture only chloride TiO2. F. 19.

Tronox began conversations with Cristal regarding a potential acquisition in 2015. F. 21. In October 2016, Tronox and Cristal agreed to a preliminary framework. F. 22. The following month, Tronox and Cristal agreed to a non-binding deal construct, and due diligence commenced. F. 23. On February 21, 2017, Tronox announced a definitive agreement to acquire Cristal's TiO2 business. F. 24.

---

6 Chloride TiO2 cannot be used in products that are ingested. F. 6 n.23. Food-grade TiO2 can only be made from sulfate TiO2 or anatase TiO2, and can be an additive to toothpaste, powdered donuts, or cookie filling. F. 6 n.23. Food-grade TiO2 is also used to prevent spoilage and increase the shelf life of foods. *See* https://www.foodsight.org/titanium-dioxide-fda-food-coloring-additive-ingredient-donuts.

The structure of the proposed Transaction is cash and shares, providing for $1.673 billion in cash and 37.58 million Class A shares representing 24% of the combined entity. F. 25. Shareholders approved the transaction on October 2, 2017. F. 25.

B. Applicable Legal Standards

1. In general

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, 2005 FTC LEXIS 215, at **3 n.4 (Jan. 6, 2005). Under the Administrative Procedure Act, an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d).

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).

2. Merger law

a. Statutory framework

Section 7 of the Clayton Act prohibits mergers or acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or . . . activity affecting commerce in any section of the country." 15 U.S.C. § 18.[7]

"Congress used the words '*may be* substantially to lessen competition' to indicate that its concern was with probabilities, not certainties." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962); *accord FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 35 (D.D.C. 2009).

7 Section 11 of the Clayton Act vests jurisdiction in the FTC to determine the legality of a corporate acquisition under Section 7. 15 U.S.C. § 21(b); *In re R.R. Donnelley & Sons Co.*, 1995 FTC LEXIS 450, at *11 (July 21, 1995). Corporations are included within the definition of "persons" that are subject to jurisdiction under the Clayton Act, 15 U.S.C. § 12(a), and the FTC Act, 15 U.S.C. § 44. The parties have stipulated that both Tronox and Cristal USA Inc., are corporations and engage in activities in or affecting commerce, within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12. F. 14, 20. Thus, the Commission has jurisdiction over this matter pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45, and Sections 7 and 11 of the Clayton Act, 15 U.S.C. § 18, 21(b).

"Congress enacted Section 7 to curtail anticompetitive harm in its incipiency." *In re Polypore Int'l Inc.*, 150 F.T.C. 586, 2010 WL 9549988 at *8 (2010), *aff'd* 686 F.3d 1208 (11th Cir. 2012). Thus, it is not necessary to demonstrate certainty that a proposed merger will produce anticompetitive effects, or even that such effects are highly probable, *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989), "but only that the loss of competition is a 'sufficiently probable and imminent' result of the merger or acquisition." *CCC Holdings*, 605 F. Supp. 2d at 35 (quoting *United States v. Marine Bancorp.*, 418 U.S. 602, 623 n.22 (1974)); *accord In re Promedica Health Sys., Inc.*, 2012 WL 1155392, at *12 (Mar. 28, 2012). *See FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991) ("[T]o satisfy section 7, the government must show a reasonable probability that the proposed transaction would substantially lessen competition in the future."). "Of course the word 'may' [in Section 7] should not be taken literally, for if it were, every acquisition would be unlawful. But the statute requires a prediction, and doubts are to be resolved against the transaction." *Elders Grain*, 868 F.2d at 906.

The allegation that an acquisition is a Section 5 violation, as well as a Section 7 violation, "does not require an independent analysis . . . ." *In re Chicago Bridge*, 2005 FTC LEXIS 215, at **8 n.23, *aff'd, Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 n.5 (5th Cir. 2008). *Accord FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1501 n.2 (D.C. Cir. 1986) (stating that Section 5 of the FTC Act "may be assumed to be merely repetitive of [Section] 7 of the Clayton Act").

b. Burden shifting framework

"Courts have traditionally analyzed Section 7 claims under a burden-shifting framework. *See, e.g.*, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990)." *Polypore*, 2010 WL 9549988, at *9. Under this framework, for its prima facie case, a plaintiff may establish a presumption of liability by defining a relevant product and geographic market, and showing that the transaction will lead to undue concentration in the relevant market. *Id.* (citing *Baker Hughes*, 908 F.2d at 982-83).

The plaintiff can bolster a prima facie case based on a market concentration presumption by adducing evidence showing that anticompetitive unilateral or coordinated effects are likely. *Polypore*, 2010 WL 9549988, at *9 (citing *Heinz*, 246 F.3d at 717). In this regard, ordinary course business documents of the merging parties "are often highly probative of both industry conditions and the likely competitive effects of a merger." *Polypore*, 2010 WL 9549988, at *9. *See Chicago Bridge*, 2005 FTC LEXIS 215, at **44 (noting that qualitative evidence on pre-acquisition competition may support conclusions based on market structure and can provide an independent basis for a prima facie case under Section 7). "Evidence that sheds light on the strategic objectives of the merging parties is also probative of likely competitive effects." *Polypore*, 2010 WL 9549988, at *9 (citing *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1047 (D.C. Cir. 2008) (Tatel, J., concurring); 4A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 964, at 18-19 (3d ed. 2009); 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines § 2.2.1) (hereinafter "Merger Guidelines § __").

If the plaintiff establishes a prima facie case, the burden shifts to the defendant to show that "traditional economic theories of the competitive effects of market concentration are not an accurate indicator of the merger's probable effect on competition in these markets or that the

procompetitive effects of the merger are likely to outweigh any potential anticompetitive effects." *CCC Holdings*, 605 F. Supp. 2d at 46. *See also FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347 (3d Cir. 2016) (stating that in order to rebut the prima facie case, defendants "must show either that the combination would not have anticompetitive effects or that the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger"). Although the courts have not defined a precise standard that must be met to rebut a prima facie case, the courts advise that "[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut [the presumption] successfully." *Baker Hughes*, 908 F.2d at 991; *Heinz*, 246 F.3d at 725; *Polypore*, 2010 WL 9549988, at *9.

The defendant "can rely on a variety of types of evidence to meet its burden on rebuttal, including evidence that casts doubt on the significance or accuracy of the plaintiff's market share and concentration evidence, factors that indicate that collusion is improbable, and evidence of likely efficiencies." *Polypore*, 2010 WL 9549988, at *9 (citing *Baker Hughes*, 908 F.2d at 985). "If the defendant successfully rebuts the presumption [of illegality], the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Baker Hughes*, 908 F.2d at 983; *Heinz*, 246 F.3d at 715; *Polypore*, 2010 WL 9549988, at *9.

C. Relevant Market

The first step in evaluating whether an acquisition may substantially lessen competition in any "line of commerce" in any "section of the country" is to determine the "line of commerce" and the "section of the country"; in other words, to determine the relevant product market and the relevant geographic market. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1110 (N. D. Cal. 2004). Complaint Counsel bears "the burden of proving a relevant market within which anticompetitive effects are likely as a result of the acquisition." *In re R.R. Donnelley & Sons*, 1995 FTC LEXIS 450, at *38.

1. Product market

a. Legal standards

A relevant product market consists of "products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered." *United States v. E.I. du Pont de Nemours Co.*, 351 U.S. 377, 404 (1956). "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325; *see du Pont*, 351 U.S. at 395 (1956). "Interchangeability of use and cross-elasticity of demand look to the availability of products that are similar in character or use to the product in question and the degree to which buyers are willing to substitute those similar products for the product." *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000) (citing *du Pont*, 351 U.S. at 393).

While the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it, "within [a] broad market, well-defined submarkets may exist which, in

themselves, constitute product markets for antitrust purposes." *Brown Shoe*, 370 U.S. at 325 (citing *United States v. E. I. du Pont de Nemours Co.*, 353 U.S. 586, 593-95 (1957)). "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id*. "[E]vidence of industry or public recognition of the submarket as a separate economic unit matters because we assume that economic actors usually have accurate perceptions of economic realities." *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 53 (D.D.C. 2011). In addition, ordinary course of business documents reveal the contours of competition from the perspective of the parties, who may be presumed to "have accurate perceptions of economic realities." *Whole Foods*, 548 F.3d at 1045 (concurring op.) (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986)).

In the instant case, Complaint Counsel alleges that the relevant market is the sale of chloride TiO2 to North American customers. CCB at 10-26. Respondents contend that the relevant market is the sale of rutile TiO2 (both chloride process and sulfate process) in a global market. RB at 46-53. In this case, the analysis of the product market and of the geographic market are dependent on each other. In section II.C.2. below, the geographic market is determined to be the North America region, consisting of the United States and Canada. In this section, which analyzes the product market, the focus is on the type of TiO2 sold to North American customers. As detailed in section III.B.1. and summarized below, the evidence proves that chloride TiO2 and sulfate TiO2 have distinct characteristics; that because of these distinct attributes, sulfate TiO2 is not suitable in the vast majority of coatings' manufacturers' products; and that North American customers are unwilling to substitute sulfate TiO2 for chloride TiO2, even when the price of chloride TiO2 has been significantly higher than sulfate TiO2. Therefore, chloride TiO2 and sulfate TiO2 are not reasonably interchangeable. Accordingly, Complaint Counsel has met its burden of showing that the relevant product market is chloride TiO2.

b. Distinct characteristics of chloride TiO2 and sulfate TiO2

Chloride TiO2 and sulfate TiO2 have distinct characteristics. Manufacturers of TiO2 recognize that there are important differences between chloride TiO2 and sulfate TiO2. *E.g.*, F. 52-57, 62-63. As acknowledged in Tronox's business documents, chloride TiO2 is a higher quality product than sulfate TiO2. *E.g.*, F. 52 ("Chloride process uses higher-quality feedstocks and makes better quality TiO2."). Kronos, a TiO2 producer that sells both chloride TiO2 and sulfate TiO2 (F. 41), recognizes that chloride TiO2 is a superior product to sulfate TiO2 on many measures used to evaluate a grade of TiO2, including on the product's optical properties, its color undertone, tinting strength, and durability. F. 53, 56, 62.

Chloride TiO2 is a brighter pigment than sulfate TiO2 due to its bluer undertone. F. 54-61. As explained in one Tronox investor presentation, "[c]hloride technology yields consistently whiter, brighter pigment grades preferred for many of the largest end-use applications (e.g., paints and plastics) as compared to the sulfate process." F. 54. As Kronos explained, the most noteworthy difference between chloride TiO2 and sulfate TiO2 is the general color and

undertone of the product produced. F. 56. Chloride TiO2 has a brighter white or a blueish undertone, whereas sulfate TiO2 has a yellowish undertone. F. 56, 59. TiO2 producers, including Tronox, recognize that North American consumers prefer the blue tone of chloride TiO2 over the yellow tone of sulfate TiO2. F. 54-58. For example, one Tronox presentation notes, "US consumers have gotten used to a more blue tone and prefer it over the more yellow tone of white." F. 55.

At trial, North American paint manufacturers consistently testified that sulfate TiO2 is not a reasonable substitute for chloride TiO2 for most of the products they sell in North America because the pigment is not as bright, tends not to be as durable, and does not allow for point of sale tinting. *E.g.*, F. 59-61, 64-65. Paint manufacturers use chloride TiO2 instead of sulfate TiO2 because it is brighter in appearance and allows manufacturers to produce crisp, clean colors and "bright whites." F. 59-61. As George Young of Sherwin-Williams, the largest paint producer in North America, explained, sulfate TiO2 does not meet Sherwin-Williams' standards for North America because it "tends to have a yellow undertone. Our market in North America requires clean colors, bright colors." F. 61. As Mario Pschaidt of Masco, the manufacturer of the Behr paints sold through Home Depot, explained, sulfate TiO2 "gives you a yellowish undertone, and that doesn't achieve that clean crisp look that you get from a chloride-produced TiO2, and therefore, we cannot use the sulfate-grade TiO2 for our main product lines." F. 61.

Coatings manufacturers use chloride TiO2 instead of sulfate TiO2 also because it tends to be more durable. F. 64-65. For example, Sherwin-Williams has found that its formulas with chloride TiO2 have better durability; True Value has found that sulfate TiO2 failed to meet its durability requirements in laboratory testing; and Mississippi Polymers, Inc. ("Mississippi Polymers") has found that sulfate TiO2 "tends not to weather as well," and "tends not to have the same longevity in an application as a TiO2 that's produced from the chloride process." F. 64-65.

Another reason paint manufacturers use chloride TiO2 and cannot substitute sulfate TiO2 is "point-of-sale tinting," where a customer picks a color at a store and a can of paint is customized to that customer's request. F. 66. In the North America market, almost all paint is tinted at the point of sale. F. 67. Paint manufacturers have found that they must use chloride TiO2 in order to get the color consistency that customers expect. F. 68. As John Vanderpool of True Value explained, "the last thing we want to have is phone calls coming in to our customer service department, one after another, that color 57 is no longer color 57; it's really 28." F. 69. Sulfate TiO2 does not provide the same consistent results as chloride TiO2 to allow for tinting at the point of sale. F. 68. A Tronox presentation acknowledges that "[t]he US also has point of sale tinting which requires a very consistent pigment base." F. 68.

Coatings manufacturers also described other attributes that prevent them from substituting sulfate TiO2 for chloride TiO2, including: sulfate TiO2 "didn't meet all the criteria that [True Values needs] in terms of scrubbability, durability, dry time, recoat time, sag [downward movement of paint], low odor, all those kinds of things, and compatibility with the other raw materials that we're using in our formulas" (F. 71); sulfate TiO2 is inferior to chloride TiO2 in terms of [redacted] (F. 72); and, sulfate TiO2 "is ill suited for [redacted]

[redacted]. (F. 73).

Respondents assert that the different properties of sulfate TiO2 and chloride TiO2 can be controlled through the finishing process and that coatings produced with chloride TiO2 and sulfate TiO2 can look the same. RB at 52. This assertion, based on the testimony of Jeffrey Engle, Tronox's vice president of marketing and sales, is contrary to Tronox documents touting its chloride technology, as compared to the sulfate process, for yielding the consistently whiter, brighter, pigment grades that are preferred for many of the largest end-use applications (e.g., paints and plastics). F. 54. *See also* F. 52 (internal Tronox email describing competitive advantages of the chloride process). Moreover, Respondents' assertion is not consistent with the actions of manufacturers who purchase chloride TiO2 instead of sulfate TiO2 because of the superior performance characteristics of chloride TiO2. Furthermore, even if the different properties could be controlled through the finishing process, manufacturers would need to reformulate their product lines to make such substitution, which, as addressed below, is a lengthy and expensive process.

c. Reasonable interchangeability

Chloride TiO2 and sulfate TiO2 are not reasonably interchangeable. As shown above, end-use customers in the United States and Canada demand high quality, premium coatings products, are accustomed to the blueish tone of chloride TiO2, and almost exclusively purchase paint that is tinted at the point of sale. Because of the differences in the attributes of chloride TiO2 and sulfate TiO2 and the demands of North American customers, North American coatings companies and plastics manufacturers overwhelmingly buy chloride TiO2 and do not consider sulfate TiO2 to be a suitable substitute. Section III.B.1.b.

Respondents argue that North American TiO2 customers use both sulfate and chloride process TiO2 in their products, asserting that True Value buys sulfate TiO2 from Lomon Billions Group ("Lomon Billions"), a Chinese supplier; Behr has switched from chloride TiO2 to sulfate TiO2 for its Kilz brand paint; and Masco has approved a sulfate process grade for use in some of its formulations. RB at 52. However, the evidence shows that North American paint companies do not use significant amounts of sulfate TiO2. In fact, sulfate TiO2 is used in less than 10% of their products and only in "very basic, entry level paints," and low-end applications such as primers and ceiling paint, traffic marking paint, and some other select products. F. 84, 86, 88, 90.

Mr. Vanderpool of True Value described sulfate TiO2 and chloride TiO2 as "apples and oranges," and would not consider switching True Value from its current use of chloride TiO2 to sulfate TiO2 for the vast majority of its paints because the products are "not the same." F. 85. Similarly, [redacted] have tested sulfate TiO2 and would not switch to sulfate TiO2 because it does not result in consistent brightness of color or consistent whites and, thus, is not suitable for most of their applications. F. 89, 91. Greg Arrowood of Deceuninck North America, a vinyl manufacturer, believes chloride TiO2 is superior to sulfate TiO2 in purity and quality, and has never purchased sulfate TiO2. F. 93.

Brian Christian of Kronos testified that "the North American market commands CP [chloride process TiO2] products." F. 94. Mr. Christian further testified that the "overwhelming preference" of Kronos' North American coatings and plastics customers is for chloride TiO2, explaining, "A lot of these customers require [chloride TiO2] grades to hit the quality level that they need for their products, so while technically feasible that you could put a sulfate grade into those applications, it would significantly reduce the quality of their products, and that's not acceptable for their business plan." F. 95.

In a conference call with investors, Tom Casey, then chairman and chief executive officer ("CEO") of Tronox, recognized that coatings companies' "ability to substitute sulfate for chloride . . . is limited by their need to maintain the quality levels of their own products." F. 96 ("I don't see as much of a shift or a material shift from chloride-processed pigment to sulfate-processed pigment because the major customers of the pigment, whether it is chloride or sulfate, are coatings companies who have requirements in their own products [such] that the use of sulfate versus chloride will affect their . . . end product.").

An additional attribute that prevents North American paint customers from switching from chloride TiO2 to sulfate TiO2 is the form in which the TiO2 is delivered. North American customers purchase TiO2 either in a bagged dry powder form or in liquid slurry form. F. 76. TiO2 slurry is made by dispersing TiO2 powder in water with other additives, is delivered to customers by rail cars or tank cars, and can be pumped directly into customers' storage tanks. F. 77, 80. More than a third of the chloride TiO2 sold in North America is in slurry form. F. 172. In North America, TiO2 slurry is only made from chloride TiO2. F. 82.

Whether one product is reasonably interchangeable for another depends on the ease and speed with which customers can substitute it, the desirability of doing so, and the cost of substitution. *Whole Foods*, 548 F.3d at 1037 (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 53-54 (D.C. Cir. 2001) (en banc)). To substitute sulfate TiO2 for chloride TiO2 and maintain the quality levels of their products, coatings and plastics manufacturers would have to reformulate their product lines and complete extensive testing, a process that would be costly and could take several years to complete. Section III.B.1.c. *E.g.*, F. 101 (qualifying a new grade of TiO2 is a multi-step process that includes tests on outdoor weathering and subjective feedback from customers, and can take as long as three years); F. 101 ("It takes a minimum of [redacted] to qualify a TiO2 grade for use in one of our core architectural or industrial coatings products, and it may take as long as [redacted]."). For industrial coatings, qualification has additional steps. F. 102. Depending on the application, some industrial coatings require customer or regulatory approval. F. 102. When asked for his perspective of what a customer would need to do to reformulate a product from using chloride process TiO2 to sulfate process TiO2, Mr. Christian of Kronos testified, "I don't have a lot of examples of that happening. That would be pretty rare, but it would entail a significant amount of work, a lot of trials, a complete reformulation of their product and grade . . . ." F. 98.

Respondents assert that Masco switched from chloride process TiO2 to sulfate process TiO2 for its Kilz brand and [redacted].

RB at 52. However, the evidence shows that Masco's switch to sulfate TiO2 was limited to Kilz' low-end primers. F. 100. Furthermore, the [redacted]. F. 100.

d. Price differential

As shown below, the evidence proves that North American TiO2 customers do not, and would not, substitute sulfate TiO2 for chloride TiO2, despite the price differential. Complaint Counsel's economic expert witness, Dr. Nicholas Hill, analyzed actual sales data obtained from customers and producers and found that, on average, chloride TiO2 was 21% more expensive than sulfate TiO2 for North American customers from 2012 through mid-2017 and that, despite this significant price disparity, the proportion of chloride TiO2 sales in North America has remained steady. F. 111-114. Indeed, chloride TiO2 accounted for around 90% of TiO2 sales in North America from 2012 through mid-2017, despite the price differential. F. 50, 112-113. *See also* F. 51 (Tronox investor presentation ("The North American market is ~90% chloride."). This evidence indicates that North American TiO2 customers do not substitute sulfate TiO2 for chloride TiO2, even when the price of chloride TiO2 is significantly higher.

Moreover, customers consistently testified that they have not switched, and would not switch, from chloride TiO2 to sulfate TiO2, even in the face of a significant price difference. For example, even when sulfate TiO2 was 40% cheaper than chloride TiO2, Sherwin-Williams did not switch its North American products from chloride TiO2 to sulfate TiO2 "because [of] the performance gap between the two materials." F. 108. True Value and Masco testified that if the price of chloride TiO2 increased by at least 10% compared to the price of sulfate TiO2, they would not switch to sulfate for their main product lines because they do not want to sacrifice the quality of their product lines. F. 107, 109. In 2011, when the price that Deceuninck North America paid for chloride TiO2 was very high, Deceuninck North America did not consider switching to sulfate TiO2, explaining, "the only way that Deceuninck would even consider sulfate TiO2 would be if chloride TiO2 was unavailable." F. 110.

Tronox's statements to investors affirm that North American customers purchase chloride TiO2 and do not substitute sulfate TiO2, notwithstanding higher pricing for chloride TiO2. In a 2014 Tronox earnings call, Mr. Casey reported, "In various markets, the customers have responded to what happened on pricing a year ago in different ways. For example in the North American market, it was 95% or 98%, or some very, very high number chloride[.] [I]t remains, essentially the same number market share for chloride. That was true when prices were over $4,000 a ton[[8]], it is true now [when chloride prices are lower]." F. 106. During a 2013 question

8 The word "ton" is a British and American measure. *Common Mistakes in Business English*, https://blog.harwardcommunications.com/2012/01/23/the-difference-between-ton-and-tonne/. In the United States and Canada, a ton is equal to 2,000 pounds. Documents and testimony in this case also refer to the metric measure, "tonne," also known as "metric ton," which is equal to 1,000 kilograms (2,205 lbs). *Id.*; https://www.rapidtables.com/convert/weight/kg-to-pound.html. The term "metric ton" may also be abbreviated as "MT." https://englishplus.com/grammar/00000058.htm. In some instances, such as where a witness is being

and answer session with investors, Tronox acknowledged that sulfate TiO2 is not a meaningful substitute for chloride TiO2 in North America:

> Q. When TiO2 prices were going up last year some of your customers were pretty vocal about substituting to other less expensive products, how much of this do you think occurred and how much is ongoing?
>
> [Tronox CEO A.:] You're right, there was significant commentary last year about substantial amounts of substitution. There has been some but limited effect from substitution. Some customers substituted 3-5% of sulfate-based pigment in an otherwise 100% chloride pigment gallon of paint. This was done primarily in industrial paint markets and in certain regions of the world. Very limited if any substitution was done by architectural coatings companies or here in North America.

F. 106. Thus, as Tronox's own CEO recognized, customers are not willing to substitute sulfate TiO2 for chloride TiO2 in the vast majority of their products, notwithstanding the price differential.

e. Respondents' opposing arguments

Respondents argue that sulfate TiO2 and chloride TiO2 are substitutes, and therefore in the same product market, because it is possible for TiO2 customers to use either sulfate TiO2 or chloride TiO2 in approximately 80% of TiO2 end-use products, provided the quality is the same, and that only 10% of TiO2 end-use products must use chloride only. RB at 51; RX1503 at 0014. However, as shown above, customers do not find the quality to be the same. Even if it is possible, as a technical matter, for paint companies to make paint with either chloride TiO2 or sulfate TiO2, the fact is that they overwhelmingly choose not to do so. Furthermore, the proper antitrust inquiry, as set forth in the Merger Guidelines, is not whether it is theoretically possible for customers to substitute, but whether customers *would reasonably* substitute sulfate TiO2 for chloride TiO2 in sufficient volumes to render a small but significant non-transitory increase in price ("SSNIP") (commonly 5%) unprofitable. Merger Guidelines §§ 4.1.1, 4.1.2 (emphasis added). As addressed in more detail in section II.C.3. below, Dr. Hill conducted an empirical analysis and found that a hypothetical monopolist of all chloride TiO2 sales to customers in North America would find it profitable to impose a SSNIP.

Respondents further argue that sulfate and chloride are in the same product market because, according to Respondents' proffered economic expert witness, Dr. Ramsey Shehadeh, "there is a long-term relationship between sulfate and chloride titanium dioxide prices" characterized by "statistically and economically significant co-movement of prices." RB at 53.

---

quoted, the Initial Decision cannot determine from the transcript of testimony whether or not the transcribed word "ton" was intended by the witness to refer to a metric ton.

This argument is unconvincing. Even if the prices are correlated, this does not show that the products are reasonably substitutable for each other, especially in light of the proof that TiO2 customers do not substitute. *See also* Preliminary Injunction Opinion, 2018 U.S. Dist. LEXIS 155127, at *21 (stating that "the mere fact that the prices of two goods move upward or downward together need not mean that they are substitutes"). As Dr. Hill explained, "[t]he prices of two goods may be correlated, but they may not be in the same market. . . . One [example of this] would be, hamburger buns and hot dog buns are made from the same thing, and their demands highly correlated. Their prices will be correlated over time, but they are not close substitutes for one another." Hill, Tr. 1707-08.

f. Summary

As shown above, North American coatings and plastic manufacturers demand particular characteristics that are provided by chloride TiO2, but which are not provided by sulfate TiO2. The two products are not reasonably interchangeable. Customers do not

substitute, and would not substitute, sulfate TiO2 for the vast majority of their products, notwithstanding higher pricing for chloride TiO2. For all these reasons, the evidence proves that chloride TiO2 is a relevant product market.

2. Geographic market

a. Legal standards

The boundaries of the relevant geographic market, like the boundaries of the relevant product market, depend on reasonable interchangeability and cross-elasticity of demand. *Brown Shoe*, 370 U.S. at 336. The relevant geographic market is the region "in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995). The "proper question" is "not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357 (1963).

Where suppliers can set prices based on customer location, and customers cannot avoid targeted price increases through arbitrage (by purchasing at a lower price from a seller in one geographic area and then transporting the product to another geographic region), the relevant geographic market may be defined around the locations of customers. *Polypore*, 2010 WL 9549988 at *16 (applying Merger Guidelines § 4.2.2). Under the Merger Guidelines, "if price discrimination based on customer location is feasible as is often the case when delivered pricing is commonly used in the industry, the Agencies may define geographic markets based on the locations of customers. . . ." Merger Guidelines § 4.2.

Courts apply the "hypothetical monopolist test" to ask whether a "hypothetical profit-maximizing firm . . . that was the only present and future seller of [the relevant] products . . . likely would impose at least a small but significant and non-transitory increase in price

('SSNIP'). . . ." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 33 (D.D.C. 2015) (quoting Merger Guidelines § 4.1.1). "If buyers would respond to the SSNIP by shifting to products produced *outside* the proposed geographic market, and this shift were sufficient to render the SSNIP unprofitable, then the proposed geographic market would be too narrow." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 123 (D.D.C. 2004).

In the instant case, the Complaint alleges that the relevant geographic market is North America, which Complaint Counsel defines as the United States and Canada. Complaint ¶ 30; CCB at 20 n.19. Respondents contend that the geographic market is global. Answer of Tronox ¶ 30; RB at 47-50. As further explained below, the evidence shows that Respondents set prices on a regional basis; that the North America region includes the United States and Canada, but not Mexico; that chloride TiO2 manufacturers deliver their product to their North American customers' locations; and that North American customers could not defeat a price increase through arbitrage. Therefore, the relevant geographic market is North America, defined as the United States and Canada.

b. Regional pricing by TiO2 suppliers

Respondents' documents and testimony confirm that they charge different prices to customers depending on the region in which the customer is located ("regional pricing"). F. 116-129. In a 2015 earnings call, Tronox's then-CEO stated, "[A]re there different prices in the regional markets in which we do business? The answer to that question is yes." F. 121. Tronox has also informed customers that it does not have a global, single-price arrangement with any of its customers and that pricing is regional because it is based on the prevailing market price in individual countries. F. 123. For example, in a July 23, 2016 email to Sherwin-Williams, Ian Mouland, vice president of sales for the Americas at Tronox, wrote, "As always, regional pricing varies over time and magnitude. Pricing in the four regions; U.S. [United States], LATAM [Latin America], EMEA [Europe, Middle East and Africa] and APAC [Asia Pacific] are not comparable. . . . There is no global price." F. 119. In a March 2016 internal Tronox email, Mr. Mouland wrote, "What happens in the US is not connected to [Latin America], totally separate markets." F. 120. John Romano, Tronox's senior vice president and chief commercial officer, confirmed that "[c]ustomers in different regions, global customers, may pay different prices in different parts of the world." F. 126. Arjen Duvekot, Tronox's vice president of global sales for EMEA, APAC and the Americas, also confirmed that Tronox does not have a single global price for its customers; that Tronox's pricing for customers is based on the prevailing market price in individual countries; and that, for Tronox's multinational customers that buy TiO2 for delivery in multiple countries, individual regions are priced separately. F. 125.

Cristal's documents show that it also charges different prices for TiO2 in different regions and that "region" is the main driver of price variance for TiO2. *See* F. 127-128. Cristal's vice president for TiO2, Jean-Yves Gigou, confirmed in testimony that Cristal sets regional price floors and price targets. F. 127. Similarly, TiO2 producer Kronos sets different price levels by region to reflect the competitive conditions in each region. F. 137.

Customers confirmed that they purchase chloride TiO2 separately for each geographic region and pay different prices in each region. F.130-133. For example, Sherwin-Williams has

manufacturing facilities in North America, South America, Europe, and Asia, but maintains regional contracts with its TiO2 suppliers. F. 130. These contracts provide for regional pricing because supply and demand conditions may create different regional pricing environments. F. 130. Mr. Young of Sherwin-Williams explained, "There's really not a universal global market" for TiO2. Rather, prices are "openly negotiated in each of the regions" because of "different market dynamics" and "different availability." F. 130.

Furthermore, the evidence shows that TiO2 suppliers know the locations of their customers, and deliver TiO2 to them, typically pricing on a delivered basis. *See* F. 152-159. Geographic markets based on customer location "often apply when suppliers deliver their products or services to customers' locations." Merger Guidelines § 4.2.2. For Tronox's North American customers, the cost of shipping is covered in the price paid to Tronox. F. 154. Nearly all of the TiO2 that Venator sells to its customers in North America is delivered to its customers' locations and sold on a delivered pricing basis. F. 155. Paint manufacturers explained that the TiO2 they purchase is delivered to their facilities, typically in railcars or tank wagon trucks, and that the price they pay for chloride TiO2 includes the cost of delivery. F. 80, 156-159.

c. North America region is the United States and Canada

Although Tronox includes Mexico in its designated "NAFTA" region (North American Free Trade Agreement), along with the United States and Canada, (Mouland, Tr. 1248), its Latin American ("LATAM") strategy for 2015 through 2017 defines "Latin America (LATAM) [as] Central & South America, Mexico, Caribbean," and notes that Mexico's "[p]ricing [is] consistent with Latin American pricing and not that of the USA." F. 135. Indeed, Mr. Mouland of Tronox admitted that, while prices ebb and flow, Tronox's prices in Mexico generally fall in between the prices in the United States and Latin America. F. 142. Additionally, Tronox has charged different prices to TiO2 customers in Mexico compared to the United States. F. 141 ("We pointed out [to the customer] that different regions have different prices and that Mexico had gravitated to LATAM price as opposed to U.S. price which it generally used to track.").

It is also significant that other TiO2 producers – Cristal, Kronos, Chemours, and Venator – define their North America region as United States and Canada, and place Mexico in their Latin American region. F. 136-138. In addition, a report prepared for Tronox by the consulting company TZ Minerals International ("TZMI") titled, "TiO2 Pigment Supply/Demand Q1 2016" ("TZMI report"), in analyzing demand for TiO2, excluded Mexico from the North America market and included Mexico in the Central and South America market. F. 139.

d. Higher prices in North America

From 2012 through 2016, chloride TiO2 prices in North America were higher than in other regions. Respondents' documents consistently recognize this. F. 146 (Tronox reporting in a 2016 earnings call that TiO2 prices in Europe and Asia were lower than prices in North America); F. 147 (June 2016 Tronox TiO2 Variance Analysis showing that the net sales price in North America was [redacted] per metric ton higher than in the other regions for Q2 2016); F. 148 (Tronox reporting in 2015 earnings call that TiO2 prices in North America were higher than the TiO2 prices in the European, Asian, and Latin American markets); F. 149 (March 2015

Cristal analysis of TiO2 prices and revenues for the year March 2014 to March 2015 reporting that North American TiO2 prices were [redacted] higher than in other regions). At trial, Mr. Romano of Tronox acknowledged that in 2015 and December 2014 the price for chloride TiO2 was higher in North America than in other regions and that in December 2013 there was a "significant price disparity" between North America and the rest of the world, with North American prices for chloride TiO2 being higher than prices in the rest of the world. F. 145.

Economic analysis performed by both parties' expert witnesses confirms that prices paid by Respondents' North American customers were significantly higher than prices paid by Respondents' customers in other regions from 2012 through 2016. F. 150 (Hill); F. 151 (Shehadeh). Complaint Counsel's expert witness determined that the prices for chloride TiO2 charged by North American plants owned by Tronox and Cristal were at least 10% and often more ($250 to $525) per metric ton than the prices Tronox and Cristal charged its customers in the rest of the world from 2012 to 2017. F. 150.

e. Arbitrage

Under the Merger Guidelines, a region forms a relevant geographic market if a SSNIP would not be defeated by arbitrage, e.g., customers in the region travelling outside it to purchase the relevant product and transport it back. Merger Guidelines § 4.2.2. Arbitrage between customers at different geographic locations may be impractical due to transportation costs. Merger Guidelines § 3. The evidence in this case shows that North American customers have not engaged in arbitrage despite higher prices in the North America region and that they would not engage in arbitrage to defeat a SSNIP.

The principle reason North American customers do not engage in arbitrage is the cost. As Tronox's Mr. Duvekot explained, if a customer wanted to buy TiO2 in one region where it is less expensive and ship it to a different region where it is more expensive, the price difference would have to cover shipping costs, external handling costs (costs to pay the freight forwarder), internal handling costs (the customer's internal costs for the logistics of exporting the product from one region to another), warehousing costs, and import duties. F. 161. Duties to import chloride TiO2 into North America vary, depending on the location from which it is shipped and when the orders are placed, but have been around 5.5%. F. 162. Kronos explained that it would be "cost prohibitive due to the 6% import duty and the cost of transatlantic shipping" for Kronos to import non-specialty grades of TiO2 to the United States from Europe. F. 163.

Furthermore, as Tronox acknowledges, "[a] large portion of the US market is satisfied by slurry shipment, which adds a logistical barrier to entry." F. 176. As noted earlier, slurry is shipped by rail cars and pumped directly into customers' storage tanks. F. 80. For those customers, switching from slurry to dry TiO2 would present logistical challenges and costs such as building new infrastructure and redesigning manufacturing processes. F. 175. Shipping slurry internationally would be cost prohibitive because of the weight of the water in the slurry. F. 173. It is also impractical because the slurry would settle in transit, meaning that the pigment separates from the water. F. 174. In addition, the slurry could grow bacteria during transit, which would contaminate the shipment. F. 174.

Another reason North American customers do not engage in arbitrage is because they want on-time delivery and do not want to incur long lead times, as both Tronox and Cristal have recognized. F. 169-171. North American customers consistently testified that they purchase chloride TiO2 from North American suppliers so that they do not have to incur long lead times from importing TiO2. F. 164-167. As Mr. Arrowood explained, Deceuninck North America has not purchased TiO2 from locations outside of North America because of potential problems with transportation resulting in extremely long lead times to get product to its factory. F. 164-165. If a TiO2 customer ships TiO2 from China to North America, it may take 12 weeks to arrive at the facility. F. 164. Because of long lead times when importing TiO2, a North American TiO2 customer would have to stock its own warehouse at least 12 weeks in advance. F. 165. In addition, North American customers could face shipping delays when importing TiO2. F. 167. Deliveries from North American suppliers are more reliable, which helps customers better manage their production cycle times. *See* F. 164-171.

Customers explained why they did not engage in arbitrage. [redacted] explained that it looked into possibly moving TiO2 from one of its European plants to a plant in Ohio, but decided against it because it is "very expensive to [transport] the titanium dioxide from Europe to the U.S., [and] the economics didn't make sense for us to do that. . . ." F. 177. [redacted] has evaluated arbitrage, but chose not to do so for TiO2 because after it "factor[ed in] all of the costs of securing the material in another geography, the transportation, the tariffs, the handling, all factors involved," the "benefit was negligible or it didn't justify the amount of effort." F. 178. [redacted] does move TiO2 from one region to another in severe shortage situations, but explained that it does not undertake general arbitrage opportunities for two reasons: (1) its volumes are too high; and (2) when [redacted] TiO2 suppliers give pricing to [redacted] for its different regions, the suppliers clearly convey that the material is to be consumed in that region and not transferred for use in another region. F. 179.

Expert opinion is consistent with the foregoing real-world proof that North American TiO2 customers do not, and would not, engage in arbitrage. Based on a quantitative analysis using invoice data produced by Tronox and Cristal, Complaint Counsel's expert witness, Dr. Hill, concluded that even when there were "significant price differences" between the price for chloride TiO2 in North America and the price in the rest of the world, customers have not engaged in arbitrage to defeat higher prices in North America by buying TiO2 in a lower priced region and transporting it to North America. F. 181.

Finally, North American customers do not buy TiO2 from regions outside North America because the amount of chloride TiO2 manufactured outside North America is limited. Imports account for only 3% of North American chloride TiO2 sales. F. 115.

f. Respondents' opposing arguments

Respondents argue that North America is not the relevant geographic market because, according to Respondents, all rutile TiO2, whether produced by the chloride or the sulfate process, competes in a global market. RB at 47-48. But the antitrust market inquiry focuses not just on where the sellers compete, but the region to which the purchasers can practicably turn for supplies. *Tampa Elec.*, 365 U.S. at 327. The evidence, detailed in section III.B.2. and

summarized above, shows that North American TiO2 customers cannot practicably turn to other regions for chloride TiO2, which is the relevant product in this case. Respondents also assert that North American prices are "correlated" and "co-integrated" with global prices and that this shows that the market is global. RB at 48-49. Correlation and co-integration analyses look only at prices. They do not address the relevant antitrust question of whether customers change their purchases in response to relative price changes. "[T]he mere fact that the prices of two goods move upward or downward together need not mean that they are substitutes." Preliminary Injunction Opinion, 2018 U.S. Dist. LEXIS 155127, at *21.

3. Economic evidence

As further support for finding a relevant market for the sale of chloride TiO2 in North America, Complaint Counsel relies on certain economic evidence developed by its economic expert witness, Dr. Hill. Dr. Hill conducted a "hypothetical monopolist test" on the candidate market for chloride TiO2 in North America. The hypothetical monopolist test asks whether a hypothetical firm that is the only seller of the candidate product (chloride TiO2) to customers in the candidate geographic area (North America) could profitably impose a SSNIP. *See* Merger Guidelines §§ 4.1.1, 4.2.2. If this hypothetical monopolist can profit from imposing a SSNIP without losing a critical mass of customers, then the candidate market passes the hypothetical monopolist test and the relevant antitrust market is defined correctly. If, on the other hand, customers can defeat the price increase "by substitution away from the relevant product or by arbitrage," the market definition must be broadened. *Id.*

Dr. Hill conducted the hypothetical monopolist test several ways. Dr. Hill conducted a critical loss analysis[9] using three different measures to determine whether it would be profitable for the hypothetical monopolist to increase the price by at least a SSNIP. F. 183-185. First, Dr. Hill used his estimate of North American customers' willingness to switch from chloride TiO2 to sulfate TiO2 (the "price elasticity of demand" measure) to determine whether enough North American customers would switch to another product to defeat a SSNIP by the hypothetical monopolist. F. 186. That measure showed that demand for chloride TiO2 by North American customers was inelastic (-0.45). F. 186. As a result, switching to other products by North American customers would prove inadequate to defeat a SSNIP. F. 186. Second, Dr. Hill used a "substitution components" measure, using data from Respondents, to ascertain whether increased imports or repatriated exports responding to a SSNIP, combined with lost sales, would render the SSNIP unprofitable for the hypothetical monopolist. F. 187. Using this approach and data, Dr. Hill found a SSNIP would be profitable. F. 187. Third, Dr. Hill relied on Tronox's estimate of the maximum North American sulfate TiO2 demand to determine whether a sufficient number of North American customers would switch to sulfate TiO2 to defeat a SSNIP and found that they

9 Critical loss analysis is a standard tool used to implement the hypothetical monopolist test to determine whether a candidate market constitutes a relevant antitrust market. Merger Guidelines § 4.1.3. A critical loss analysis has two stages: (1) calculation of the critical loss, which means the percentage of sales a hypothetical monopolist would have to lose to keep its profit unchanged if it increased its price by a small amount; and (2) calculation of the predicted loss, which means the percentage of sales that the hypothetical monopolist would likely lose given a particular price increase and keep its profit unchanged. If the predicted loss is smaller than the critical loss, then the price increase will increase the hypothetical monopolist's profit. F. 183.

would not. F. 188. In each of his three critical loss analyses, Dr. Hill found that the predicted loss is lower than the critical loss, and thus opined that the market passes the hypothetical monopolist test. F. 186-188.

In addition, Dr. Hill used the measure of price elasticity of demand for chloride TiO2 in North America to determine whether demand would remain inelastic if prices increased by a SSNIP. F. 189. Dr. Hill found that it would, and thus opined that the sale of chloride TiO2 to North American customers passes the hypothetical monopolist test. F. 189. Based on these calculations, Dr. Hill concluded that the relevant market consists of North American chloride TiO2 sales. F.190.

Respondents, through their economic expert witness, Dr. Shehadeh, dispute Dr. Hill's methodology and urge that Dr. Hill's analyses in this regard be rejected. RB at 50; RX0170 (Shehadeh Expert Report at 0028-30 ¶¶ 35-41). However, even if Dr. Hill's analyses as to the effect of a theoretical price increase are ignored, as urged by Respondents, the practical, real world evidence presented by the record, summarized above, is more than sufficient to conclude that customers have not substituted sulfate TiO2 for chloride TiO2 and have not engaged in arbitrage, despite the differences in price, and that they would not do so in the face of a price increase by a hypothetical monopolist.

4. Conclusion

For all the reasons set forth above, the relevant market is the sale of chloride TiO2 to North American customers.

D. Prima Facie Case

1. Market shares and concentration

After determining the relevant product and geographic market, the next step is to "consider the likely effects of the proposed acquisition on competition within that market." *Swedish Match*, 131 F. Supp. 2d at 166. The government can establish a presumption that the transaction will substantially lessen competition by showing that the acquisition would produce "'a firm controlling an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of firms in that market.'" *Heinz*, 246 F.3d at 715 (quoting *Philadelphia Nat'l Bank*, 374 U.S. at 363); *see also Baker Hughes*, 908 F.2d at 982.

"Market concentration . . . is often measured using the Herfindahl-Hirschmann Index ('HHI')." *Heinz*, 246 F.3d at 716; *Swedish Match*, 131 F. Supp. 2d at 166 n.11. As the court explained in *Swedish Match*:

> The HHI calculates market power [by] summing the squares of the individual market shares of all the firms in the market. The HHI takes into account the relative size and distribution of the firms in a market, increasing both as the number of firms in the market decreases and as the disparity in size among those firms increases.

Id. Sufficiently high HHI figures establish a prima facie case of anticompetitiveness. *H&R Block*, 833 F. Supp. 2d at 71 (citing *Heinz*, 246 F.3d at 715 n.9).

The Merger Guidelines consider markets with an HHI above 2500 to be "highly concentrated," and state that "[m]ergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." Merger Guidelines § 5.3; *Heinz*, 246 F.3d at 715 (citing *Baker Hughes*, 908 F.2d at 982) (noting that significant increase in market concentration "establishes a 'presumption' that the merger will substantially lessen competition.").

The North American chloride TiO2 market is dominated by five major producers. Tronox, Cristal, Chemours, Kronos, and Venator account for over 99% of chloride TiO2 sales in North America. F. 192-193. Based on producer invoice and other pricing data analyzed by Dr. Hill, the market participants and their market shares in 2016 were as follows: Tronox [redacted], Cristal [redacted], Chemours [redacted], Kronos [redacted], and Venator [redacted]. F. 194. Post-Acquisition, the combined firm would have a market share of [redacted] [nearly 40%] of North American sales of chloride TiO2. F. 200.

Dr. Hill also calculated HHIs, based on the market share data. F. 202-203. Dr. Hill's calculations show that the Acquisition would increase the HHI by over 700 points, to a level of over 3000, which, under the Merger Guidelines, would render the post-Acquisition North American chloride TiO2 market a "highly concentrated" market. F. 203. *See* Merger Guidelines § 5.3. These market share statistics demonstrate that the proposed Acquisition is presumptively anticompetitive. *See FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 128 (D.D.C. 2016); *Sysco*, 113 F. Supp. 3d at 52-53.

Accordingly, based on the foregoing, Complaint Counsel has established a presumption that the effect of the Acquisition may be to substantially lessen competition. Under applicable authorities recited in section II.B.2., this presumption is sufficient to establish a prima facie case under Section 7 and shift the burden of rebuttal to Respondents. Moreover, in the instant case, the presumption is strengthened by additional evidence demonstrating a reasonable probability of anticompetitive effects, as discussed below.

2. Reasonable probability of anticompetitive effects

a. Overview

As the court explained in *ProMedica Health Systems v. FTC*, anticompetitive effects of a merger can include coordinated effects and/or unilateral effects.

> [T]he idea behind coordinated effects is that, "where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and achieve profits above competitive levels." *H&R Block*, 833 F. Supp. 2d at 77. . . . Unilateral-effects theory, on the other hand, holds that "[t]he elimination of competition between two firms that

> results from their merger may alone constitute a substantial lessening of competition." *Merger Guidelines* § 6 at 20.

749 F.3d 559, 568-69 (6th Cir. 2014). In the instant case, to support the argument that the Acquisition is likely to have anticompetitive effects, Complaint Counsel asserts: (1) the Acquisition will facilitate coordination among competitors, in a highly concentrated market that is vulnerable to coordination (coordinated effects); and (2) the Acquisition will enable the combined entity to engage in strategic output withholding, in a market with incentives for and a history of such conduct (unilateral effects). *See* CCB section II.A., B. Respondents dispute that anticompetitive effects are likely, arguing that the evidence fails to show that coordination among competitors or unilateral strategic output withholding by the combined entity is likely. *See* RB section II.B., C. The question of likely coordinated effects is analyzed below.

b. Likelihood of coordinated effects

i. Legal principles

"Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). *See also* Merger Guidelines § 7 (Coordinated interaction includes an implied understanding or parallel accommodating conduct not pursuant to a prior understanding.).

> Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm's incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm's incentive to raise prices, by assuaging the fear that such a move would lose customers to rivals.

Merger Guidelines § 7.

"It is a central object of merger policy to obstruct the creation or reinforcement by merger" of market structures in which tacit coordination can occur. *Heinz*, 246 F.3d at 725. "Tacit coordination is feared by antitrust policy even more than express collusion, for tacit coordination, even when observed, cannot easily be controlled directly by the antitrust laws." *Id*. "[P]ermit[ting] mergers to be challenged prior to their occurrence and thus before the harm from coordinated interaction has materialized . . . is particularly valuable in situations where coordinated interaction is difficult to detect and remedy directly under § 1 of the Sherman Act." Herbert Hovenkamp, *Prophylactic Merger Policy*, HASTINGS L.J. (August 2018) at 12.

It is not necessary to prove that tacit coordination has already occurred in order to demonstrate a reasonable probability of future coordination. *See Arch Coal*, 329 F. Supp. 2d at 116 ("While proof of prior cooperative behavior is relevant, it is not a necessary element of likely future coordination in violation of Section 7.").

ii. Analysis

Under the Merger Guidelines, a merger may substantially lessen competition if: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct; and (3) the merger is likely to enhance that vulnerability. Merger Guidelines § 7.1. As shown above, the evidence proves that the Acquisition in this case would significantly increase concentration in the relevant market and lead to a highly concentrated market. As discussed below, the evidence further proves that the North American chloride TiO2 market is vulnerable to coordinated conduct, and that this vulnerability will be enhanced by the Acquisition. *See generally* Merger Guidelines § 7.2 (discussing factors evidencing vulnerability to coordination).

First, with only five participants selling chloride TiO2 in North America (F. 192), the number of firms in the relevant market is small. "The fewer competitors there are in a market, the easier it is for them to coordinate their pricing without committing detectable violations of section 1 of the Sherman Act . . . ." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1387 (7th Cir. 1986). In the instant case, the Acquisition will reduce the number of firms to four, thereby making it easier for the remaining firms to coordinate on price or output. *See Elders Grain*, 868 F.2d. at 905 (holding that acquisition reducing firms from six to five would make it easier for leading members of the industry to collude on price and output); *Univ. Health*, 938 F.2d at 1219 (holding that four businesses remaining after merger could easily collude to raise price and decrease output without committing detectable violations of the Sherman Act). In particular, the Acquisition would not only simplify coordination by eliminating Cristal, a current competitor, but would also create a new firm of a similar size to Chemours, the current market leader. *See* F. 194, 196, 200. Indeed, the Acquisition will result in only two firms – Tronox and Chemours – in control of [redacted] [nearly three-quarters] of North American sales, and over [redacted] of North American capacity. F. 201. "With only two dominant firms left in the market, the incentives to preserve market shares would be even greater, and the costs of price cutting riskier, as an attempt by either firm to undercut the other may result in a debilitating race to the bottom." *CCC Holdings*, 605 F. Supp. 2d at 67.

Second, chloride TiO2 is a commodity product. F. 247-249. Markets for homogenous products are more susceptible to coordination. F. 250. One reason for this is that reactions by rivals to attempts to steal their business are likely to be strong, given that each firm's product is largely interchangeable with its rivals' products. F. 250. In this case, given the small number of market participants in the relevant market, and the commodity nature of chloride TiO2, the market is fairly characterized as an oligopoly. *See* Areeda ¶ 1429a at 221; *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1031 n.3 (8th Cir. 2000) (quoting Black's Law Dictionary 1086 (6th ed. 1990)); *see also* Preliminary Injunction Opinion, 2018 U.S. Dist. LEXIS 155127, at *7 ("The titanium dioxide market has been described as an

'oligopoly,' as TiO2 is a 'commodity-like product with no substitutes, the market is dominated by a handful of firms, and there are substantial barriers to entry.'" (quoting *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 190 (3d Cir. 2017)).

Third, mutually recognized interdependence is indicative of a market that is vulnerable to coordination. In such a market,each [competitor] knows that his choice will affect the others, who are likely to respond, and that their responses will affect the profitability of his initial choice. Each knows that expanding his sales or lowering his price will reduce the sales of rivals, who will notice that fact, identify the cause, and probably respond with a matching price reduction. Unless he can somehow conceal his price reduction, or unless his own position is improved by a lower market price, he will hesitate to reduce prices at all. Areeda ¶ 1410b at 65 (emphasis and footnote omitted). Recognized interdependence is a distinct characteristic of an oligopolistic market. Areeda ¶ 404a; *see also Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995) ("[b]y definition, oligopolists are interdependent . . ." (citation omitted); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 359 (3rd Cir. 2004) (explaining that a participant in an oligopoly market "'must take into account the anticipated reaction of the other [] firms'") (citation omitted)).

In the instant case, the evidence proves that the North American chloride TiO2 market is characterized by mutually recognized interdependence. F. 204. As acknowledged in a November 2016 Tronox presentation, the "TiO2 market shows oligopoly pricing behavior (one supplier can drive price down, action of all suppliers needed to pull prices up)." F. 206. Indeed, the record is replete with testimony and documents from Tronox and Cristal demonstrating recognized interdependence among market participants. F. 205-246. *E.g.*, F. 207 (Tronox's Mr. Romano testifying that "it only takes one to make the price go down. The whole market has to go up. But any one competitor can make pricing go down."); F. 212 (Tronox's Mr. Romano testifying that success of a price increase "depends on what our competition is doing"); F. 213 (Tronox's Mr. Casey stating in an email: "[T]he success of this [Tronox December 2015 price increase] initiative will be materially affected by how Huntsman [now Venator], Cristal and Kronos respond. Chemours announced an equivalent price increase yesterday . . . ."); F. 208 (Mr. Gigou of Cristal testifying that when considering whether to issue a price increase and for what amount, Cristal takes into account information from customers regarding other TiO2 suppliers); F. 217 (Mark Stoll, general manager of mergers and acquisitions for Cristal, stating in a 2012 email: "In current market conditions of excessive inventory we cannot raise price and gain market share at the same time unless all suppliers support the price movement.").

In addition, the evidence shows mutual accommodating conduct by chloride TiO2 producers in order to support market discipline and avoid triggering adverse competitor responses. F. 228-246. For example, in a July 2015 email discussing pricing for a customer, Mr. Duvekot of Tronox wrote: "Especially on a highly visible account like [this particular customer] any price move will be seen by the competitors, even more so if we use it to take a piece of the pie. That will cause a reaction from the competition, at this account or elsewhere in the market, which will just lead to more price erosion in the market. Tronox does not want to play this game (anymore)." F. 244. In a March 2016 email, Tronox's Mr. Mouland wrote to two salespeople: "We will have to pass on this opportunity as I do not want to undercut a competitor. The price

increase is taking hold and any attempt to get volume at the expense of price could undermine our progress." F. 246. *See also* F. 231 ("The problem we face is that pricing is falling and if we take action to go after market share, price will deteriorate further and we do not want [to] facilitate or fuel that process. Everyone is defending their business and matching offers from the competition to maintain their share as no one want[s] to loose [sic] business."); F. 235 (Cristal email stating: "All of the large global TiO2 suppliers are still acting in a disciplined manner, respecting each other's market positions and share and holding on to price. No volume stalking of any great consequence is taking place yet, which is very good news.").

Fourth, "[a] market typically is more vulnerable to coordinated conduct if each competitively important firm's significant competitive initiatives can be promptly and confidently observed by that firm's rivals. . . . Regular monitoring by suppliers of one another's prices or customers can indicate that the terms offered to customers are relatively transparent." Merger Guidelines § 7.2. *See also Oracle*, 331 F. Supp. 2d at 1166 ("Without homogeneity or transparency, the market conditions are not conducive to coordinated effects, either tacit or express."). The evidence in this case shows that TiO2 suppliers monitor, and are able to observe, significant moves by their competitors, including as to price and output, from public statements by competitors and information obtained from customers. *See* section III.C.2.c.

Tronox and Cristal monitor and analyze public statements by competitors such as quarterly earnings updates, presentations at industry conferences, and ratings agency meetings. F. 259. For example, Tronox's Mr. Engle, vice president of marketing, listens to competitors' earnings calls to learn about their production plans and other announcements, and to obtain competitive intelligence. F. 260. Indeed, these sources represent Tronox's largest source of competitor intelligence. F. 260. Reports and analyses are provided to Tronox's executives. F. 259, 264. Cristal also monitors TiO2 competitors' public calls and circulates detailed analyses to executives, highlighting information such as production curtailments, capacity utilization, and planned price increases. F. 265-266.

The information provided in public earnings calls and similar public presentations can be specific. Tronox discusses in its quarterly results earnings calls such matters as changes in sales volume, changes in the selling prices by region, margin information, and operation related information such as relative plant utilization rate and inventory levels. F. 257, 267. Tronox publicly announced in a second quarter 2015 earnings call its decision to reduce production at two facilities, including Tronox's Hamilton plant, and specifically noted that "these processing line curtailments represent approximately 15% of total pigment production." F. 268. In a first quarter 2016 conference call, Tronox described its plan to continue to be "disciplined" about production and not to bring back "full production" on the first sign of price recovery. F. 269. In a second quarter 2016 earnings call, Chemours stated its prediction that for "the rest of the year, you'll see a cadence up in our price as you look at third quarter . . . ." F. 262. At a basic materials conference sponsored by Goldman Sachs, the executive vice president of Huntsman (now Venator) stated: "Well, there's the April 1 effective price increase. It was roughly $235 a ton, nominated. And we have communicated and signaled that we would expect the realization on that price would be on the upper end of what we've been realizing over the last 3 or 4 quarters. That is closer to 2/3, 70% realization." F. 263.

Publically disclosing information in a market characterized by interdependence can serve as a signal to the market, enhancing predictability and the potential for tacit coordination. North American chloride TiO2 producers over the years have increased TiO2 prices typically in close proximity to each other in time. F. 219. For example, Chemours announced a price increase of $150 per metric ton on December 17, 2015. F. 221. Within about a half hour of learning this information, Mr. Casey of Tronox reacted by directing that "[w]e will put out a [redacted] global price increase announcement of our own before 9:30 tomorrow," which Tronox did. F. 221, 222. In an internal email, Tronox explained that, with its price increase, Tronox was "testing whether [the market] is ready for price increases or at least to stop declines." F. 222. Cristal learned of the price increase by Tronox on the same day it was announced, and remarked in an internal email: "Tronox follows the trend. . . . Expectedly, other TiO2 manufacturer's [sic] may follow the trend." F. 215. Cristal characterized these announced pricing moves as "an initiative to taste the market readiness to accept this announced price increase." F. 215. Later that day on December 18, 2015, Cristal confirmed that both Chemours and Huntsman had also announced price increases. F. 215. From Cristal's perspective, the December 2015 price increase announcements were "[n]ot based on supply/demand dynamics." F. 223.

In another example, shortly after Tronox publicly announced in its second quarter 2015 earnings call its decision to reduce production at its Hamilton plant, Chemours closed its Edge Moor plant in Delaware, and shut down a production line at its Johnsonville, Tennessee plant, removing 150,000 metric tons of capacity. F. 225, 268. Tronox considered this "Good news!!" with then-CEO Mr. Casey responding that "[i]t's good that [Chemours] can follow the leader!" F. 226.

The Acquisition will increase the competitive information available to market participants through earnings calls and similar public presentations. Tronox, Chemours,

Kronos, and Venator are publically traded companies, F. 251, and therefore required to report earnings and similar business information to investors and others in the ordinary course of business. Presently, Cristal is a privately held company. F. 252. With the merger, all participants will be reporting as public companies.

Chloride TiO2 producers also monitor competitive actions in the market through information obtained from their customers. F. 270-288. It is part of Tronox's price increase implementation process to collect competitive intelligence on its competitors' pricing in order to assess whether its competitors are "maintain[ing] a disciplined approach" with respect to a price increase. F. 277. Customer-provided information is included in reports provided to senior management and is used to make pricing decisions. F. 271, F. 275. In many instances, this can include specific pricing information. *E.g.*, F. 276 ("Per [redacted], Purchasing Mgr, Kronos and DuPont have moved their price by [redacted]"); F. 276 ("customer confirmed Kronos is taking them up [redacted]"; F. 276 (describing that Cristal is offering [redacted] per pound lower than Tronox at [redacted]); F. 279 (Cristal email reporting that customer "indicated that Huntsman offered [redacted] for volume . . . "); F. 279 (internal Cristal email

stating: "Our refusal to . . . meet [redacted] price resulted in [a customer] moving 5 trucks per month away from us and over to [redacted] . . .").

Competitor price information, once disclosed, gets further communicated within the market "from competitor to customer to other supplier." F. 280.[10]

Fifth, the fact that the chloride TiO2 market has low demand elasticity makes coordination more profitable, which increases incentives to coordinate. Price elasticity of demand is how responsive demand is to changes in price. F. 289. Inelastic demand makes a market more susceptible to coordination because if prices of all firms were to rise, few sales would be lost, which makes the reward for coordinating greater. F. 289.

Here, the price elasticity of demand for chloride TiO2 in North America is low. F. 189.[11]

iii. Respondents' opposing arguments

Respondents argue that Complaint Counsel has failed to prove that coordinated effects are likely, citing *United States v. Oracle Corporation*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004). RB at 57. *Oracle* does not support Respondents' argument. In that case, the court denied a preliminary injunction under Section 7, finding, among other things, that "the products of Oracle and SAP are not homogeneous, but are differentiated products, and that the pricing of these products is not standardized or transparent." 331 F. Supp. 2d at 1109. Indeed, the plaintiffs in *Oracle* did not contend that any of those conditions were present in the proposed merger. *Id.* at 1113. In the instant case, by contrast, the evidence proves that chloride TiO2 is a commodity product and suppliers are able to gain relatively detailed and specific information about competitors' pricing.

Respondents further assert that the evidence fails to show coordination has occurred in the past. RB at 59-62. However, as explained above, proof of prior tacit coordination is not necessary to demonstrate a reasonable probability of future coordination. *See Arch Coal*, 329 F. Supp. 2d at 116. Respondents additionally contend that coordination would be difficult to conceive, monitor, or enforce because announced prices are not necessarily the actual price paid

---

10 Respondents contend that customer-provided pricing information is not reliable because customers in a negotiation may not necessarily be truthful about competing offers. RRFF 476-85. However, the fact that suppliers report and rely on customer-provided competitor pricing information in making their own pricing decision is indicative of the information's reliability. In addition, Cristal's redbook, a data compilation, uses customer-provided sales information to track suppliers' sales volumes, and market share data calculated from the data proved to be a close match to market shares calculated from actual data derived from suppliers' invoices. F. 282-285. The totality of the evidence belies the notion that customers routinely provide false information as part of the negotiation process.

11 It is also noteworthy that customers in the relevant market are concerned about the increased consolidation of suppliers post-Acquisition. F. 293 (Mr. Vanderpool of True Value testifying: "[We're] going from five major suppliers down to four major suppliers . . . . [redacted]. So we see raw material prices continue to go up and tightening in the market from allocation, and that's a very big concern of ours"); F. 294 (Ampacet email stating, "The acquisition of Cristal by Tronox is cause for concern for Ampacet" noting the "20% reduction in [its] supply base").

by customers; rather, prices are individually negotiated with each customer. RB at 61. Respondents' argument ignores the facts that suppliers obtain reliable information about actual prices being offered by the competition directly from customers, among other sources, and that such information spreads to other suppliers in the market. Moreover, knowledge of precise competitor pricing is not necessary to be able to coordinate price movements through parallel price increases, which are publicly disclosed. In any event, it is not necessary to demonstrate that market participants can form and enforce an agreement. Coordinated interaction includes a range of conduct, and can involve parallel conduct "in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms." Merger Guidelines § 7.

Respondents also argue that TiO2 sales are subject to "fierce competition." RB at 58-59. Respondents assert that most customer contracts do not set price but rather provide for prices to be negotiated; that contracts typically contain an option to switch suppliers if they find a better price (a "meet or release" clause), which can result in a lower price; and that buyers "pit" suppliers against each other to obtain a lower price. *See, e.g.*, RB at 59; RFF 533. However, such evidence does not logically preclude a finding that the market is also vulnerable to coordination, particularly where, as here, the market is characterized by oligopolistic interdependence, exacerbated by relative transparency and product homogeneity.[12] Furthermore, "[a]s the statutory language suggests, Congress enacted Section 7 to curtail anticompetitive harm in its *incipiency*." *Polypore*, 2010 WL 9549988 at *8 (citing *Chicago Bridge*, 534 F.3d at 423) (emphasis added). *See also* Merger Guidelines § 7.1 ("Pursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place.").

iv. Summary

Based on the foregoing, the evidence proves that the North American chloride TiO2 market is vulnerable to coordinated conduct, and that this vulnerability will be enhanced by the Acquisition.

3. Conclusion

As set forth above, market concentration evidence warrants the presumption that the Acquisition is likely to have anticompetitive effects in the relevant market. That presumption is

12 According to the Merger Guidelines, "meet or release" clauses tend to increase the vulnerability of a market to coordinated interaction by increasing visibility of competitive initiatives. *See* Merger Guidelines § 7.2 ("A market typically is more vulnerable to coordinated conduct if a firm's prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals. This is more likely to be the case, the stronger and faster are the responses the firm anticipates from its rivals. The firm is more likely to anticipate strong responses if there are few significant competitors, if products in the relevant market are relatively homogeneous, if customers find it relatively easy to switch between suppliers, or if suppliers use meeting-competition clauses.").

bolstered by substantial evidence demonstrating that anticompetitive coordinated effects are in fact likely. The foregoing amply demonstrates a strong prima facie case that the Acquisition may substantially lessen competition.[13]

The analysis now turns to Respondents' rebuttal evidence.

E. Rebuttal

As noted in section II.B.2. above, a defendant may rebut a prima facie showing of likely anticompetitive effects with evidence that anticompetitive effects are not likely to result from the merger, or that procompetitive benefits, such as efficiencies, outweigh any likely anticompetitive effects. *See, e.g.*, *Baker Hughes*, 908 F.2d at 985; *Polypore*, 2010 WL 9549988, at *9. "The more compelling the prima facie case, the more evidence the defendant must present" to successfully rebut that case. *Baker Hughes*, 908 F.2d at 991; *Heinz*, 246 F.3d at 725; *Polypore*, 2010 WL 9549988, at *9. Respondents have failed to meet this burden, as explained below.

1. Entry

a. Applicable legal standards

Even in highly concentrated markets, such as the relevant market in the instant case, "if there is sufficient ease of entry, enough firms can enter to compete with the merging firms, undercutting any of the likely anti-competitive effects of the proposed mergers. In other words, entry is one way in which post-merger pricing practices can be forced back down to competitive levels." *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 55 (D.D.C. 1998). *See also United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1072 (D. Del. 1991) ("[I]f alternative sources of supply could enter the market with relative ease, then no hypothetical monopolist or cartel could achieve or maintain supra-competitive pricing . . . ."); *In re Echlin Mfg. Co., Inc.*, 105 F.T.C. 410, 1985 FTC LEXIS 46, at *25 (June 28, 1985) ("An attempt to exercise market power in an industry without entry barriers would cause new competitors to enter the market. This additional supply would drive prices back to the competitive level.").

Entry can be demonstrated either by new firms entering the relevant market or by expansion into the relevant market by existing firms. *See Baker Hughes*, 908 F.2d at 988-89

13 Complaint Counsel's additional theory of likely anticompetitive effects, that the Acquisition will enable the combined entity to engage in strategic output withholding (unilateral effects), has been fully considered, together with the relevant evidence in the record. However, findings or conclusions as to the likelihood of anticompetitive unilateral effects are unnecessary because the presumption of anticompetitive effects, based on market concentration evidence, combined with the evidence of likely coordinated effects, is already sufficient to make a strong prima facie case of likely anticompetitive effects. Further determining the likelihood of unilateral effects would not affect this result. *See Polypore*, 2010 WL 9549988, at *9 ("A plaintiff can bolster a *prima facie* case based on market structure with evidence showing that anticompetitive unilateral *or* coordinated effects are likely.") (emphasis added). *See also* 5 U.S.C. § 557(c)(3)(A) (Administrative Procedures Act); 16 C.F.R. § 3.51(c)(1) (Commission rule on Initial Decisions) (both requiring findings and conclusions only for "material" issues of fact and law). Issues of fact or law that do not affect the result are not fairly deemed "material," notwithstanding that there may be allegations or evidence presented on such issues.

(affirming finding of entry where evidence showed, among other things, that at least two companies had entered the United States market immediately prior to the challenged acquisition and that a number of firms competing in Canada and other countries were likely to do so).

Determining whether there is ease of entry hinges upon an analysis of the barriers to new firms entering the market or to existing firms expanding into the relevant market. *Cardinal Health*, 12 F. Supp. 2d at 55 (citing *Baker Hughes*, 908 F.2d at 987). Entry barriers have been explained as follows:

> Expertise in the industry, a fair amount of capital, a positive reputation, and the need to have specialized equipment are all barriers to entry. *Fruehauf Corp. v. FTC*, 603 F.2d 345, 357 (2d Cir. 1979); *Cardinal Health*, F. Supp. 2d at 58; *United States v. Blue Bell, Inc.*, 395 F. Supp. 538, 549 (M.D. Tenn. 1975). . . . In some markets, "the need for reliability is so great and the consequences of new product failure so dire that, even if the competitive nature of the market deteriorated, consumers would still be reluctant to switch to new entrants." *Tote*, 768 F. Supp. at 1076 (finding proven ability to provide reliable systems and service an important factor in a racetrack's selection of a totalisator supplier to preserve the track's revenue and goodwill). The unwillingness of customers to use a company with an unproven track record is a barrier to entry. *See Tote*, 768 F. Supp. at 1078.

In re Chicago Bridge & Iron Co., 138 F.T.C. 1024, 2003 FTC LEXIS 96, at **242-43 (June 18, 2003), *aff'd,* 2005 FTC LEXIS 215 (Jan. 6, 2005), *aff'd*, 534 F.3d 410 (5th Cir. 2008).

A fundamental step in determining ease of entry is timeliness. *Cardinal Health*, 12 F. Supp. 2d at 55 ("The first step in determining ease of entry is timeliness."). In this regard, the Merger Guidelines state: "In order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect." Merger Guidelines § 9.1. Entry must also be proven to be "*likely*, and *sufficient* in its magnitude, character and scope to deter or counteract the competitive effects of concern." *Cardinal Health*, 12 F. Supp. 2d at 55 (quoting Merger Guidelines (1992 ed.) § 3.0 (emphasis added)).

The burden of proving that entry will be timely, likely, and sufficient to deter or counteract anticompetitive effects is on Respondents. *Staples*, 190 F. Supp. 3d at 133; *Sysco*, 113 F. Supp. 3d at 80. As shown below, Respondents have failed to meet their burden.

b. Analysis

Respondents argue that Chinese suppliers are a current, and growing, competitive threat. Respondents rely in particular on an announced plan by Lomon Billions, discussed further below, to expand its chloride TiO2 capacity. Respondents further contend that Chinese suppliers benefit from low costs and a regulatory environment that facilitate entry. RB at 71-74.

Complaint Counsel argues that Chinese producers provide very little chloride TiO2 and that there are significant barriers to Chinese chloride TiO2 becoming a meaningful competitive presence in North America. CCB at 61-63. Whether Chinese producers will be able to overcome these barriers is highly uncertain, according to Complaint Counsel, and in any event they would be unlikely to do so in a timely and sufficient manner to counteract the competitive harm resulting from the Acquisition. CCB at 63-67.

Respondents assert that China dominates the TiO2 export market, exporting a million tons a year. However, the vast majority of production in China is sulfate TiO2, which is not typically exported outside the Asia-Pacific region (F. 297, 298), and which, as shown in section II.C.1., is not a reasonable substitute for chloride TiO2 in North America.

In fact, only a small amount of chloride TiO2 is sold by Chinese suppliers to the North American market. Chloride TiO2 sales by suppliers other than Tronox, Cristal, Kronos, Chemours, and Venator, accounted for a 0.5% share of the total 831,132 metric tons of chloride TiO2 sold in North America in 2016. F. 296. Lomon Billions, which is the fourth largest TiO2 producer globally by capacity, sold approximately 3,000 to 4,000 metric tons of chloride TiO2 in the United States in 2017. F. 300, 303. Major paint manufacturers, such as [redacted], determined after testing that Chinese-produced chloride TiO2 did not meet their quality standards, F. 309, 310, 312, which no doubt contributes to the relatively low sales volume in North America. *See also* F. 313 (Kronos does not see chloride TiO2 from China in the markets in which it competes, and has observed that such products are used for "lower quality products"). Moreover, as explained in section II.C.2., import costs, lead times, and other logistical and supply issues deter North American customers from purchasing chloride TiO2 from China.

Industry participants do not expect easy or rapid entry by Chinese chloride TiO2 producers, citing numerous barriers, including lack of technological know-how. The chloride process for TiO2 is technically more difficult than the sulfate process to master and operate. F. 299. In 2016, Tronox observed that China "struggles" to commission chloride TiO2 plants, which "suffer[] from poor profitability, uptime, and quality." F. 323. Tronox also noted in 2016 that it is "[s]till expected to take a while for appreciable profitable tonnes to start flowing," and cited as reasons: "Legitimacy of base technology [is] questionable," "Chinese made adjustment to base technology," "Recommendation on equipment specs/sourcing ignored," "Limited commissioning support," and lack of "know-how/experience of running CP [chloride process] plant." F. 322. Tronox further acknowledged in 2017 that "[i]t could take years before the Chinese chloride based TiO2 industry is mature and stable enough to bring the same quality and consistency as their international competitors." F. 324; *see also* F. 321 (Mr. Casey of Tronox stating in a 2015 email, "I think it is a very remote prospect that China will be producing chloride capacity of any magnitude in the next 3-5 years"). Similarly, in 2016, Cristal observed: "It's been exceedingly difficult for the Chinese to acquire and successfully employ the proprietary chloride technology . . . [and it is] difficult to predict when, to what extent, and how fast this will occur. Very small inroads have been made to date." F. 325.

In addition, Venator stated in 2017 that the "Chinese struggle with quality control, consistency of production, no automation and too much manual interruption - ultimately the know-how of how to run plants." F. 326. *See also* F. 327 (Venator citing "technology issues" as among the "headwinds" facing Chinese TiO2 producers). Kronos noted in a 2017 investor presentation that the Chinese threat was "manageable," due to the "[s]uperior chloride process technology" being "closely guarded by Western producers" and "[q]uality and reliability concerns." F. 315. Kronos believes that it is "highly unlikely" that Chinese chloride process TiO2 will constitute any threat to its business within the next two to three years. F. 319. Similarly, Chemours does not project that Chinese chloride TiO2 producers, to the extent they further develop their process and quality, will affect the North American market anytime within the next three to five years. F. 320.

The evidence further shows that North American TiO2 customers do not view Chinese chloride producers as a reliable supply source for chloride TiO2 in the foreseeable future. F. 336. Cited reasons include lower product quality and the time required to qualify a new product for use. F. 336. For example, True Value's qualification process for chloride TiO2 products takes [redacted] for interior paint products and [redacted] for exterior paint products. F. 311. As noted above, past efforts to qualify Chinese chloride TiO2 have been unsuccessful. F. 312 ([redacted] found that the quality is "not yet satisfactory"); F. 310 (Lomon Billions' chloride process TiO2 did not pass [redacted]); F. 309 ([redacted]).

Furthermore, contrary to Respondents' arguments, low labor costs and relaxed environmental standards that might exist in China are not cost advantages that are applicable to chloride TiO2 production. F. 328. This is because chloride TiO2 production is much less labor intensive than sulfate TiO2 production. F. 328. In addition, the chloride process for TiO2 is environmentally cleaner than the sulfate process. F. 299. As Mr. Christian of Kronos testified: "[C]heap labor and relaxed environmental standards" are not applicable to chloride TiO2, as opposed to sulfate TiO2, "because [the latter is] much more labor-intensive and it generates a significant amount of waste or byproducts per ton of TiO2 . . . . So when you think about China as a potential competitor, a lot of their historic, perceived advantages over the western world just don't exist or at least aren't overly material in comparison to western producers." F. 328. In fact, chloride technology requires a highly skilled labor force and an uninterrupted power supply, which increase costs for producers. F. 315. Tronox acknowledged in a September 2017 presentation that the Chinese producers were facing "Inflationary Pressures" including "Higher Energy Prices" and "Wage Growth." F. 332. Similarly, Chinese producers have the added cost of importing high-grade feedstock, which is a large part of the cost of producing chloride process TiO2. F. 330, 344. *See also* F. 327 (Venator describing "headwinds" facing Chinese TiO2 producers, including feedstock cost and availability, wage growth, and increase in energy prices, technology issues, and financing availability). For all these reasons, the assertion that Chinese chloride TiO2 producers necessarily benefit from a lower cost structure is unsupported by the evidence.

Respondents rely in particular on Lomon Billions' announced expansion of chloride TiO2 production in China. According to a February 2018 press release, Lomon Billions plans to invest $285 million to construct two new chloride TiO2 manufacturing lines at its existing

chloride production plant in Jiaozuo, China, with annual chloride TiO2 capacity of 200,000 tons, and to begin commercial production from the new lines "during 2019." F. 306. Lomon Billions also plans "[f]uture additional 300,000 tonne[s of] chloride capacity . . . mostly likely at a new coastal location in China." F. 306. Notwithstanding these announced plans, the numerous barriers to entry into the North American chloride TiO2 market that apply to Chinese producers generally, described above, also apply to Lomon Billions. For example, production from Lomon Billions' existing chloride production plant has been operating considerably below capacity, indicating that Lomon Billions is "not successfully utilizing the chloride technology . . . [and is] struggling with the technology they have now." F. 317.

Tronox itself has expressed doubts regarding Lomon Billions' expansion. In a 2017 fourth quarter earnings call, Mr. Romano described Lomon Billions' plan to expand production by 200,000 tons in 2019 as "a bit aggressive on timeline." F. 335. Mr. Casey also stated in 2017 that the projections [redacted] of expanded chloride capacity and production in China "seem[] aggressive since almost no commercial grade pigment is produced today" and that "the Chinese generally overstate their plant capacity." F. 314. Kronos also doubts Lomon Billions can bring new production on line "inside a year or two, for 200, 250 million dollars" and produce 200,000 metric tons. F. 317. As Mr. Christian explained, "I think those numbers are . . . difficult to achieve. I think that is an extremely low cost per metric ton. . . ." F. 317. Indeed, based on TZMI's 2016 producer cost study, Lomon Billions' Jinzhou plant in China has higher variable manufacturing costs than any plant in North America and is the highest cost chloride TiO2 plant in the world. F. 331.

In addition, it is unlikely that construction of a new chloride plant in coastal China, as announced by Lomon Billions, will be sufficiently timely. The evidence shows that construction of a new TiO2 plant from scratch takes at least four and a half years, which Mr. Romano testified is an aggressive timeline that assumes everything proceeds according to plan. F. 307. Mr. Christian of Kronos testified that, even with a fully constructed plant, it can take five to seven years to "figure out how to make a quality CP [chloride process TiO2] grade." F. 307. As a point of reference, Chemours announced an expansion into Mexico in 2011 but the plant did not begin production until 2018. F. 307.

Moreover, it cannot be assumed that expanded chloride TiO2 production from China in the future, if it occurs, will result in additional supply to the North American market. In November 2016, Tronox predicted that Chinese producers would be limited in their ability to grow exports of TiO2 because Chinese demand growth is expected to exceed Chinese production growth. F. 333. As Mr. Casey stated in a 2016 third quarter earnings call: "As demand grows domestically [in China], more and more supply will go into the domestic market, which means less will be available for the export market. . . ." F. 334. *See also* F. 335 (Mr. Romano noting in a 2017 earnings call that supply and demand were "in balance" and Jeffry Quinn, chief executive officer of Tronox, adding that "all the incremental expansion over the next 18 to 24 months, will really kind of just be soaked up by the incremental global growth.").

d. Summary

Even if it is accepted that Chinese producers are likely to emerge, at some point, as true competition in the North American chloride TiO2 market, the "pertinent question here is whether the emergence . . . can be 'rapid enough to make unprofitable overall the [predicted] actions' that otherwise lead to the Commission's concerns about anticompetitive effects" from the Acquisition. Preliminary Injunction Opinion, 2018 U.S. Dist. LEXIS 155127, at *56 (quoting Merger Guidelines § 9.1). For the reasons explained above, the evidence fails to show that entry or expansion by Chinese producers is likely, or that such entry will be timely or sufficient to counteract the likely anticompetitive effects of the Acquisition. *See also* Preliminary Injunction Opinion, 2018 U.S. Dist. LEXIS 155127, at *60 (finding that "[t]he limited presence of Lomon Billions in the North American chloride market today, the substantial barriers to entry, and China's internal TiO2 demand trends do not paint a picture of rapid entrants ready to replace the loss of Cristal as a source of competition").[14]

2. Efficiencies

a. Applicable legal standards

"[A] defendant may rebut the government's prima facie case with evidence showing that the intended merger would create significant efficiencies in the relevant market." *Univ. Health*, 938 F.2d at 1222. An anticompetitive merger cannot be justified on the basis of asserted efficiencies outside the relevant market. *Philadelphia Nat'l Bank*, 374 U.S. at 370.

Cognizable efficiencies are defined as "merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service." *H&R Block*, 833 F. Supp. 2d at 89 (quoting Merger Guidelines § 10). A cognizable efficiency claim "must represent a type of cost saving that could not be achieved without the merger and the estimate of the predicted saving must be reasonably verifiable by an independent party." *Id.*

To be verifiable, the claimed efficiencies require "clear evidence showing that the merger will result in efficiencies that will offset the anticompetitive effects and ultimately benefit consumers." *Penn State Hershey Med. Ctr.*, 838 F.3d at 350. A merger specific efficiency is one that "cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor." *Heinz*, 246 F.3d at 722.

---

14 Respondents argue that Chinese TiO2 producers should be deemed "rapid entrants" because they could switch capacity to serve the North American market. RB at 72. *See* Merger Guidelines § 5.1 (stating that, in certain circumstances, "a supplier with efficient idle capacity, or readily available 'swing' capacity currently used in adjacent markets that can easily and profitably be shifted to serve the relevant market, may be a rapid entrant"). In support of this argument, Respondents assert that, after a fire at a Venator plant in Pori, Finland, Chinese TiO2 producers expanded their imports into Europe. *See* RB at 73-74; RFF 507. Given the logistical and cost barriers to importing chloride TiO2 from China to North America, among other barriers to entry described herein, Respondents' argument that Chinese producers would be rapid entrants into the North American market based on swing capacity is without merit.

The law requires "a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior." *Heinz*, 246 F.3d at 721. *Accord H&R Block*, 833 F. Supp. 2d at 89. As the court in *H&R Block* explained:

> Efficiencies are inherently "difficult to verify and quantify" and "it is incumbent upon the merging firms to substantiate efficiency claims" so that it is possible to "verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."

Id. (quoting Merger Guidelines § 10).

In addition, where a merger will substantially increase market concentration and result in a highly concentrated market, there must be proof of "extraordinary" efficiencies. *See Heinz*, 246 F.3d at 720-21 (quoting 4A Areeda, *et al.*, *Antitrust Law* P 971f, at 44 that extraordinary efficiencies are required where the "HHI is well above 1800 and the HHI increase is well above 100"); *Sysco*, 113 F. Supp. 3d at 81. As found in section II.D.1. above, the Acquisition would increase the HHI by over 700 points, to over 3000, which, under the Merger Guidelines, is a highly concentrated market. In the instant case, therefore, proof of extraordinary efficiencies is required.

To be able to offset a merger's likely anticompetitive effects, purported synergies and efficiencies must "represent more than mere speculation and promises about post-merger behavior." *Heinz*, 246 F.3d at 721. The burden of proving both that the asserted efficiencies are merger specific and that they are reasonably verified by an independent party is on Respondents. *Staples*, 190 F. Supp. 3d at 137 n.15. Respondents do not cite any case in which efficiencies alone have been deemed sufficient to defeat a showing of likely anticompetitive effects. *See Sysco*, 113 F. Supp. 3d at 82 (noting that courts have "rarely, if ever, denied a preliminary injunction solely based on the likely efficiencies") (quoting *CCC Holdings*, 605 F. Supp. 2d. at 72).

b. Analysis

Respondents argue that the Acquisition will increase global output of TiO2 by: (1) using Tronox's excess feedstock production to supply Cristal's plants; (2) restarting a presently non-operating feedstock producing facility in Saudi Arabia, referred to as the Jazan slagger; and (3) increasing production at Cristal's pigment plant in Yanbu, Saudi Arabia. RB at 64-68. Such increased output is good for consumers, Respondents argue, and will also enable the merged firm to better compete with Chemours and Chinese producers such as Lomon Billions. Respondents further argue that efficiencies from the merger will result in significant savings in selling, general, and administrative costs ("SG&A") and in costs related to procurement, supply chain, and logistics. RB at 68-69.

Complaint Counsel responds that Respondents have failed to demonstrate that their purported efficiencies are legally cognizable. CCB at 72-78. Complaint Counsel asserts that Respondents have failed to provide independent verification of either their asserted output enhancing synergies or cost savings; have failed to show that the asserted output enhancing synergies or cost savings are merger-specific; and have failed to show that the asserted output enhancing synergies or cost savings would benefit competition or consumers in the relevant North American chloride TiO2 market. CCB at 72-80.

As further explained below, Respondents have failed to demonstrate that their asserted efficiencies are cognizable.

i. Output increasing synergies

(a) Vertical integration

Respondents argue that combining the two companies' feedstock and TiO2-producing capabilities will create greater vertical integration, which will lower costs and ultimately lead to expanded output and lower pricing. In support of this argument, Respondents assert that Tronox presently produces more TiO2 feedstock than its TiO2 pigment plants can consume (i.e., Tronox is "long" on feedstock), while Cristal's feedstock production is insufficient to meet Cristal's TiO2 production requirements (i.e., Cristal is "short" on feedstock), which requires Cristal to purchase its additional requirements on the market. Respondents argue that the merger will eliminate middle-man margins, because Tronox's excess feedstock can "feed" Cristal's plants, and lead to increased TiO2 production. RB at 64-66.

Respondents do not quantify any middle-man margins assertedly eliminated from vertical integration, and fail to demonstrate how increased vertical integration, or alleged savings therefrom, would lead to increased chloride TiO2 output or lower pricing for North American chloride TiO2 purchasers. *See United States v. Aetna Inc.*, 240 F. Supp. 3d. 1, 98 (D.D.C. 2017) (stating that where defendant "has not attributed the claimed efficiencies to the particular markets challenged in the complaint, the Court cannot be confident that the consumers who are likely to be harmed by the merger would also share in its benefits").

Moreover, the weight of the evidence is inconsistent with Respondents' assertions as to the combined entity's post-Acquisition feedstock position. For a manufacturer to produce chloride TiO2, it needs access to high-grade feedstock.[15] F. 344. Tronox is presently "long" in high-grade feedstock by about [redacted] TiO2 kMT.[16] F. 346. Tronox projected that after the Transaction, it would be "significantly short on high grade feedstock," with an estimated deficit in 2018 of [redacted] TiO2 kMT. F. 347. Even if the Jazan slagger, which is currently not operating, were to begin operating at capacity, the combined entity would still be short of high-grade

15 The most common raw materials for feedstock are rutile and ilmenite. Natural rutile can be directly converted into TiO2 pigment and thus is a high-grade feedstock. Ilmenite must undergo further processing to be converted into TiO2. F. 338, 341.

16 The abbreviation "kMT" is an acronym that "stands for kilo metric ton." https://www.acronymfinder. com/Kilo-Metric-Ton-(measurement)-(KMT).html.

feedstock. F. 348, 352. This evidence indicates that the combined company would still need to purchase high-grade feedstock from third parties in order to meet chloride TiO2 demand, which undercuts the conclusion that integrating feedstock production will create efficiencies to the benefit of the North American chloride TiO2 market.

(b) Planned improvements to Jazan slagger and Yanbu plant

Respondents contend that the Acquisition will result in increased TiO2 production in two ways: (1) by increasing production at Cristal's chloride TiO2 plant in Yanbu, Saudi Arabia (the "Yanbu plant"), which Respondents assert has been underperforming; and, (2) by repairing and restarting a smelting facility in Jazan, Saudi Arabia (the "Jazan slagger"), which Respondents assert will result in increased feedstock production, and ultimately, increased TiO2 output. RB at 66-68. Respondents have failed to demonstrate that these purported efficiencies are cognizable, for the reasons discussed below.

Respondents do not explain how, or point to evidence indicating that, improvements in performance and increased output from either the Yanbu plant or the Jazan slagger will benefit the relevant market for chloride TiO2 in North America. As Mr. Quinn, chief executive officer of Tronox, acknowledged in his testimony, the overwhelming majority of the asserted operating synergies are related to assets outside the United States, F. 431, and thus outside the relevant North America geographic market. Moreover, the customers served by Cristal's chloride TiO2 plant in Yanbu are predominantly located in Saudi Arabia, and none of the TiO2 grades produced at the Yanbu plant are sold in North America. F. 384. Furthermore, as explained in section II.C.2., import costs, lead times, and other logistical and supply issues deter North American customers from importing chloride TiO2. Respondents emphasize that the asserted synergies will increase output of TiO2 on the global market. However, allegedly procompetitive effects outside the relevant market do not rebut a prima facie case of anticompetitive effects in the relevant market. *See Philadelphia Nat'l Bank*, 374 U.S. at 370 (rejecting asserted justification for a merger that was based on procompetitive benefits outside the relevant market); *see also United States v. Anthem Inc.*, 855 F.3d 345, 363-64 (D.C. Cir. 2017) (rejecting claimed savings based on a broad market definition, and stating that the evidence was "unmoored from the actual market at issue"). Accordingly, Respondents fail to demonstrate that increased output from the Yanbu plant or the Jazan slagger will benefit the relevant market for chloride TiO2 in North America. For this reason alone, Respondents' synergies claims based on planned improvements to the Yanbu plant and the Jazan slagger fail to rebut the prima facie proof of likely anticompetitive effects. *See Univ. Health*, 938 F.2d at 1222 (defendant may rebut prima facie case with evidence showing significant efficiencies *in the relevant market*) (emphasis added).

Furthermore, the conclusion that planned improvements to the Jazan slagger and the Yanbu plant will lead to increased TiO2 output is speculative. Although Tronox may be sincere in its plans to make output enhancing improvements to the Jazan slagger and the Yanbu plant, whether or not these efforts will succeed cannot be reasonably verified before they occur. This was also the conclusion of the district court, evaluating virtually the same record. Preliminary

Injunction Opinion, 2018 U.S. Dist. LEXIS 155127, at *64. As Respondents acknowledged in the synergies white paper that they submitted to the FTC in August 2017, [redacted]. F. 356. Dr. Fadi Trabzuni of TASNEE also admitted that [redacted]. F. 357. Willem Van Niekerk, senior vice president of strategy at Tronox, further acknowledged that Tronox cannot even fully determine the impact of [redacted]. F. 357.

Respondents' assertions as to the Jazan slagger are particularly speculative, given that the Acquisition at issue in this proceeding does not even include an acquisition of the Jazan slagger. F. 373. The Jazan slagger is not owned directly by Cristal, but is owned by another entity, AMIC, which is owned half by Cristal and half by TASNEE. F. 350. Approximately one year after the announcement of the Acquisition, Tronox signed an option agreement and technical services agreement with AMIC regarding the Jazan slagger. F. 374. Tronox chose to pursue an option agreement for the potential purchase of the Jazan slagger because the slagger's current inoperable state makes its value uncertain and Tronox did not want to acquire an asset that has not been proven to work. F. 377. The option agreement obligates Tronox to purchase the Jazan slagger in the future only if the facility achieves certain production levels. F. 376. If these performance metrics are met, then any amounts provided by Tronox under the option agreement are credited to the $125 million purchase price; otherwise, such amounts must be repaid to Tronox. F. 376. This deal structure reflects Tronox's own uncertainty that the planned improvements will succeed, by "remov[ing] the risk to Tronox if Jazan demonstrates unsurmountable weakness." F. 378. Ultimately, there is no certainty that Tronox will even purchase the Jazan slagger. F. 379. *See also* Preliminary Injunction Opinion, 2018 U.S. Dist. LEXIS 155127, at *64-65 (characterizing the option agreement as a reflection of Tronox's uncertainty as to whether the improvements and output enhancements at the Jazan slagger would be actualized).

Respondents' assertions as to the Yanbu plant are based on a two-page document titled, "Preliminary Yanbu Improvement Plan." F. 386. This plan refers generally to implementing "best practices" and "operational excellence" techniques, and applying to Yanbu the "lessons learned" from Tronox's Hamilton, Mississippi plant, which Tronox asserts is "nearly identical in every material way" to Yanbu. F. 387; RB at 67. Even if Yanbu's plant design is similar to Hamilton, however, there are particular challenges to Tronox's successfully implementing planned changes at the Yanbu plant. F. 394-395. Richard Dean, vice president of global operations integration at Tronox, who provided the estimates contained in the Preliminary Yanbu Improvement Plan, identified organizational culture as "the biggest challenge [Tronox] face[s] at Yanbu." F. 389, 395. Christian Gunther, head of Cristal's titanium unit, explained the challenge of employee "accountability, meaning the challenge of making people in the plant at every level truly feel accountable for the success at the operations of the entire plant." F. 395. This is not the case at the Hamilton plant which, according to Mr. Dean, has "a very engaged and interested workforce," "interested in the success of not only Hamilton but Tronox as a whole." F. 396.

Respondents have also failed to provide independent verification for the planned improvements at either the Jazan slagger or the Yanbu plant, or for the projected impacts. For example, KPMG, which was hired to assist Tronox with Tronox's synergies assessment, "*assume[d]* that the Jazan Slagger will reach the production levels projected by [Tronox]" and that "the operational and technical improvements identified by [Tronox]" will enable Yanbu to exceed production forecasts. F. 381, F. 398 (emphasis added). Similarly, Respondents' proffered experts based their opinions as to likely output increases from improvements to the Jazan slagger and the Yanbu plant upon the assertions, judgments, and/or expectations of Respondents, without any apparent independent verification. F. 429. Respondents argue that this is sufficient verification, because of the knowledge and experience of the Tronox personnel involved, and that the Merger Guidelines do not require any particular method of verification. *See* RRB at 46-49. As set forth in section II.E.2.a., however, Respondents have the burden of substantiating their efficiency claims, and to be cognizable, such claims must be reasonably verifiable by "an independent party." *H&R Block*, 883 F. Supp. 2d at 89. As the court in *H&R Block* explained, while reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter,

> the lack of a verifiable method of factual analysis resulting in the [claimed efficiencies] renders them not cognizable . . . . If this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act because management would be able to present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise.

Id. at 91.

(c) Summary

Respondents have failed to demonstrate that their claimed output enhancing efficiencies will increase output in the relevant market. Moreover, Respondents have failed to substantiate their claims with independent verification. For these reasons, Respondents have failed to demonstrate that their claimed output enhancing efficiencies are cognizable.[17]

---

17 Respondents' claimed output enhancing efficiencies from planned improvements to the Jazan slagger and the Yanbu plant are also not cognizable because the evidence fails to show these efficiencies are merger-specific, i.e., that the Acquisition, and resulting removal of Cristal as a competitor in the relevant market, is necessary to achieve the claimed output enhancing efficiencies. Cristal has hired employees with expertise in the low-pressure technology used at the Yanbu plant and has implemented organizational and operational changes, which have led to improvements in production. F. 404-417. In addition, Mr. Dean, Tronox's vice president of operations integration, acknowledged that Cristal probably does not need a merger with Tronox to develop such beneficial practices as shift handover protocols, workflow management protocols, meeting protocols, short interval control protocols, or operator checklists. F. 420. Furthermore, in recent years, Cristal has engaged outside engineers and consultants to address the issues with the Jazan slagger, and as of February 2017, Cristal had completed several modifications. F. 360-370. In June 2017, a TASNEE press release stated that "work is still ongoing to solve the technical problems" at the Jazan slagger, and projected a trial operation during the first half of 2018. F. 372. AMIC has invested over [redacted] in the Jazan slagger and [redacted]. F. 380.

ii. Cost savings

Respondents argue that the Acquisition will lead to "sizable cost savings synergies" in "SG&A" (selling, general, and administrative costs), primarily from reduction in personnel and services costs; and in procurement, supply chain, and logistics, including volume discounts. RB at 68-69. Respondents further contend that the consulting firm KPMG has assessed and validated Tronox's synergies estimates, noting that KPMG had access to the entire data room related to the Acquisition. As discussed below, Respondents' asserted cost savings efficiencies are not cognizable.

First, Respondents have failed to provide independent verification for their asserted cost savings. The objective of KPMG's engagement was to assist in the assessment of the potential synergies that Tronox anticipates in connection with the proposed Acquisition. F. 424. The procedures that KPMG agreed to perform [redacted]. F. 425. Moreover, as the district court in the preliminary injunction case also found, KPMG's synergies' conclusions were at least partially based upon estimates and assumptions provided by Respondents' management. F. 426-428. *See* Preliminary Injunction Opinion, 2018 U.S. Dist. LEXIS 155127, at *65-66. For example, part of KPMG's role was to build an Excel model which would track all of the synergies, including the synergies originally identified in the initial due diligence period and a revised estimate of synergies identified during the "sign-to-close diligence" period. F. 428. The revised estimates were provided by Tronox's business people, and KPMG fed those estimates into the tracking model. F. 428.

Second, Respondents have failed to demonstrate that the cost savings are merger-specific. KPMG does not purport to address whether cost savings could be achieved by either Tronox or Cristal alone. For this reason as well, Respondents' asserted costs savings efficiencies are not cognizable. *See Sysco*, 113 F. Supp. 3d at 83 ("Sysco did not hire McKinsey to identify merger-specific savings for antitrust purposes. . . . McKinsey was not given instructions on identifying merger-specific savings . . . ."). *See also* Preliminary Injunction Opinion, 2018 U.S. Dist. LEXIS 155127, at *66 (noting that KPMG was not hired "to identify 'merger-specific' cost savings for antitrust purposes, but to 'provide consulting support' for the 'sign-to-close period' of the deal.").

Finally, even if it is assumed that the Acquisition will reduce the combined entity's general costs of doing business, Respondents have failed to show that such savings will benefit North American consumers of chloride TiO2, which is the relevant market in this case. *See CCC Holdings*, 605 F. Supp. 2d at 74 (rejecting asserted cost savings efficiencies, noting that there was "no evidence to suggest that a sufficient percentage of those savings will accrue to the benefit of the consumers to offset the potential for increased prices. . . . [T]hese advantages could show up in higher profits instead . . . ."). Indeed, Tronox has not evaluated how lowering its costs would affect TiO2 pricing, which is affected by many factors. Mr. Quinn acknowledged that lowering Tronox's costs is unlikely to have an impact on TiO2 pricing. F. 430.

Accordingly, for the reasons summarized above, Respondents have failed to demonstrate that their claimed cost savings are cognizable.

3. Conclusion

Respondents have failed to rebut the prima facie proof that the Acquisition is reasonably likely to have anticompetitive effects in the relevant market for the sale of chloride TiO2 in North America. Accordingly, the evidence proves that the planned Acquisition may substantially lessen competition in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.

The analysis now addresses the appropriate remedy.

F. Remedy

For the remedy in this case, Complaint Counsel seeks an order prohibiting any acquisition of Cristal by Tronox. *See* CCB Exhibit A (hereinafter "Proposed Order"). The Proposed Order contains four substantive provisions,[18] summarized as follows: Paragraph II.A., which requires Respondents to terminate the acquisition agreement and refrain from any actions to consummate the agreement; Paragraph II.B., which enjoins Tronox from acquiring Cristal, directly or indirectly, in whole or in part; Paragraph II.C., which requires Respondents to return all confidential information, and destroy all notes related thereto; and Paragraph II.D., which requires Respondents to submit written certification of their compliance with Paragraphs II.A. and II.C., together with supporting documentation, within 15 days of the Order becoming final.

Complaint Counsel asserts that the Proposed Order is appropriate to prevent Respondents from entering into the Acquisition, thereby preserving competition in the relevant market. Complaint Counsel argues that the Commission has broad discretion to fashion a remedy, so long as the provisions are reasonably related to the violation found to exist. Respondents do not address the Proposed Order in their post-trial briefing.[19]

The remedy for a violation of Section 7 of the Clayton Act is set forth in Section 11(b) of that act, as follows:

> If upon such hearing the Commission . . . shall be of the opinion that any of the provisions of [Section 7] have been or are being violated, it shall . . . issue and cause to be served on such person an order requiring such person to cease and desist from such violations . . . .

15 U.S.C. § 21(b). In addition, it is well established that the Commission has broad discretion in choice of remedy, so long as it bears a reasonable relation to the unlawful practice found to exist. *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946). "The touchstone principle for . . . analyzing remedies is that a successful merger

18 Paragraph I of the Proposed Order is limited to definitions of the Respondents and the planned acquisition, all of which are consistent with the findings and conclusions of this Initial Decision.

19 Respondents maintain that no remedy is appropriate because Complaint Counsel has failed to prove that the planned acquisition is unlawful. As held above, the planned acquisition is unlawful. Thus, a remedy is appropriate.

remedy must effectively preserve competition in the relevant market." *Sysco*, 113 F. Supp. 3d at 73 (quoting Antitrust Div., U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 1 (June 2011)).

Based on the foregoing, the Proposed Order, submitted by Complaint Counsel, will be issued herewith as the Order in this case (hereinafter "Order").[20] It has been determined that the Acquisition is unlawful because the effect may be to substantially lessen competition in the relevant market for the sale of chloride TiO2 in North America.

The Order accomplishes the remedial objectives of the Clayton Act and the FTC Act by enjoining the Acquisition and preserving competition in the relevant market. In addition, its provisions are reasonably related to the proven violation.

III. FACTS

A. Background

1. Titanium dioxide

1. Titanium dioxide ("TiO2") is an industrial chemical primarily used as a pigment. (Joint Stipulations of Jurisdiction, Law, and Fact, JX0001-002 ¶¶ 12-13). TiO2 is an essential pigment used to add whiteness, brightness, opacity[21] and durability to paints, industrial and automotive coatings, plastics, and other specialty products. (Young, Tr. 642; Pschaidt, Tr. 965; PX3011 at 012 (Kronos investor presentation); PX9020 at 006, 013, 045, 083, 117 (Chemical Economics Handbook); PX1001 at 005 (Tronox investor presentation)).

2. TiO2 can have two different crystal structures – rutile and anatase. (PX9020 at 013 (Chemical Economics Handbook)). Rutile TiO2 and anatase TiO2 have different physical characteristics and applications and are not substitutes for any use relevant to this matter. (PX1424 at 010 (Tronox presentation); PX9022 at 120 (Venator SEC Filing)).

3. The first step in developing TiO2 pigment starts by mining heavy materials that are concentrated in sand dunes. (Turgeon, Tr. 2585-87).

4. TiO2 is produced from feedstock (titanium-containing ores)[22] through one of two manufacturing processes that extract TiO2 from ore: (1) the chloride process that uses chlorine ("chloride TiO2"); and (2) the sulfate process that uses sulfuric acid ("sulfate TiO2"). (PX9020 at 021-23, 025-28 (Chemical Economics Handbook)).

---

20 The Order contains no substantive changes from the Proposed Order.

21 Opacity is how well a paint covers the wall. (Engle, Tr. 2452).

22 Feedstock is explained in more detail in F. 337-342.

5. The chloride process is a continuous process that uses chlorine gas to create titanium tetrachloride, which is then oxidized to create TiO2. In the sulfate process, feedstock is combined with sulfuric acid in batches, to make a "black liquor" from which solid titanium hydroxide is extracted and treated to create TiO2. (Turgeon, Tr. 2613-17).

6. The primary customers of TiO2 include paint and coatings manufacturers and plastic producers. Approximately 60% of TiO2 is used in coatings applications, 25% in plastics, 10% in paper, and 5% in other uses, including inks, foods,[23] and pharmaceuticals. (Mouland, Tr. 1211; PX9020 at 042 (Chemical Economics Handbook); Christian, Tr. 775).

7. The term "coatings" encompasses architectural coatings, meaning paint, and industrial-type coatings, such as automotive coatings, marine coatings, packaging coatings, and other products that are for industrial application. (Malichky, Tr. 348; Young, Tr. 631; Christian, Tr. 773).

2. The parties and the proposed acquisition

a. Tronox

8. Tronox is a for-profit corporation headquartered in Stamford, Connecticut. (Joint Stipulations of Jurisdiction, Law, and Fact, JX0001-001 ¶ 1).

9. Tronox was spun off from the Kerr-McGee Corporation ("Kerr-McGee") in 2005. (PX0001 at 004; Dean, Tr. 2920).

10. Tronox went into chapter 11 bankruptcy in January 2009 and emerged from bankruptcy in February 2011. (Romano, Tr. 2209-10).

11. Tronox owns and operates three mines: one on the west coast of Australia near Perth (Cooljarloo), one on the east coast of South Africa (KZN Sands), and one on the west coast of South Africa (Namakwa Sands). Tronox owns and operates smelters in South Africa to produce titanium feedstock. (Turgeon, Tr. 2590, 2597; PX9040 at 010 (Tronox investor presentation); Mei, Tr. 3150-51).

12. Tronox owns and operates three chloride TiO2 plants, which are located in Hamilton, Mississippi; Botlek, Netherlands; and Kwinana, Australia. (PX9040 at 010 (Tronox investor presentation)).

13. The only type of TiO2 that Tronox manufactures is chloride TiO2. (Romano, Tr. 2177; Quinn, Tr. 2413).

---

23 Chloride TiO2 cannot be used in products that are ingested. (Christian, Tr. 775). Food-grade TiO2 can only be made from sulfate TiO2 or anatase TiO2, and can be an additive to toothpaste, powdered donuts, or cookie filling. (Christian, Tr. 776, 782, 889). Food-grade TiO2 is also used to prevent spoilage and increase the shelf life of foods. *See* https://www.foodinsight.org/titanium-dioxide-fda-food-coloring-additive-ingredient-donuts.

14. Tronox engages in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44 (2008), and Section 1 of the Clayton Act, 15 U.S.C. § 12 (2008). (Joint Stipulations of Jurisdiction, Law, and Fact, JX0001-001 ¶ 3).

b. Cristal

15. Three legal entities collectively constitute "Cristal." Cristal USA Inc. is a Delaware corporation and an indirectly owned subsidiary of Saudi Arabian companies The National Industrialization Company ("TASNEE") and The National Titanium Dioxide Company. (Joint Stipulations of Jurisdiction, Law, and Fact, JX0001-001 ¶ 4). For ease of reference, the name "Cristal" is used herein to refer to the subject of the Acquisition (F. 25), as well as to the three affiliated corporate entities, unless the context otherwise dictates.

16. Cristal owns and operates titanium feedstock mining assets in Australia. (PX9040 at 010 (Tronox investor presentation); PX7006 (Stoll, IHT at 42)).

17. Cristal owns and operates a titanium feedstock mining asset in Paraiba, Brazil. (PX9040 at 010 (Tronox investor presentation); PX0002 at 024 (Cristal's Narrative Response to the Second Request)).

18. Cristal owns and operates three sulfate TiO2 plants located in Thann, France; Bahia, Brazil; and Fuzhou, China. (PX9040 at 010 (Tronox investor presentation); PX7008 (Hewson, IHT at 11-12)).

19. Cristal owns and operates five chloride TiO2 plants, two of which are located in Ashtabula, Ohio; one in Yanbu, Saudi Arabia; one in Stallingborough, United Kingdom; and one in Bunbury, Australia. (PX9040 at 010 (Tronox investor presentation); PX7008 (Hewson, IHT at 11)).

20. Cristal USA engages in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44 (2008), and Section 1 of the Clayton Act, 15 U.S.C. § 12 (2008). (Joint Stipulations of Jurisdiction, Law, and Fact, JX0001-002 ¶ 6).

c. Proposed acquisition

21. Tronox began conversations with Cristal regarding a potential combination in 2015. (Quinn, Tr. 2302; RX0236 at 0001).

22. In October 2016, Tom Casey, then-CEO of Tronox, reported to the board of directors that Tronox and Cristal had reached a preliminary framework for an acquisition. (Quinn, Tr. 2299-2300).

23. On November 23, 2016, Tronox and Cristal agreed to a non-binding deal construct, and due diligence between the parties commenced. (PX9053 at 018).

24. On February 21, 2017, Tronox announced a definitive agreement to acquire the titanium dioxide business of Cristal. (PX0009 at 001; PX0001 at 005).

25. The transaction for Tronox to acquire the titanium dioxide business of Cristal (the "Acquisition") is structured as a cash-and-shares transaction that includes $1.673 billion in cash and 37.58 million Class A shares representing 24% of the combined entity. (RX1257 at 0002). Shareholders approved the transaction on October 2, 2017. (PX9053 at 18).

d. Key employees of Respondents

i. Tronox

26. Brennan Arndt, Sr. is the senior vice president of investor relations at Tronox and has worked at Tronox since May 2012. (Arndt, Tr. 1353; PX7011 (Arndt, Dep. at 8)).

27. Tom Casey was the former chief executive officer ("CEO") and chairman of the board at Tronox from May 2011 through May 2017. (Arndt, Tr. 1358, 1394; Mancini, Tr. 2740).

28. Richard Dean is the vice president of global operations integration at Tronox. He has been with Tronox since 1996 and has been vice president of global operations integration since 2017. (Dean, Tr. 2911; PX7023 (Dean, Dep. at 7-8)).

29. Arjen Duvekot is the vice president of sales for Europe, the Middle East, and Africa (EMEA) and the Asia Pacific region (APAC) at Tronox. He has been with Tronox since 2012 and became vice president of sales for the above regions in 2016. (Duvekot, Tr. 1290; PX7026 (Duvekot, Dep. at 14)).

30. Jeffrey Engle is the vice president of marketing and product development at Tronox. He has been with Tronox since 2006 and has been vice president of marketing and product development since 2012. (Engle, Tr. 2433-36).

31. Raoul Charles ("Chuck") Mancini is the senior vice president of organizational effectiveness of Tronox. He has been with Tronox since 2012 and has been chief of staff at Tronox since March 2018. (Mancini, Tr. 2739).

32. Rose Mei is director of sales and operation planning and global logistics at Tronox and has worked at Tronox for five years. (Mei, Tr. 3140).

33. Ian Mouland is the vice president of sales for the Americas at Tronox. He has worked at Tronox since 1998. (Mouland, Tr. 1140-41; PX7002 (Mouland, IHT at 20)).

34. John Romano is the senior vice president and chief commercial officer at Tronox. (Romano, Tr. 2135-36). He has worked at Tronox and its predecessor Kerr-McGee for 30 years. (PX7046 (Romano, Dep. at 7, 20)).

35. Jeffry Quinn is the chief executive officer at Tronox. (Quinn, Tr. 2292). Mr. Quinn started at Tronox as a member of the board of directors in 2011 after Tronox was emerging from bankruptcy. He became the chief executive officer in December 2017. (PX7014 (Quinn, Dep. at 19)).

36. Jean-Francois Turgeon is the executive vice president and chief operating officer at Tronox. He has worked at Tronox since 2014. (Turgeon, Tr. 2579).

37. Willem Van Niekerk is senior vice president of strategy at Tronox. He has worked at Tronox since 2012. (Van Niekerk, Tr. 3899, 3906; PX7007 (Van Niekerk, Dep. at 15-16)).

ii. Cristal

38. Graham Hewson is the vice president of integration operations at Cristal. Mr. Hewson's responsibilities include developing the integration of Cristal and Tronox. (Hewson, Tr. 1600). Mr. Hewson has worked at Cristal since 2012 and previously worked at Tronox for approximately 21 years. (Hewson, Tr. 1601-03).

39. Jean-Yves Gigou is the vice president of the TiO2 business unit at Cristal International B.V. in Cologne. He has worked at Cristal for 15 years. (PX7043 (Gigou, Dep. at 8-9)).

40. Mark Stoll is the general manager of mergers and acquisitions at Cristal USA. (Stoll, Tr. 2062). Mr. Stoll has worked at Cristal for 33 years. (PX7006 (Stoll, Dep. at 7)).

3. Other TiO2 manufacturers

41. Kronos Worldwide, Inc. ("Kronos") is a TiO2 manufacturer that sells both chloride TiO2 and sulfate TiO2. (PX8002 (Christian, Decl. at 002 ¶ 6)). Brian Christian is an executive vice president of Kronos. (Christian, Tr. 744-45; PX7035 (Christian, Dep. at 16)).

42. Venator Materials Corporation ("Venator") is a TiO2 manufacturer that sells both chloride TiO2 and sulfate TiO2. (PX8005 (Maiter, Decl. at 001 ¶ 11)). Mahomed Maiter is the senior vice president for white pigments for Venator. (PX8005 (Maiter, Decl. at 001 ¶1)).

43. The Chemours Company ("Chemours") is a TiO2 manufacturer that sells only chloride TiO2. (PX8004 (O'Sullivan, Decl. at 001 ¶ 3)). Peter O'Sullivan is a commercial transformation executive with Chemours. (PX8004 (O'Sullivan, Decl. at 001 ¶ 2)).

4. TiO2 customers

44. Deceuninck North America is a manufacturer of vinyl window and patio door frames that are sold into the building materials market. Greg Arrowood is a commodities manager for Deceuninck North America. He has worked at Deceuninck North America for 32 years and has been a commodities manager for five years. (Arrowood, Tr. 1052, 1058).

45. Masco Coatings Corporation ("Masco") is a paint manufacturer. Its two brand names are Behr paints, sold through Home Depot, and Kilz paints. Mario Pschaidt is the vice president of procurement at Masco, and has worked at Masco for four years. (Pschaidt, Tr. 963-66).

46. PPG Industries ("PPG") is a paint and coatings manufacturer. PPG sells paint to consumers under its main brand name paints of Glidden and Pittsburgh Paint and also sells industrial or non-consumer paint. Paul Malichky is the director of raw materials sourcing at PPG. He has held this position for almost five years. (Malichky, Tr. 267-69).

47. The Sherwin-Williams Company ("Sherwin-Williams") is the largest paint and coatings manufacturer in North America. Some of Sherwin-Williams major brands include Valspar, which Sherwin-Williams acquired in 2017, and Dutch Boy. George Young is the senior vice president of global procurement and supply chain at Sherwin-Williams. (Young, Tr. 630-33; PX7020 (Young, Dep. at 121)).

48. True Value Company ("True Value") is a hardware cooperative that manufactures EasyCare brand paint and sells it through the True Value stores. (Vanderpool, Tr. 157, 160). John Vanderpool is the divisional vice president of paint at True Value. He has held this position since 2015. (Vanderpool, Tr. 153; PX7044 (Vanderpool, Dep. at 10)).

49. Four paint manufacturers, Sherwin-Williams, Valspar, PPG, and Masco, collectively account for 40% of all TiO2 purchases in North America in 2016. (PX5000 (Hill Expert Report at 047 n.204)).

B. Relevant Market

1. Relevant product market

50. Between 2012 and mid-2017, chloride TiO2 accounted for around 90% of TiO2 sales in North America.[24] (Hill, Tr. 1684; PX5000 (Hill Expert Report at 047 Fig. 17)).

51. Tronox recognizes that the North American market is predominantly chloride TiO2 – "95% or 98% or some very, very high number." (PX9012 at 008 (Q4 2013 Tronox Earnings Call); PX1322 at 003 (Tronox presentation) ("The North American market is ~90% chloride.")).

a. Differences in attributes of chloride TiO2 and sulfate TiO2

52. Chloride TiO2 is a higher quality product than sulfate TiO2. (PX1427 at 003 (internal Tronox email) ("Chloride process uses higher-quality feedstocks and makes better-quality TiO2."); PX9015 at 011 (Q1 2013 Tronox Earnings Call) ("We are selling to

24 The product market and the geographic market are dependent on each other. In section III.B.2. *infra*, the geographic market is found to be the North America region, consisting of the United States and Canada. In this section, which finds the relevant product market, the focus is on the type of TiO2 sold to North American customers.

customers that have demand for our higher-quality chloride product, and that cannot be met by Chinese manufacturers at this point, because they don't have any [chloride product]."); PX1324 at 001 (internal Tronox email) ("Consistency of quality is still an issue with the 2nd tier Sulfate producers"); PX2229 at 005 (Cristal email with attachment) ("Even the best performing Sulfate rutile requires 1.8X [times] more pigment to equal the performance of Tiona 595 [a chloride TiO2 grade]" in film thickness for latex paint.)).

53. Chloride TiO2 is a superior product to sulfate TiO2 on its optical properties, its color undertone, tinting strength, durability, and a whole host of different ways of evaluating a grade of TiO2. (Christian, Tr. 776-77, 960 ("[T]he market would say that our [chloride process] products are superior to our [sulfate process] products, and that is confirmed in a lot of instances based upon technical evaluations and lab work.")).

i. Brightness

54. Chloride TiO2 is a brighter pigment than sulfate TiO2. (PX1346 at 013 (Tronox investor presentation) ("Chloride technology yields consistently whiter, brighter pigment grades preferred for many of the largest end-use applications (e.g., paints and plastics) as compared to the sulfate process[.]")).

55. Tronox is aware that North American customers prefer the blue tone of chloride TiO2 over the yellow tone of sulfate TiO2. (PX1322 at 003 (Tronox presentation) ("US consumers have gotten used to a more blue tone and prefer it over the more yellow tone of white.")).

56. Chloride TiO2 is a brighter pigment than sulfate TiO2 due to its bluer undertone. (Christian, Tr. 773-74 ("[T]he most noteworthy [difference between chloride TiO2 and sulfate TiO2] is going to be in the general color and undertone of the product produced. An SP [sulfate process] product is going to produce what we would call a yellowish undertone, where the CP [chloride process] product is going to have a brighter white to it, or we call it a bluish undertone."); PX8005 (Maiter, Decl. at 002 ¶7) (Chloride TiO2 provides more whiteness than sulfate TiO2.)).

57. Brighter colors and brilliant whites are "achievable only through chloride manufactured pigment." (PX9121 at 007 (Chemours 2017 Form 10-K); PX7052 (O'Sullivan, Dep. at 160-61) (chloride TiO2 has a higher fundamental whiteness than sulfate TiO2)).

58. North American customers prefer chloride TiO2 over sulfate TiO2 because it is a brighter pigment. (PX8002 (Christian, Decl. at 004 ¶ 17) ("Chloride grades are preferable globally, and especially so in the U.S. The customer base in the U.S. prefers chloride grades because they are a more durable pigment and are a brighter pigment because of their bluish undertones."); PX8004 (O'Sullivan, Decl. at 002 ¶ 7) ("North American customers prefer chloride process titanium dioxide with a blue undertone.")).

59. Paint manufacturers use chloride TiO2 instead of sulfate TiO2 because it is brighter in appearance due to chloride TiO2's bluer undertone compared to sulfate TiO2's yellow undertone. (Vanderpool, Tr. 182-83 (chloride TiO2 is purer and brighter than sulfate TiO2, which is "dirtier" and has a yellow tint); Young, Tr. 643 (because sulfate TiO2 has an undertone, Sherwin-Williams has not been able to get consistent brightness of color and consistent whiteness with sulfate TiO2)).

60. For Masco, the "ultra pure white" feature of its Behr paints and crisp, clean colors are "very, very important." "That is how we differentiate ourselves in the marketplace, and that [is what] also . . . gives the quality of the paint that we want and we need." The ultra pure white feature is created by "the TiO2 that [Masco] use[s], and in order to achieve that [Masco] need[s] to use TiO2 produced [by] the chloride process." (Pschaidt, Tr. 966, 971, 973, 977).

61. End-use consumers in North America demand crisp and brighter colors. (Young, Tr. 665 (Sulfate TiO2 does not meet Sherwin-Williams' standards for North America because it "tends to have a yellow undertone. Our market in North America requires clean colors, bright colors . . ."); Pschaidt, Tr. 978 ("[Sulfate TiO2] gives you a yellowish undertone, and that doesn't achieve that clean, crisp look that you get from a chloride-produced TiO2, and, therefore, we cannot use the sulfate-grade TiO2 for our main product lines.")).

ii. Durability

62. Chloride TiO2 tends to provide more durability than sulfate TiO2. (PX8005 (Maiter, Decl. at 002 ¶ 7); Christian, Tr. 776-77; PX8002 (Christian, Decl. at 004 ¶ 17) (chloride TiO2 is a "more durable pigment" than sulfate TiO2); Quinn, Tr. 2414 (acknowledging that some customers have a preference in certain applications for chloride TiO2 because it typically has greater durability)).

63. Durability is important for all products, but especially for exterior products that are exposed to sunlight and various other weather elements. (Christian, Tr. 780-81).

64. Paint manufacturers use chloride TiO2 instead of sulfate TiO2 because it provides more durability. (Young, Tr. 666-67 ("[I]n our formulas we've had better durability of our chloride product."); PX8003 (Young, Decl. at 003 ¶ 12) ("[T]he chemistry of sulfate TiO2 may result in . . . less durability than chloride TiO2 . . . ."); Malichky, Tr. 274-75, 295-96 (sulfate carries iron with the product, and that decreases the durability in the final application); Vanderpool, Tr. 195 (sulfate TiO2 failed to meet True Value's durability requirements in laboratory testing)).

65. Coatings manufacturers find chloride TiO2 tends to be more durable than sulfate TiO2. (PX7003 (DeCastro, IHT at 21) (RPM International ("RPM"), a coatings manufacturer of the Rust-Oleum brand, would not use sulfate TiO2 for exterior applications); PX7049, *in camera* [redacted], a manufacturer of plastic films, prefers not to use sulfate TiO2 because "it tends not to weather as well, in part because of the molecule structure, the crystalline

structure, and also in part because of the sulfate process by which it's made. And so it . . . tends not to have the same longevity in an application as a TiO2 that's produced from the chloride process.")).

iii. Consistency for point of sale tinting

66. Point-of-sale tinting is where a customer picks a color at the retail store and a can of paint is customized to a customer's request. (Young, Tr. 643-44 (Tinting is "a process by which colorant is usually injected into a can of paint, it's put on a shaker, and it achieves the color that a customer desires, so it's basically customizing the product.")).

67. In the North American market, almost all paint is tinted at the point of sale. (PX7020 (Young, Dep. at 48); Pschaidt, Tr. 971-72 (the majority of paints Masco sells are tinted in-store); Malichky, Tr. 302-03 (only a small amount of paint in the United States is pre-tinted at manufacturing)).

68. For paint to be tinted at the point of sale, manufacturers must use chloride TiO2 in order to get the color consistency and bright whites that customers expect. (Young, Tr. 643-47; PX7020 (Young, Dep. at 47-49); PX7025 (Malichky, Dep. at 117-18) ("[I]f it's a tintable formula, we can't use [sulfate TiO2]")). Sulfate TiO2 does not provide the same consistent results as chloride TiO2 to allow for tinting at the point of sale. (Young, Tr. 646, *in camera* [redacted]; PX7020 (Young, Dep. at 47-49). *See also* PX1322 at 003 (Tronox presentation) ("The US also has point of sale tinting which requires a very consistent pigment base.")).

69. Color fidelity is very important to paint manufacturers and they do not want to substitute raw materials that may jeopardize their color schemes. (Malichky, Tr. 296-97 ("So [if by] switching the TiO2 and you're off a little bit in color, that's unacceptable for the consumer . . . ."); Vanderpool, Tr. 196 ("The last thing we want to have is phone calls coming in to our customer service department, one after another, that color 57 is no longer color 57; it's really 28.")).

70. Color fidelity is a challenge for the large paint companies, which can have tens of thousands of colors. (Malichky, Tr. 296-97; PX7025 (Malichky, Dep. at 124)). It is also a challenge for applications such as automotive coatings, which require color matching for all vehicles on the road today, including discontinued ones. (Malichky, Tr. 297).

iv. Other performance attributes

71. Sulfate TiO2 "didn't meet all the criteria that [True Value needs] in terms of scrubbability, durability, dry time, recoat time, sag [downward movement of paint], low odor, all those kinds of things, and compatibility with the other raw materials that we're using in our formulas." (Vanderpool, Tr. 195).

72. Sulfate TiO2 is subject to [redacted]. (Young, Tr. 643, 666; PX8003 (Young, Decl. at 003 ¶ 12), *in camera*).

73. [redacted].

74. RPM has found that chloride TiO2 produces better gloss in higher gloss paint products whereas sulfate TiO2 may not give you the gloss you are looking for in higher gloss paint products. (PX7016 (DeCastro, Dep. at 97)).

75. Performance attributes that distinguish chloride TiO2 from sulfate TiO2 include paint manufacturers' ability to make paint that can be scrubbed without it flaking off the substrate ("scrubbability") and paint that can completely cover, from an optical standpoint, the color or coat of paint that was on the wall or substrate previously, to where you can't see what the previous color was, without having to apply a primer or more than one coat ("one-coat coverage"). (Christian, Tr. 774-76).

v. Slurry

76. North American customers purchase TiO2 either in: (1) a bagged dry powder form; or (2) a liquid slurry form. (PX9020 at 033 (Chemical Economics Handbook); Christian, Tr. 782).

77. TiO2 slurry is made by dispersing TiO2 powder in water with other additives. (Christian, Tr. 783; Engle, Tr. 2451-52; PX7007 (Van Niekerk, Dep. at 44)).

78. "A large portion of the US market is satisfied by slurry shipment . . . ." (PX1322 at 003 (Tronox presentation)).

79. Large paint and coatings manufacturers in North America purchase the majority of their TiO2 in a slurry form. (Young, Tr. 680-81, *in camera* (Sherwin-Williams purchases [redacted] of its TiO2 in North America in slurry form); Malichky, Tr. 303, *in camera* (PPG purchases [redacted] of its TiO2 in North America in slurry form); PX8002 (Christian, Decl. at 003 ¶ 13) (A significant portion of TiO2 sold by Kronos in the United States is in slurry form); PX8004 (O'Sullivan, Decl. at 002 ¶ 7), *in camera* [redacted].

25 "Chalking is when the surface starts to degrade and basically a dry, chalky material . . . starts to come out of the film." (Young, Tr. 666).

80. TiO2 slurry is delivered to customers by rail cars or tank cars. (Christian, Tr. 782; Pschaidt, Tr. 981; Young, Tr. 648-49). Slurry TiO2 can be pumped directly into customers' storage tanks, which simplifies handling and manufacturing. (PX9020 at 045 (Chemical Economic Handbook); Young, Tr. 648-49; Pschaidt, Tr. 982; Engle, Tr. 2451-52).

81. Paint manufacturers use slurry TiO2 because it lowers their costs. (Young, Tr. 648-50; Malichky, Tr. 294; PX8006 (Pschaidt, Decl. at 002 ¶ 9)). Using TiO2 in slurry form allows Sherman-Williams to efficiently handle bulk deliveries of universal grades. (PX8003 (Young, Decl. at 002-03 ¶ 9)).

82. In North America, TiO2 slurry is made only from chloride TiO2. (Pschaidt, Tr. 985-86; PX7016 (DeCastro, Dep. at 84)).

b. Unsuitability of sulfate TiO2

83. End-use customers in the United States and Canada demand high quality, premium coatings products. (Malichky, Tr. 294-95; Christian, Tr. 779-80 ("[M]ore developed economies and parts of the world . . . have higher standards for [paint] products . . . .")). As Sherwin-Williams explained, sulfate TiO2 is not suitable for most paint formulations in North America, which require clean, bright colors and which has the highest quality standard in the world. (Young, Tr. 642-44, 664-65).

84. True Value uses sulfate TiO2 in [redacted] or less of its paints, which are its very basic, entry-level paints. True Value has found that "there is definitely a difference" between paint made with sulfate TiO2 and paint made with chloride TiO2. True Value paints made with sulfate TiO2 do not cover or hide as well as its paints made with chloride TiO2, are not light reflectant, cannot be tinted with many colors, and cannot withstand as many scrubs as its paints made with chloride TiO2. (Vanderpool, Tr. 192-93, *in camera*).

85. True Value described sulfate TiO2 and chloride TiO2 as "apples and oranges," and would not consider switching from its current use of chloride TiO2 to sulfate TiO2 for the vast majority of its paints because the products are "not the same." (Vanderpool, Tr. 193-94 ("[T]here's no way" the sulfate TiO2 that True Value has tested could meet its benchmarking standards.)).

86. Over [redacted] of PPG's North American TiO2 purchases cannot be switched from chloride TiO2 to sulfate TiO2. (Malichky, Tr. 298, *in camera*). Due to differences in durability and other performance properties, sulfate TiO2 cannot be used in place of chloride TiO2 for many of PPG's architectural or industrial coatings. (Malichky Tr. 294 ("Q.: Why does PPG use chloride rather than sulfate in the vast majority of its coatings in the United States and Canada? A.: The first reason is the durability piece of it. So for exterior applications, anything that needs durability, we have to use chloride, so that's a large percent of our applications, are in that space.")).

87. PPG has used sulfate TiO2 only in specific interior low-end applications such as primers and ceiling paint. (Malichky, Tr. 298-99, 302; PX8000 (Malichky, Decl. at 003-04 ¶ 16)). Sulfate TiO2 can be used for these applications because these products have lower durability requirements and no color matching requirements. (Malichky, Tr. 302-03).

88. Sherwin-Williams uses "predominantly" chloride TiO2 in North America. Chloride TiO2 accounts for a percentage in the [redacted] of Sherwin-Williams' use. (Young, Tr. 643, 657, *in camera*). [redacted]. (PX8003 (Young, Decl. at 003 ¶¶ 12-13), *in camera*; Young, Tr. 642-43, 715).

89. [redacted]. Sulfate TiO2 is unsuitable for most of Sherwin-Williams' applications in North America because it does not result in consistent brightness of color or consistent whites, and Sherwin-Williams has been "unwilling to compromise the quality of [its] goods" by using sulfate TiO2. In other regions of the world, where quality standards are different than in North America, Sherwin-Williams has found sulfate TiO2 suitable for use in its products. (Young, Tr. 642-43, 715, *in camera*; PX8003 (Young, Decl. at 003 ¶ 12), *in camera*).

90. Of Masco's purchases of TiO2, [redacted] are sulfate TiO2 and [redacted] are chloride TiO2. The proportion of sulfate TiO2 purchased by Masco has [redacted] over time. (Pschaidt, Tr. 985, *in camera*).

91. Masco uses sulfate TiO2 only for certain primer product lines, including the Kilz brand primer, and lower end contract paints. (Pschaidt, Tr. 966, 968, 983-84, 1043-44). Masco has tested sulfate TiO2 "over and over [and] found that [sulfate TiO2 grades] are not suitable for [its] main product lines." (Pschaidt, Tr. 978).

92. Ampacet Corporation ("Ampacet"), a multinational plastics manufacturer, purchases only chloride TiO2 for North America, but purchases sulfate TiO2 for other geographic regions. (PX7040 (Santoro, Dep. at 85)).

93. Deceuninck North America, a vinyl manufacturer, has never purchased sulfate TiO2. Deceuninck North America believes chloride TiO2 is a much purer grade that is superior to sulfate in quality. (Arrowood, Tr. 1065-66). "[T]he only way that Deceuninck [North America] would even consider sulfate TiO2 would be if chloride TiO2 was unavailable." (Arrowood, Tr. 1093).

94. In Kronos' experience, "the North American market commands CP [chloride process TiO2] products." (Christian, Tr. 813-14). North American customers have the lowest tolerance for sulfate TiO2 of any region in the world. (Christian, Tr. 778-79, 781-82; PX8002 (Christian, Decl. at 002 ¶ 6)).

95. The "overwhelming preference" for Kronos' North American coatings and plastics customers is for chloride TiO2. (Christian, Tr. 778-79, 897 (explaining that the word

"preference" of Kronos' customers connotes "a larger threshold of requirement to make the products that they're in business to make. A lot of these customers require [chloride TiO2] grades to hit the quality level that they need for their products, so while technically feasible that you could put a sulfate grade into those applications, it would significantly reduce the quality of their products, and that's not acceptable for their business plan")).

96. Coatings companies' "ability to substitute sulfate for chloride . . . is limited by their need to maintain the quality levels of their own products." (PX9119 at 009 (2012 Tronox investor conference call transcript) ("I don't see as much of a shift or a material shift from chloride-processed pigment to sulfate-processed pigment because the major customers of the pigment, whether it is chloride or sulfate, are coatings companies who have requirements in their own products that the use of sulfate versus chloride will affect their . . . end product.")).

c. Reformulation of products to switch from chloride TiO2 to sulfate TiO2

97. To switch from chloride TiO2 to sulfate TiO2, manufacturers would need to reformulate their products. (Mouland, Tr. 1225; Christian, Tr. 777; Malichky, Tr. 301).

98. North American customers cannot readily switch their formulation of products from chloride TiO2 to sulfate TiO2 due to high costs and testing time. (Christian, Tr. 777-78 ("Q.: . . . [I]n your experience, what would a customer need to do to reformulate a product from using chloride to sulfate? A: I don't have a lot of examples of that happening. That would be pretty rare, but it would entail a significant amount of work, a lot of trials, a complete reformulation of their product and grade . . . ."); PX8002 (Christian, Decl. at 004-05 ¶ 20) ("Even if a customer could change its formulations, that customer would face additional strategic challenges with its customers if the resulting product fundamentally changed.")).

99. Before reformulating its products, Masco undertakes very extensive research. With respect to TiO2, Masco tests how it incorporates into its paint, what the titanium dioxide [redacted]. Masco also tests the [redacted]. (Pschaidt, Tr. 989-90, *in camera*).

100. For its Kilz' low-end primer paints, Masco [redacted]. (Christian, Tr. 941-42).

101. For coatings manufacturers, qualifying a new grade of TiO2 is a multi-step process that includes tests on outdoor weathering and subjective feedback from customers and can

take as long as three years. (Young, Tr. 652-54; PX8003 (Young, Decl. at 004 ¶ 17) ("It takes a minimum of one year to qualify a TiO2 grade for use in one of our core architectural or industrial coatings products, and it may take as long as three years."); PX8006 (Pschaidt, Decl. at 002 ¶ 11) ("This [qualification] process can take up to [redacted] for interior formulations and [redacted] for exterior formulations."). Outdoor testing is conducted in various climate zones in North America and multiple seasonal cycles. (Pschaidt, Tr. 990, *in camera*).

102. For industrial coatings, qualification has additional steps. Depending on the application, "some industrial coatings require customer or regulatory approval." (PX8003 (Young, Decl. at 004 ¶ 19)). In addition, the time needed for performance testing varies based on the industrial coating application. (PX8003 (Young, Decl. at 004 ¶ 19) ("Some industrial coatings, for instance, need to be tested in salt water for two years.")).

103. For Deceuninck North America, switching to a sulfate TiO2 grade, "would require extensive testing"; "a lot of time, a lot of money, a lot of effort"; and could take two years or longer. (Arrowood, Tr. 1088). Compared to qualifying a chloride TiO2 grade (which takes three to six months), it could take four times longer to qualify a sulfate TiO2 grade. (Arrowood, Tr. 1067, 1088).

d. Price of chloride TiO2 compared to sulfate TiO2

104. Sherwin-Williams found that from 2012 to 2017, the cost of chloride TiO2 was higher relative to the cost of sulfate TiO2; there was a wide range of the difference; and, the largest price difference was when sulfate TiO2 was 40% less expensive than chloride TiO2. (Young, Tr. 647-48).

105. Cristal sets two separate price floors for chloride TiO2 versus sulfate TiO2. (PX2366 at 003 (Cristal spreadsheet for Q4 2017) (showing different pricing floors for sulfate TiO2 and chloride TiO2 in North America); PX2369 at 004 (Cristal spreadsheet for Q1 2018) (showing different pricing floors for sulfate TiO2 and chloride TiO2 in North America); PX7043 (Gigou, Dep. at 23) (explaining that Cristal has separate price floors for chloride TiO2 versus sulfate TiO2, because "[c]hloride brings a higher value to the market than sulfate.")).

106. North American customers purchase chloride TiO2 instead of sulfate TiO2 regardless of the difference in price between them. (PX9012 at 008 (Q4 2013 Tronox Earnings Call) (Mr. Casey, then-chairman and CEO stating: "In various markets, the customers have responded to what happened on pricing a year ago in different ways. For example in the North American market, it was 95% or 98%, or some very, very high number chloride[.] [I]t remains, essentially the same number market share for chloride. That was true when prices were over $4,000 a ton,[26] it is true now [when chloride prices are lower].");

26 The word "ton" is a British and American measure. *Common Mistakes in Business English*, https://blog.harwardcommunications.com/2012/01/23/the-difference-between-ton-and-tonne/. In the United States and Canada, a ton is equal to 2,000 pounds. Documents and testimony in this case also refer to the metric measure,

PX1399 at 004-05 (Sept. 2013 "Fireside Chat" Q&A with Tronox CEO) ("Q. When TiO2 prices were going up last year some of your customers were pretty vocal about substituting to other less expensive products, how much of this do you think occurred and how much is ongoing? [Tronox CEO A.:] You're right, there was significant commentary last year about substantial amounts of substitution. There has been some but limited effect from substitution. Some customers substituted 3 to 5% of sulfate-based pigment in an otherwise 100% chloride pigment gallon of paint. This was done primarily in industrial paint markets and in certain regions of the world. Very limited if any substitution was done by architectural coatings companies or here in North America.")).

107. If the price of chloride TiO2 went up significantly compared to sulfate TiO2, True Value would not switch to use more sulfate TiO2. (Vanderpool, Tr. 197 ("[W]e can't – in my opinion, these are apples and oranges. We can't just substitute because the price went up. This is – we are a quality house [paint]. Again, we can't – we can't betray the consumer, and the consumers come to know these EasyCare products as high quality, and that's what they're getting.")).

108. Even when sulfate TiO2 was 40% cheaper than chloride TiO2, Sherwin-Williams did not switch its North American products from chloride TiO2 to sulfate TiO2 "because [of] the performance gap between the two materials." (Young, Tr. 669-70).

109. When the price of chloride TiO2 was increased by at least 10% compared to the price of sulfate TiO2, Masco was not willing to switch to sulfate TiO2 in its main product lines because Masco does not want to sacrifice the quality of its products. (Pschaidt, Tr. 979-80, *in camera* ("[I]f we cannot achieve that ultra pure white, crisp look, and being able to have thousands of colors tinted to the colors that our consumers want and ask for, we will not sacrifice that. So, therefore, we cannot switch away from the chloride-produced TiO2 for our [redacted] product lines.")).

110. In 2011, when the price that Deceuninck North America paid for chloride TiO2 was very high, Deceuninck North America did not consider switching to sulfate TiO2. (Arrowood, Tr. 1088, 1093 ("Just – on the sulfate TiO2, just to be, you know, very candid, the only way that Deceuninck would even consider sulfate TiO2 would be if chloride TiO2 was unavailable.")).

111. Based on data from customers and producers analyzed by Complaint Counsel's economic expert witness, Dr. Nicholas Hill, chloride TiO2 was, on average, 21% more expensive

---

"tonne," also known as "metric ton," which is equal to 1,000 kilograms (2,205 lbs). *Id.*; https://.www.rapidtables.com/convert/weight/kg-to-pound.html. The term "metric ton" may also be abbreviated as "MT". https://englishplus.com/grammar/00000058.htm. In some instances, such as where a witness is being quoted, the Initial Decision cannot determine from the transcript of testimony whether or not the transcribed word "ton" was intended by the witness to refer to a metric ton.

than sulfate TiO2 for North American customers between 2012 and mid-2017. (Hill, Tr. 1683-85; PX5000 (Hill Expert Report at 046-47 ¶ 100 & Fig. 17)).[27]

112. The price difference between chloride TiO2 and sulfate TiO2 varied significantly over the 2012 to mid-2017 time period, from a high of over $800 per metric ton to a low of just above $100 per metric ton, but there is very little change in the proportion of chloride TiO2 purchased. (Hill, Tr. 1683-85; PX5000 (Hill Expert Report at 047-48 ¶ 102 & Fig. 18)).

113. Regardless of the price difference between chloride TiO2 and sulfate TiO2 in North America, the proportion of sales between chloride TiO2 and sulfate TiO2 holds steady. (Hill, Tr. 1683-85; PX5000 (Hill Expert Report at 046-48 ¶¶ 100-02 & Figs. 17-18)).

114. The lack of correlation between the price of chloride TiO2 and sulfate TiO2 and the proportion of sales of chloride TiO2 is not what would be expected if North American customers were willing and able to substitute sulfate TiO2 for chloride TiO2 in response to a change in their relative prices. (Hill, Tr. 1683-85; PX5000 (Hill Expert Report at 046 ¶100)).

2. Relevant geographic market

115. In 2016, 97% of chloride TiO2 sold in North America was manufactured in North America and 3% was imported from abroad. (Hill, Tr. 1725-26; PX5000 (Hill Expert Report at 032 ¶ 78)).

a. Regional pricing

116. Respondents charge different prices to customers depending on the region in which the customer is located ("regional pricing"). F. 117-129.

117. In a March 2017 internal Tronox email, responding to questions raised by a customer, [redacted], about pricing in the United States compared to pricing in Japan, vice president of sales for the Americas, Mr. Mouland, wrote: "[He] will need to know that regional pricing is regional pricing. If they expect [redacted] in the US then it will be bye-bye [redacted]!"**}**. (PX1682 at 001, *in camera* (Mouland email to Larson)).

118. In a November 2016 TiO2 review, Tronox analyzed the TiO2 markets by region, including with charts evaluating "[r]egional TiO2 pricing" performance by region. (PX1006 at 010 (Tronox's November 2016 TiO2 Review)).

---

27 Dr. Hill derived the unit-weighted average price of sulfate TiO2 and chloride TiO2 using producer invoice data for North America sales, the price from the International Trade Commission, and the price from the United Nations Comtrade data for imports into Canada. (PX5000 (Hill Expert Report at 046 n.202)). Although Dr. Hill's data set was missing data from Kronos from 2012 and 2013 and Chemours from 2017, the missing data does not affect these results because the relationship between the proportion of sales that are chloride TiO2 and sulfate TiO2 is consistent over time. (Hill, Tr. 1949-51, 2058).

119. In a July 23, 2016 email to Sherwin-Williams, Mr. Mouland wrote: "As always, regional pricing varies over time and magnitude. Pricing in the four regions; U.S. [United States], LATAM [Latin America], EMEA [Europe, Middle East and Africa] and APAC [Asia Pacific] are not comparable. . . . There is no global price." (RX0281; Mouland Tr. 1176-78).

120. The prices Tronox offers for its TiO2 in one region of the world are not connected to Tronox's prices in other regions. (Mouland, Tr. 1281; PX1739 at 001 (Tronox March 2016 email) ("What happens in the US is not connected to [Latin America], totally separate markets.")).

121. In a 2015 earnings call, Tronox reported that TiO2 prices in North America were higher than TiO2 prices in the European, Asian and Latin American markets. (PX9008 at 008 (Tronox Q4 2014 Earnings Call) (Tronox then-CEO stating: "[A]re there different prices in the regional markets in which we do business? The answer to that question is yes.")).

122. Tronox does not offer a "one size" price to all regions. "Regional pricing . . . will vary." (PX1345 at 004 (August 2015 Mouland email to Duvekot)).

123. Tronox has informed customers that it does not have a global single-price arrangement with any of its customers, and that pricing is regional because it is based on the prevailing market price in individual countries. (PX1449 at 001 (February 2012 Tronox email)).

124. In a September 2011 internal Tronox email, Mr. Mouland wrote: "Once again PPG need[s] to stop being concerned about regional price differences and accept that regions are different just like it is for their sales unless he is telling you that PPG sell[s] a can of paint in Mexico for the same price as in Germany?!" (PX1085 at 001 (Mouland email to Duvekot)).

125. Tronox does not have a single global price for its customers. Tronox's pricing for customers is based on the prevailing market price in individual countries. (Duvekot, Tr. 1298-99; PX1454 at 001 (Duvekot email to Mouland); PX1451 at 001 (internal Tronox email) ("There is no global price to multinationals, we have regional pricing as you know with all of our customers. Therefore there is no reason for the Latin-American prices to influence the Asian prices.").

126. For Tronox's multinational customers that buy TiO2 for delivery in multiple countries, individual regions are priced separately. (Romano, Tr. 2151-52 ("Customers in different regions, global customers, may pay different prices in different parts of the world."); PX7001 (Romano, IHT at 145-46) ("[I]f we're selling to a company like PPG who buys from us in multiple regions of the world, all the dynamics may be a bit different, and the pricing isn't the same in every region."); Mouland, Tr. 1172-73 (Sherwin-Williams and PPG do business in multiple regions, but pay different prices in different regions of the world for TiO2 from Tronox; each region is different; and there can be significant gaps in the price of TiO2 between different regions).

127. Cristal sets regional price floors and price targets for TiO2. (PX7043 (Gigou, Dep. at 14-15); PX7037 (Pickett, Dep. at 46) PX7000 (Snider, IHT at 24, 30-31)).

128. Cristal charges different prices for TiO2 in different regions. (PX2025 at 008 (Cristal presentation breaking down sales by North America, Asia Pacific, Europe, Latin America, and MEAI [Middle East, Africa, and the Indian subcontinents]; PX2366 at 003 and PX2367 at 004 (Cristal spreadsheets) (showing different pricing floors for different geographic regions)).

129. For Cristal, "region" is the main driver of price variance for TiO2. (PX2116 at 013, 134 (Cristal August 2016 email with marketing and sales presentation attached); PX2356 at 009 (September 28, 2017 pricing discussion) (listing "geographical mix" as one of the reasons why prices differ between Cristal and a competitor; stating, "Cristal sells relatively more to lower-priced markets (e.g., MEAf [sic], Latin America, Asia-Pacific)").

130. Sherwin-Williams has manufacturing facilities in North and South America, Europe and Asia, but maintains regional contracts with its TiO2 suppliers. These contracts provide for regional pricing, since supply and demand conditions may create different regional pricing environments. (PX8003 (Young, Decl. at 006 ¶ 28); Young, Tr. 672-73 (prices "are higher and lower in various regions, depending on supply-demand dynamics . . ."). Sherwin-Williams has found that "[t]here's really not a universal global market" for TiO2 because prices are "openly negotiated in each of the regions" because of "different market dynamics" and "different availability." (Young, Tr. 671-72).

131. PPG does not pay one global price for TiO2 from its suppliers but instead pays different prices for the different regions. (Malichky, Tr. 311-12).

132. AkzoNobel, a manufacturer of paints and performance coatings, uses TiO2 in multiple regions and pays regional prices when obtaining TiO2 from its suppliers. (PX7033 (Post, Dep. at 153-54) (TiO2 "markets are regional and considered regional by the industry")).

133. [redacted] is negotiating an annual contract with [redacted] that covers its chloride TiO2 purchases throughout the world, wherein the price terms vary by geographic regions. [redacted], *in camera*).

b. The North America region

134. The North America region is made up of the United States and Canada. The North America region does not include Mexico because market participants group Mexico in their Latin American markets (F. 135-140); and because of differences in pricing and other demand characteristics between Mexico and the United States and Canada. (F. 141-144).

135. Tronox's LATAM 2015-2017 Strategy document defines "Latin America (LATAM) [as] Central & South America, Mexico, Caribbean" noting Mexico's "[p]ricing [as] consistent

with Latin American pricing and not that of the USA." (PX1327 at 005, 025 (Tronox LATAM 2015-2017 Strategy)).

136. Cristal's North America sales region includes the United States and Canada. Cristal's Latin American sales region includes Mexico. (PX7043 (Gigou, Dep. at 14-17); PX7000 (Snider, IHT at 24) (Cristal sets prices by region and the North America region is the United States and Canada); PX7037 (Pickett, Dep. at 65) (the sales manager for North America is responsible for sales in the United States and Canada; the sales manager for Latin America is responsible for sales in Mexico)).

137. Kronos organizes markets by geographic area and defines its North America market as Canada and the United States, and defines its Latin America market as Mexico, the Caribbean, South America, and Central America. (Christian, Tr. 778). Kronos sets different price levels by region to reflect competitive conditions in each region. (PX8002 (Christian, Decl. at 004 ¶ 15)).

138. Chemours and Venator view the North America market as United States and Canada. (PX8004 (O'Sullivan, Decl. at 002 ¶ 7) (Chemours organizes its chloride TiO2 businesses into different regions based on customer locations: "North America (United States and Canada); Europe, the Middle East, and Africa; Asia-Pacific, excluding China; China; and Latin America (including Mexico)."); PX8005 (Maiter, Decl. at 002 ¶ 8) (describing Venator's North American customers as United States and Canada)).

139. TZ Minerals International ("TZMI"), a consulting company, prepared a report for Tronox titled, "TiO2 Pigment Supply/Demand Q1 2016." In analyzing demand for TiO2, this TZMI report excluded Mexico from the North America market and included Mexico in the Central and South America market. (PX9077 at 034-35 (TZMI Presentation: TiO2 Pigment Supply/Demand Q1 2016)).

140. Sherwin-Williams and PPG consider the North America market for TiO2 to refer to the United States and Canada. (Young, Tr. 632-33; Malichky, Tr. 311-12, 388).

141. Tronox charges different prices to TiO2 customers in Mexico compared to the United States. (PX1319 (October 26, 2015 internal Tronox email ("We pointed out [to the customer] that different regions have different prices and that Mexico had gravitated to LATAM price as opposed to U.S. price[,] which it generally used to track."); Mouland, Tr. 1181-83).

142. Tronox's prices in Mexico are generally lower than in the United States. While prices ebb and flow, Tronox's prices in Mexico usually fall between the prices in United States and Latin America. Tronox does not sell very much TiO2 in Mexico in part because the pricing in Mexico is low. (PX7002 (Mouland, IHT at 155)).

143. Based on producer invoice data for Cristal analyzed by Dr. Hill, Cristal's prices for North-American produced chloride TiO2 are similar when sold in the United States and

Canada, but different when sold in Mexico. (PX5000 (Hill Expert Report at 025 ¶ 58 & Fig. 8)).

144. PPG pays a different price for TiO2 purchased for use in the United States and Canada than it does for TiO2 purchased for use in Mexico. (Malichky, Tr. 311-12). "[E]ven though TiO2 is produced in the U.S. and shipped to Mexico, the suppliers sell it at two different prices, one price in the U.S. and one price in Mexico." (Malichky, Tr. 610; PX1301 at 001-02 (November 14, 2014 Mouland email to Duvekot and Romano) (stating that Mr. Mouland "[r]eiterated [to PPG] that price should not spill over into US. [Pricing information provided was for] Mexico only, separate market.")).

c. Price difference between North America and other regions

145. Mr. Romano of Tronox acknowledged that in 2015 and December 2014 its prices for chloride TiO2 were higher in North America than in other regions and that in December 2013 there was a "significant price disparity" between North America and the rest of the world, with North American prices for chloride TiO2 being higher than prices in the rest of the world. (Romano, Tr. 2177-81; PX1620 at 025; PX1111 at 002; PX1349 at 009 (Tronox presentation) (noting that "[t]he significant price disparity between North America and the rest of the world continues to be the focus of most of the price discussions with the large multinational accounts")).

146. In a 2016 earnings call, Tronox reported that TiO2 prices in Europe and Asia were lower than prices in North America. (PX9001 at 007 (Tronox Q3 2016 earnings call)).

147. Based on a Tronox summary of its TiO2 revenue, as of June 2016, the net sales price in North America was [redacted] per metric ton higher than those in the other regions for Q2 2016. (PX1008 at 011, *in camera* (Tronox TiO2 Variance Analysis)).

148. In a 2015 earnings call, Tronox reported that TiO2 prices in North America were higher than the TiO2 prices in the European, Asian and Latin American markets. (PX9008 at 008 (Tronox Q4 2014 earnings call)).

149. A March 2015 Cristal analysis of TiO2 prices and revenues for the year March 2014 to March 2015 reported that North American TiO2 prices were [redacted] higher than in other regions. (PX2050 at 005, *in camera* (Cristal email with report attached)).

150. Based on invoice data from Tronox and Cristal analyzed by Dr. Hill, the prices for chloride TiO2 charged by North American plants owned by Tronox and Cristal were at least 10% higher and often more ($250 to $525 per metric ton) than the prices Tronox and Cristal charged customers in the rest of the world from 2012 to 2017. (Hill, Tr. 1722-24; PX5000 (Hill Expert Report at 063-64 ¶ 144 & Fig. 24)).

151. Based on the analysis conducted by Respondents' economic expert witness, Dr. Ramsey Shehadeh, the prices Tronox charged its North American customers for chloride TiO2

were at least 10% higher than the prices Tronox charged in the next highest region between the first quarter of 2012 and the first quarter of 2016, with the exception of the third quarter of 2012. Cristal's North American TiO2 customers paid the highest average prices from the second quarter of 2012 through the first quarter of 2017. (Shehadeh, Tr. 3627-33; RX0170 (Shehadeh Expert Report at 108-09 Figs. 53 & 54)).

d. Delivery of chloride TiO2 to customers' locations, with delivered pricing

152. Delivered pricing means that the price the TiO2 supplier charges to its customers includes the cost of shipping the product to the customer. (Duvekot, Tr. 1306-07).

153. North American customers obtain nearly all their chloride TiO2 through deliveries by suppliers to their locations in North America, with delivered pricing. F. 154-159.

154. For Tronox's North American customers, the cost of shipping is covered in the price paid to Tronox when obtaining TiO2 from Tronox's North American plants. (Duvekot, Tr. 1307).

155. Nearly all of the TiO2 that Venator sells to its customers in North America is delivered to its customers' locations and sold on a delivered pricing basis. (PX7015 (Maiter, Dep. at 176)).

156. Masco's TiO2 suppliers deliver chloride TiO2 to Masco's facilities and the price that Masco pays for chloride TiO2 includes the cost of delivery. (Pschaidt, Tr. 980).

157. PPG pays a delivered price for its chloride TiO2 purchases for North America and the chloride TiO2 is delivered to PPG's locations in railcars or tank wagon trucks. (Malichky, Tr. 304-05; PX7025 (Malichky, Dep. at 208-09)).

158. RPM, a multinational coatings manufacturer, buys chloride TiO2 from domestic manufacturers on a delivered basis. (PX7016 (DeCastro, Dep. at 87-88)).

159. Ampacet, a multinational plastics manufacturer, pays delivered pricing for TiO2 purchased from North American producers. (PX7040 (Santoro, Dep. at 12)).

160. If a customer wanted to buy TiO2 in one region and ship it to another region, the customer would have to pay for the shipping. (Duvekot, Tr. 1303).

e. Costs and logistical considerations of importing TiO2

161. If a customer wanted to buy TiO2 in one region where it is less expensive and ship it to a different region where it is more expensive ("arbitrage"), the price difference would have to cover shipping costs, external handling costs (costs to pay the freight forwarder), internal handling costs (internal to the customer to cover the costs of the logistics of

exporting the product from one region to another), warehousing costs, and import duties. (Duvekot, Tr. 1304-05).

162. Duties to import chloride TiO2 into North America vary, depending on the location from which it is shipped and when it is purchased, but have been around 5.5%. (PX0003 at 038 (Tronox Second Request Narrative Response to Specification 16) (5 to 6%); PX7050 (Mei, Dep. at 081-82, 112-13) (5.5%); PX8005 (Maiter, Decl. at 004 ¶ 20) (6%); PX8002 (Christian, Decl. at 003 ¶ 14) (6%)).

163. Costs to transport TiO2 pigment can add 5% to the cost of importing TiO2 to the United States. (PX0003 at 038 (Tronox September 2017 Narrative Responses). *See also* PX8005 (Maiter, Decl. at 004 ¶ 20), *in camera* (cost for Venator to import TiO2 to North America from Europe is approximately [redacted] per tonne" for total freight and duty costs); PX8002 (Christian, Decl. at 003 ¶ 14) (for Kronos to import non-specialty grades of TiO2 to the United States from Europe is "cost prohibitive due to the 6% import duty and the cost of transatlantic shipping."); Malichky, Tr. 318 (PPG estimated that freight costs to import from China to the U.S. would add about 10% to the cost of the TiO2 that it purchases)).

164. North American customers purchase chloride TiO2 from North American suppliers so that they do not have to incur long lead times of importing TiO2. (Vanderpool, Tr. 199-200; Arrowood, Tr. 1084 (Deceuninck North America has not purchased TiO2 from locations outside of North America because of the "problems that [one] can run into with transportation, with product taking an extremely long lead time to get to [Deceuninck North America's] factory and just all the difficulties that you can face with transportation . . ."). If a North American TiO2 customer ships TiO2 from China, it may take 12 weeks to arrive at the facility. (PX7033 (Post, Dep. at 162)).

165. Because of long lead times when importing TiO2, a North American TiO2 customer would have to stock its own warehouse at least 12 weeks in advance. A TiO2 customer's warehouses may not be big enough to stock these products ahead of time. (PX7033 (Post, Dep. at 162)).

166. If True Value chose to import TiO2 from outside of the United States, it would be less equipped to deal with a spike in demand since it could not get additional supply quickly. (Vanderpool, Tr. 199-200).

167. North American customers purchase chloride TiO2 from North American suppliers so that they can avoid the risk of potential shipping delays. When TiO2 arrives from overseas, it can get stuck in the port or the ship can get delayed, creating timing issues. (Malichky, Tr. 310-11). [redacted] Lomon Billions Group ("Lomon Billions"), a TiO2 manufacturer in China (F. 300), is "not a reliable supplier" because "[t]hey don't ship on time." [redacted].

168. The logistics involved in obtaining chloride TiO2 from a North American supplier, i.e., the "planning and timing" of the procurement, are much easier. (Arrowood, Tr. 1084;

Young, Tr. 670-71; [redacted] (stating that it is easier to source TiO2 from the U.S. TiO2 manufacturers on a delivered basis, so the TiO2 customer does not have to get involved with any of the logistics)).

169. TiO2 customers in North America that order TiO2 from Tronox's Hamilton plant will have reduced lead time and shipping time and a cost advantage over TiO2 ordered from Tronox's non-North American plants, based on differences in duty and shipping costs and warehousing. (PX7026 (Duvekot, Dep. at 84-85)).

170. TiO2 customers value a direct relationship with large suppliers, product consistency, and on-time delivery. (PX7002 (Mouland, IHT at 69, 102-03) ("[Customers] want to know they can rely on us for on-time delivery in full."); PX1000 at 005 (Tronox 2016 presentation) (recognizing that U.S. "customers are looking for . . . reliability to deliver")).

171. It is easier for Cristal's customers to be supplied by a production facility that is close to them because of the shorter lead times for delivery. (PX7043 (Gigou, Dep. at 83); *see also* PX7000 (Snider, IHT at 34-35) ("[A] lot of North American customers are under contract," are more concerned with security of supply, and want just-in-time vendor-managed inventory)).

172. Based on data analyzed by Dr. Hill, more than a third of the chloride TiO2 sold in North America is in slurry form. (PX5000 (Hill Expert Report at 017 ¶ 39); *see* F. 79).

173. Shipping slurry internationally would be cost prohibitive because of the weight of the water in the slurry. (Christian, Tr. 783-84 ("When [you are] shipping an aqueous slurry, [you are] paying to basically ship water across the region where you are shipping it. So the freight is much more expensive."); PX7016 (DeCastro, Dep. at 83-84)).

174. Shipping slurry across the ocean is impractical because it would settle in transit, meaning that the pigment separates out of the water, and the slurry could grow bacteria during transit that would contaminate the shipment. (Malichky, Tr. 305; *see also* PX7041 (Veazey, Dep. at 53-54) (Tronox cannot ship slurry across the ocean because "[t]he product in transit settles.")).

175. Switching from slurry to dry TiO2 would present difficult logistical challenges and costs for the coatings customers that currently receive the majority of their chloride TiO2 in slurry form. (Malichky, Tr. 305-06 (Switching to dry TiO2 would require building new infrastructure at PPG's plants and redesigning PPG's manufacturing process.); Young, Tr. 682-83 (Switching to dry TiO2 would require a significant capital investment and it is not economical for Sherwin-Williams to make its own slurry.)).

176. As Tronox acknowledges, "[a] large portion of the US market is satisfied by slurry shipment, which adds a logistical barrier to entry." (PX1322 at 003 (Tronox presentation)).

f. Arbitrage

177. When TiO2 prices in North America were higher than those in Europe, Deceuninck North America looked into possibly moving TiO2 from one of Deceuninck's European plants to Deceuninck North America's Monroe, Ohio plant, but decided not to do that because "the cost, transportation cost, is very expensive to get the titanium dioxide from Europe to the U.S., the economics didn't make sense for us to do that . . . ." (Arrowood, Tr. 1089-90).

178. [redacted].

179. [redacted].

180. In a September 2011 email, Mr. Duvekot acknowledged that PPG could not purchase TiO2 in one region then ship it to another region for the price difference between Europe and the United States at the time. (Duvekot, Tr. 1302-03; PX1085 at 001 (September 2011 Duvekot email to Mouland)).

181. Based on a quantitative analysis of invoice data produced by Tronox and Cristal, conducted by Complaint Counsel's economic expert witness, Dr. Hill, even when there were "significant price differences" between the price for chloride TiO2 in North America and the price for chloride TiO2 in the rest of the world, customers have not engaged in arbitrage to defeat higher prices in North America by buying TiO2 in a lower-priced region and transporting it to North America. (Hill, Tr. 1720-25; PX5000 (Hill Expert Report at 063-64 ¶ 144 & Fig. 24)).

3. Hypothetical monopolist test

182. The Horizontal Merger Guidelines provide a test, called the hypothetical monopolist test, for evaluating whether a product or group of products in a particular geographic area is a relevant market. In applying the test, the analysis focuses on whether it would be profit maximizing for a hypothetical monopolist of all sales of a specific product in a specific region to increase price by a small but significant non-transitory increase in price ("SSNIP"). If the hypothetical monopolist can successfully impose a SSNIP in the proposed market, the proposed market passes the hypothetical monopolist test and the

relevant market is defined correctly. Critical loss analysis is a standard tool economists use to implement the hypothetical monopolist test. (Hill, Tr. 1668-70; PX5000 (Hill Expert Report at 049-50 ¶¶ 104, 07; PX9085 at 011-14 (Horizontal Merger Guidelines §§ 4.1.1, 4.1.2)).

183. A critical loss analysis has two stages: (1) calculation of the critical loss, which means the percentage of sales a hypothetical monopolist would have to lose to keep its profit unchanged if it increased its price by a small amount, often 5 or 10 percent; and (2) calculation of the predicted loss, which means the percentage of sales that the hypothetical monopolist would likely lose given a particular price increase and keep its profit unchanged. If the predicted loss is smaller than the critical loss, then the price increase will increase the hypothetical monopolist's profit. (PX5000 (Hill Expert Report at 049 ¶¶ 104-06)).

184. To determine the critical loss, Dr. Hill divided the SSNIP to be tested by the sum of (1) the SSNIP of 10% and (2) the hypothetical monopolist's margin on lost chloride TiO2 sales of 55%[28] to calculate the critical loss percentage to be 15% (10 divided by 65). (Hill, Tr. 1668; PX5000 (Hill Expert Report at 050-51 ¶ 109 & Fig. 19)).

185. Dr. Hill conducted three separate critical loss analyses using three different estimates of the predicted loss to test whether chloride TiO2 sold to North American customers is a relevant antitrust market. (PX5000 (Hill Expert Report at 050-56 ¶¶ 108-22 & Figs. 20-22); Hill, Tr. 1690-92; F. 186-188).

186. In the first critical loss analysis, Dr. Hill used his estimate of the price elasticity of demand, which measures North American customers' willingness to switch from chloride TiO2 to sulfate TiO2, to determine whether enough North American customers would switch to an alternative product to defeat a SSNIP by the hypothetical monopolist. (PX5000 (Hill Expert Report at 051-52 ¶ 113)). Dr. Hill's estimate of the price elasticity of demand was -0.45, which means that a 10% increase in price is predicted to lower sales of chloride TiO2 in North American by 4.5%, which shows that the demand for chloride TiO2 by North American customers is inelastic. (PX5000 (Hill Expert Report at 051-52 ¶ 113)). As a result, switching to other products by North American customers would prove inadequate to defeat a SSNIP, which shows that the sale of chloride TiO2 to North American customers passes the hypothetical monopolist test. (PX5000 (Hill Expert Report at 052 ¶ 114); Hill, Tr. at 1692-96)). Because the predicted loss of 4.5% is well below the critical loss of 15%, the market passes the hypothetical monopolist test (F. 182). (PX5000 (Hill Expert Report at 052 ¶ 114 & Fig. 20)).

28 Dr. Hill calculated the hypothetical monopolist's margin using the average variable margin for all chloride plants currently operating in North America. (PX5000 (Hill Expert Report at 050 n.214)).

187. In his second critical loss analysis, Dr. Hill predicted substitution indirectly by using data from Tronox's White Paper[29] to ascertain whether increased imports or repatriated exports ("net imports") (which is a supply response, rather than demand substitution), combined with lost sales, would render a SSNIP unprofitable for the hypothetical monopolist. (PX5000 (Hill Expert Report at 052-54 ¶¶ 115-20)). Using this data, Dr. Hill calculated that in response to a 10% increase in the price of chloride TiO2, increased imports and decreased exports would displace 9% of chloride TiO2 sales in North America and that the loss of sales of chloride TiO2 to reduced purchases of TiO2 of any type would be 3.6%. Combining this loss with the net imports estimate yields a predicted loss of 13%. Because the predicted loss of 13% is lower than the critical loss of 15%, the market passes the hypothetical monopolist test (F. 182). (PX5000 (Hill Expert Report at 053-54 ¶¶ 117, 120 & Fig. 21)).

188. In his third critical loss analysis, Dr. Hill used a Tronox document that estimated that the share of Chinese sulfate in North America could increase from 10% to 15% of applications.[30] Assuming that a 10% SSNIP would reduce the share of chloride TiO2 by 5% and the purchases of TiO2 of any type by 3.6%, Dr. Hill calculated that the resulting loss of sales to the hypothetical monopolist would be 8.7%. Because the predicted loss of 8.7% is lower than the critical loss of 15%, the market passes the hypothetical monopolist test (F. 182). (PX5000 (Hill Expert Report at 055-56 ¶¶ 121-22 & Fig. 22); Hill, Tr. at 1696-97)).

189. Dr. Hill additionally implemented the hypothetical monopolist test based on the price elasticity of demand for chloride TiO2 in North America. (PX5000 (Hill Expert Report at 056-58 ¶¶ 123-29 & Fig. 23); Hill, Tr. at 1692-96)). Dr. Hill found that the price elasticity of demand for chloride TiO2 after a 5% SSNIP is still inelastic, and therefore chloride TiO2 in North America passes the hypothetical monopolist test (F. 182) based on the price elasticity of demand. (PX5000 (Hill Expert Report at 056-58 ¶¶ 123-29 & Fig. 23); Hill, Tr. at 1692-96).

190. The hypothetical monopolist test (F. 182), implemented in four different ways (F. 186-189), indicates that demand for chloride TiO2 is strong and that North American customers will not substitute to sulfate TiO2 in significant amounts in the face of a SSNIP. (Hill, Tr. at 1698; PX5000 (Hill Expert Report at 050-58 ¶¶ 108-29 & Figs. 20-23)).

---

29 On October 17, 2017, Tronox submitted a document to the FTC titled, "White Paper on Behalf of Tronox," which provided data on U.S. net imports and relative trade prices. (PX0016 at 047).

30 PX1000 at 007 (2016 Tronox presentation). Based on data analyzed by Dr. Hill, currently, 10% of all rutile TiO2 sales in North America are sulfate TiO2. (PX5000 (Hill Expert Report at 055 ¶ 121)).

C. Prima Facie Case

1. Market structure

191. All TiO2 produced in North America is chloride TiO2, with the exception of a small plant in Canada owned by Kronos that produces sulfate TiO2. (PX5000 (Hill Expert Report at 025-26 ¶ 59 & Fig. 9); Christian, Tr. 752).

192. There are five major producers in the North American chloride TiO2 market: Tronox, Cristal, Chemours, Kronos, and Venator. (Christian, Tr. 817-18; Vanderpool, Tr. 185; PX1230 at 019 (Tronox presentation) ("Concentrated supplier base for high-quality TiO2 (5 global players, few local champions.")).

193. Tronox, Cristal, Chemours, Kronos, and Venator account for over 99% of chloride TiO2 sales in North America and for 100% of North America chloride TiO2 production capacity.[31] (PX5000 (Hill Expert Report at 010, 025-26, 067-68 ¶¶ 13, 59, 152 & Figs. 9, 25)).

194. In 2016, the shares of the chloride TiO2 market of the five major producers were: Tronox [redacted], Cristal [redacted], Chemours [redacted], Kronos [redacted], and Venator [redacted]. (PX5000 (Hill Expert Report at 067-68 ¶ 152 & Fig. 25), *in camera*).

195. Chemours was spun off from E. I. du Pont de Nemours and Company ("DuPont") in 2015 and became its own publicly traded company. (PX7052 (O'Sullivan, Dep. at 13)).

196. Chemours is currently the largest TiO2 producer in North America and globally. (PX9020 at 011 (Chemical Economics Handbook); PX9040 at 008 (Tronox investor presentation)). Chemours has four TiO2 plants: DeLisle, Mississippi; New Johnsonville, Tennessee; Altamira, Mexico; and Kuan Yin, Taiwan. (PX8004 (O'Sullivan, Decl. at 001-02 ¶¶ 1, 6)). Chemours' TiO2 plants produce only chloride TiO2. (PX8004 (O'Sullivan, Decl. at 002 ¶ 3)).

197. Kronos has one TiO2 plant in Quebec, Canada and four plants in Europe. Kronos' Quebec facility consists of two plants, a chloride TiO2 plant and a small sulfate TiO2 plant. (Christian, Tr. 752). Kronos' sulfate plant in Quebec produces almost exclusively anatase TiO2 for food, pharmaceutical, and other niche applications. Kronos and Venator own a 50-50 joint venture that operates a chloride TiO2 plant in Lake Charles, Louisiana, with each company entitled to half of the facility's output. (PX8002 (Christian, Decl. at 002 ¶ 7); Christian, Tr. 751-53). Of Kronos' production of TiO2, 75% is chloride TiO2 and 25% is sulfate TiO2. (PX8002 (Christian, Decl. at 002 ¶¶ 7-8); Christian, Tr. 751-52, 781-82).

---

31 Dr. Hill calculated market shares based on producer invoice data, as further explained in Appendix D.1 to his report. (PX5000 (Hill Expert Report at 068, 144, Fig. 25 & Appendix D.1)).

198. Venator was spun off from Huntsman Corporation in 2017 and became its own publicly traded company. (PX8005 (Maiter, Decl. at 001 ¶ 1)).

199. Venator operates six TiO2 plants in Europe and one plant in Asia. (PX8005 (Maiter, Decl. at 001-02 ¶¶ 1, 9)). Venator and Kronos own a 50-50 joint venture that operates a chloride TiO2 plant in Lake Charles, Louisiana, with each company entitled to half of the facility's output. (PX8005 (Maiter, Decl. at 002 ¶ 10)). Other than the Louisiana facility, only one of Venator's plants makes chloride TiO2. (PX8005 (Maiter, Decl. at 002 ¶ 11)). Unlike the other four major North American producers, Venator does not have any TiO2 slurry capacity in North America. (PX7015 (Maiter, Dep. at 53-54, 60)).

200. Post-Acquisition, the combined Tronox/Cristal firm would have a market share of [redacted] of sales of chloride TiO2 in North America. (PX5000 (Hill Expert Report at 067-68 ¶ 152 & Fig. 25), *in camera*).

201. Post-Acquisition, the combined Tronox/Cristal firm and Chemours would have a market share of [redacted] of North American chloride TiO2 sales and over [redacted] of North American chloride TiO2 capacity. (PX5000 (Hill Expert Report at 067-68 ¶ 152 & Fig. 25), *in camera*; PX5000 (Hill Expert Report at 25-26 ¶ 59 & Fig. 9), *in camera*).

202. The federal antitrust agencies measure concentration using the Herfindahl-Hirschman Index ("HHI"). (PX9085 at 021-22 (Horizontal Merger Guidelines, § 5.3)). The HHI is calculated by totaling the squares of the market shares of each firm in the relevant market. (PX9085 at 021-22 (Horizontal Merger Guidelines, § 5.3)).

203. The proposed Acquisition would increase the HHI by over 700 points, to over 3000. (PX5000 (Hill Expert Report at 067-68 ¶¶ 152-53 & Fig. 25)).

2. Coordinated effects

a. Interdependence

204. The North American chloride TiO2 market is characterized by mutually recognized interdependence. F. 205-264.

205. Tronox's five-year TiO2 strategy plan update from August 2016 states that, in the pigment industry, suppliers must "recognize that using price to grow faster than the market generally leads to no permanent market share gains but enduring revenue and margin losses." (PX1004 at 015 (Tronox TiO2 Strategy and 5-Year Plan Update, August 2016)).

206. A November 2016 Tronox presentation stated that the "TiO2 market shows oligopoly pricing behavior (one supplier can drive price down, action of all suppliers needed to pull prices up."). (PX1030 at 013).

207. Tronox recognizes that competitor pricing decisions impact their own pricing and sales volumes. (PX7001 (Romano, IHT at 214) ("[I]t only takes one to make the price go down. The whole market has to go up. But any one competitor can make pricing go down."); PX7001 (Romano, IHT at 223) ("Any one competitor can drive price down . . . . I can make it go down, but I can't make it go up by myself."); Romano, Tr. 2156-57; PX7002 (Mouland, IHT at 77) ("[D]epending on how the customer plays it and has the negotiations with their other suppliers, if something changes from supplier or competitor activity, then it makes it difficult for me to get an increase."); PX7026 (Duvekot, Dep. at 52) (Tronox "take[s] note of the competitor's price announcements or price actions" when setting its pricing strategy.)).

208. Cristal recognizes that competitor pricing decisions impact their own pricing and sales volumes. (PX7043 (Gigou, Dep. at 31-33) (When considering whether to issue a price increase and for what amount, Cristal takes into account information from customers regarding other TiO2 suppliers.)).

209. In a 2016 board of directors presentation discussing Tronox's price increase implementation process, Mr. Romano, Tronox's chief commercial officer, explained that "[t]he success of any increase will largely depend on the market conditions and the industries['] ability to maintain a disciplined approach to the [price increase] implementation process." (PX1021 at 002 (Romano email to Turgeon); PX7001 (Romano, IHT at 143) ("It was a summary that I put together to review with our board on how we implemented price increases.")).

210. As part of Tronox's price increase implementation efforts, Tronox collects "competitive intelligence on [Tronox's] competitors' actions" to assess whether the other TiO2 producers are "maintain[ing] a disciplined approach." (PX1021 at 002 (Romano email to Turgeon)).

211. With respect to Tronox's implementing a price increase, "to the extent some other competitor is not doing what we're doing or they're doing less of a magnitude or giving more time, it has an impact on how we're going to be able to increase and the extent of what that increase would be." (PX7001 (Romano, IHT at 158-59)).

212. With respect to Tronox's implementing a price increase, "it all depends on what our competition is doing from the standpoint of being competitive. . . . [W]hen we're trying to implement a price increase and we've got other competitors that aren't raising the price, it has an impact on our ability to either lose volume or increase the price." (PX7001 (Romano, IHT at 138)).

213. In an email to Tronox's board members following a December 2015 price increase announcement by Tronox, Mr. Casey explained: "[T]he success of this initiative will be materially affected by how Huntsman [now Venator], Cristal and Kronos respond. Chemours announced an equivalent price increase yesterday . . . ." Mr. Nkosi, a Tronox board member, responded: "Great move Sir. Let's see whether they bite." (PX1047 at 001 (Casey email to Tronox board members)).

214. Earnings calls and industry conference remarks of Tronox's and Cristal's competitors refer to the need for "discipline" in their competitive behavior and in their responses to the behavior of others. (PX9075 at 004 (Huntsman [Venator] Q2 2016 Earnings Call) ("We continue to be disciplined with our sales volumes in an effort to maximize the effective capture of the announced TiO2 price increase."); PX9075 at 014 (Huntsman [Venator] Q2 2016 Earnings Call) ("I see greater pricing discipline taking place in TiO2."); PX9025 at 003 (Chemours at Goldman Sachs Basic Materials Conference Transcript) ("Now, reflecting on the dynamics of the past, we at Chemours conclude that our own response to market dynamics was a contributor to the volatility that we experienced in our business performance. And we've decided to take a more meaningful approach to the TiO2 market.")).

215. On December 18, 2015, the same day that Tronox announced a price increase (F. 222), the Tronox announcement was the subject of an internal Cristal email. A Cristal employee noted: "Tronox follows the trend. Tronox also[] announces global increase of US$150/tonne for all TiO2 grades, effective Jan. 1, 2016, or as contracts allow. Expectedly, other TiO2 manufacturer's [sic] may follow the trend. We would be keen to observe market acceptance of these price increase announcements in Q1 2016. It's an initiative to taste the market readiness to accept this announced price increase." Minutes later, a Cristal executive replied that Huntsman (Venator) and Chemours had also announced price increases. (PX2035 at 001-02).

216. A Tronox weekly regional sales report for the Americas from May 2016 reports: "We are prepping customers for a full increase [redacted] on July 1st given current market strength. Success will obviously depend on competitor behavior and the different announcement levels." (PX1163 at 001, *in camera* (Tronox Americas weekly report); PX7002 (Mouland, IHT at 74-75), *in camera*).

217. In an email to Cristal's chairman, Cristal's sales vice president at the time observed: "In current market conditions of excessive inventory we cannot raise price and gain market share at the same time unless all suppliers support the price movement. If we see other such public price announcement information for other suppliers in the coming days, we will then assess whether or not we want to also make a price announcement and if market dynamics can support such an initiative." (PX2087 at 002 (Stoll email to Al-Shair)).

218. In October 2016, regarding an announced price increase by Huntsman, Mr. Gigou, Cristal's sales vice president, wrote to other Cristal senior executives: "This is good news as it seems that the momentum is getting more support. It is our plan to announce also a price increase before year end," to which Mr. Gunther, Cristal's head of TiO2 business, responded: "Indeed, great news. How fast do we need to react?" (PX2007 at 001 (Gigou email to Gunther)).

219. North American chloride TiO2 producers over the years have increased TiO2 prices typically in close proximity to each other in time. (PX1204 (December 2016 Tronox Excel spreadsheets tracking competitors' price increases); Pschaidt, Tr. 975 ("Usually the TiO2 manufacturers announce price increases very close to each other, so it normally is

announced within a short period of time of each other."); Malichky, Tr. 328, 332 ("[I]f one announces a price increase of 150, you know, shortly after that another one will announce 140 or 170, and so they're not exactly matching up, but you can see that they're making the trend out there that, yeah, they're all announcing price increases or, you know, four out of five or three out of four are announcing similar increases at similar times."); PX8003 (Young, Decl. at 006 ¶ 29); PX8001 (Zamec, Decl. at 003 ¶ 17)).

220. In a 2017 email, Mr. Mouland, a Tronox sales vice president, requested approval for a [redacted] increase at some customers instead of the [redacted] increase that Tronox had announced, because competitors were agreeing to [redacted] increases. (PX1093 (Mouland email to Romano), *in camera*; PX1201, *in camera* (Mouland email to Romano) ("Based on multiple US data points, feedback indicates our competitors are gravitating towards an increase of [redacted]. I am requesting a floor of [redacted] for this reason."); Mouland, Tr. 1156-58, *in camera*; *see also* PX1212 at 003, *in camera* (January 2017 Price Approval Request regarding a plastics customer, [redacted]) ("Cristal reported they are taking the price up [redacted] to their customers based on Chemours doing the same.")).

221. When Chemours announced a price increase of [redacted] on December 17, 2015, Tronox learned about that increase when it came across the wire at around 4:45 that afternoon. Within about a half hour, Mr. Casey, formerly chairman and CEO of Tronox, reacted to the Chemours increase by directing "[redacted] price increase announcement of our own before 9:30 tomorrow." (PX1046 at 002, *in camera* (Casey email to Romano and Grebey)).

222. In a December 18, 2015 email to Tronox's board members, Mr. Casey wrote: "This morning, we announced a [redacted] this morning." Mr. Casey explained, "Given the importance of a continuing focus on cash generation in 2017, we are trying to see whether we can accelerate the recovery on TiO2 pricing, by testing whether it is ready for price increases or at least to stop declines." (PX1047 at 001, *in camera* (Casey email to Tronox board members)).

223. From Cristal's perspective, the December 2015 price increase announcements (F. 221-223) were "[n]ot based on supply/demand dynamics." (PX2055 at 022 (Cristal presentation)). The purpose according to Cristal's then-president was to "hopefully stop deterioration of price [and] increase purchasing." (PX2216 at 001 (Nahas email to VanValkenburgh)).

224. In Tronox's 2015 third quarter earnings call, Mr. Casey disclosed that Tronox had idled a portion of its TiO2 production, emphasizing the impact of this decision on pricing and that Tronox observed other TiO2 producers "acting in the same way." Mr. Casey stated: "[T]he question is, when will [the prices] turn? We're addressing that by managing our production so that inventories get reduced to normal or below normal levels. And when that happens, prices will rise. We – from what we see with Chemours and Huntsman and

presumably the others as well, they're doing the same thing. We see them acting in the same way." (PX9005 at 010 (Tronox Q3 2015 Earnings Call)).

225. In 2015, shortly after Mr. Casey had publically stated that Tronox had idled part of its Hamilton plant (F. 268), Chemours closed its Edge Moor plant in Delaware, and shut down a production line at its Johnsonville, Tennessee plant, removing 150,000 metric tons of capacity. (Christian, Tr. 875-76; PX2055 at 024 (Cristal presentation)).

226. In August 2015, when Tronox learned that Chemours closed its Edge Moor plant in Delaware, an internal email was circulated that characterized these developments as "Good news!!" Tronox's then-CEO Mr. Casey replied, "[i]t's good that [Chemours] can follow the leader!" (PX1325; *see* PX2055 at 024 (Cristal presentation) (noting that Chemours had closed its Edge Moor plant in Delaware and shut down a production line at its Johnsonville, Tennessee plant, removing 150,000 metric tons of capacity)).

227. In a September 2011 email, Cristal's Mr. Stoll noted that the "discipline of taking supply off-line and allowing inventories to fall as demand improve[s] lead[s] to pricing discipline and pricing power over the following quarters." (PX2083 at 001 (Stoll email to Najjar)).

228. Tronox and Cristal documents demonstrate mutually accommodating conduct by chloride TiO2 producers in order to support market discipline and avoid triggering adverse competitor responses. (F. 229-246).

229. Mr. Casey of Tronox stated in a 2014 earnings call: "As you saw, we have not gained market share by trying to reduce price. We don't think that's the appropriate strategy going forward . . . ." (PX9010 at 005 (Tronox Q2 2014 Earnings Call)).

230. In 2011, in response to an email from Mr. Casey regarding "softness" in current orders, Mr. Romano explained the soft demand at that time and further explained Tronox's efforts to balance sales volume and pricing in that environment: "We have also been working very hard to maximize our price increase implementation in Q4. When customers have inventory to work with during the negotiation process, this can create pressure on the volumes as customers hold back on order placement on the expectation that this could create an opportunity for a smaller increase. . . . [I]n most cases, not all, the customer will want an incentive to take on additional inventory. If the customer is not willing to take on additional inventory[,] the volume could be taken from a competitor and that may lead to a competitive response[,] which could facilitate price erosion. We have to be selective on where we try to pick up additional volume because we do not want to facilitate a downward movement on price." (PX1090 at 001 (Romano email to Casey)).

231. In a July 2012 email, Mr. Romano wrote to Mr. Casey and to Mr. Greenwell, then-CFO of Tronox: "The problem we face is that pricing is falling and if we take action to go after market share, price will deteriorate further and we do not want [to] facilitate or fuel that process. Everyone is defending their business and matching offers from the

competition to maintain their share as no one want[s] to loose [sic] business." (PX1015 at 001 (Romano email to Casey and Greenwell); Romano, Tr. 2161-63).

232. In the same email to Mr. Casey and Mr. Greenwell referenced in F. 231, Mr. Romano explained: "Using price to try to take market share in a soft market will create churn, destroy value and will take much longer for us to recover when the market does pickup. Price is the most significant lever we have and we need to do everything we can to prevent it from falling further." (PX1015 at 001 (Romano email to Casey and Greenwell); Romano, Tr. 2163-64).

233. In 2011, Mr. Wayne Hinman, a member of the Tronox board of directors advised Mr. Casey in an email: "[W]e will be better off in the long run, by trying to maintain pricing and where possible pass on higher raw material costs and give up sales volume in the short term, and take the short term margin/cost hit, rather than try and keep our plants loaded." (PX1075 at 001 (Hinman email to Casey)).

234. An October 2011 presentation by Cristal's Mr. Stoll to Cristal's Steering Body stated: "The *'Evil Sin'* would be to attempt to lower prices to take market share as markets weaken. *We Must Hold Price!*" (PX2242 at 017 (Cristal Steering Body Meeting Commercial Update) (italics in original); Stoll, Tr. 2086; PX7009 (Stoll, Dep. at 146-47)).

235. In December 2011, Mr. Stoll of Cristal sent an email to Mr. Nahas, Cristal's then-president, informing him that despite lower customer demand, prices had remained steady because "[a]ll of the large global TiO2 suppliers are still acting in a disciplined manner, respecting each other's market positions and share and holding on to price. No volume stalking of any great consequence is taking place yet, which is very good news." (PX6000 at 003 (Stoll email to Nahas)).

236. Mr. Stoll of Cristal explained the meaning of the email referenced in F. 235: "[E]ven though the market demand was slowing, we weren't out starting to be the initiator to drop price to get more share because we realized that hanging on to price had a lot more impact on our profitability than to try and gain more share. Once you lower price to get more share, you might gain a couple thousand tons of volume, but you can bring down the price on all of the other tons that you're selling all over the world and the financial consequence of that is extremely significant. It's more significant than trying to get a larger share position." (PX2247 (Stoll, Dep. at 154-56)).

237. In a July 2011 email, responding to a sales manager's request for a price to quote for a prospective customer [redacted], Mr. Mouland of Tronox referenced the pricing of DuPont (now Chemours (F. 195)), stating: "At this point, we certainly don't want to undercut DuPont & send the wrong message." (PX1291 at 001, *in camera* (Mouland email to Larson)).

238. In an August 2011 email, a Tronox sales manager reported to Mr. Mouland on his discussions at a paint company, [redacted]: "Personally, I would like to have a

small portion of their business but we certainly cannot undercut DuPont [Chemours] to get it." Mr. Mouland responded: "Just to close out on this officially. We are not interested in undercutting DuPont [Chemours] and bidding on business." (PX1292 at 001-02, *in camera* (email exchange between Mouland and Larson)).

239. In May 2011, Cristal had a potential business opportunity at [redacted], which had been a "100% Tronox account for over 10 years." A senior manager at Cristal wrote that he was "not sure [he] believe[s] this is a good time to take on new business at a 10 year 100% account like this. I believe that Tronox would find out about it . . . ." Another manager agreed: "[I]t would be very visible to Tronox and would send a conflicting signal to price ourselves aggressive[ly], there is little to gain and quite a bit to loose [sic]." Cristal decided to forgo the opportunity and told the potential customer that it was "very tight on supply." (PX2021 at 001-02, *in camera* (email exchange between Herrmann, Jaquet, and others)).

240. In a 2014 presentation regarding Tronox's sales and marketing strategy, when considering a strategy to increase sales in higher priced regions such as North America and Europe, Tronox identified "[c]ompetitive response" as a risk. (PX1016 at 062 (Tronox presentation)).

241. In November 2014, an internal Tronox email discussed an opportunity to secure new business at [redacted], a siding and window profile manufacturer, replacing then-incumbent supplier DuPont (now Chemours). Mr. Romano stated that the price offer being contemplated by Tronox was "very low" and cautioned that Tronox should not be "undercutting significantly." (PX1086 at 002-03, *in camera* (Romano email to Duvekot, Mouland, and Doherty)).

242. In May 2014, in an internal Tronox email regarding a sales and marketing presentation, Mr. Duvekot recommended the presentation include as an "action" item "[k]eep[ing] pigment price as high as possible for the time being – don't use discounts in high priced regions to attract additional sales, this will lead to market price destruction." (PX1360 at 001 (Duvekot email to Romano); PX7026 (Duvekot, Dep. at 111-12) ("[B]ack in those days, in those circumstances, in 2014, if we were to start using discounts in those high priced regions to attract additional sales, all it would do is lead to market price destruction."); *see also* PX1030 at 013 (Tronox presentation)).

243. In April 2015, responding to an email seeking approval to reduce price to secure business at a prospective customer, Tronox's Mr. Duvekot suggested a higher price offer and wrote: "Being aggressive leads to disaster unless we know where the competition is and know what aggressiveness means." (PX1453 at 001 (Duvekot email to Mouland); *see also* PX1429 at 001, *in camera* (Duvekot email to Bruno) ("It doesn't make sense to undercut the competition, [redacted] [a customer] will use it to put pressure on the others.")).

244. In a July 2015 email discussing pricing for a customer, [redacted], Mr. Duvekot stated: "Especially on a highly visible account like [redacted] any price move will be seen by the competitors, even more so if we use it to take a piece of the pie. That will cause a

reaction from the competition, at this account or elsewhere in the market, which will just lead to more price erosion in the market. Tronox does not want to play this game (anymore)." (PX1432 at 001, *in camera* (Duvekot email to Hofman); PX7026 (Duvekot, Dep. at 125-27), *in camera*).

245. In an August 2015 email approving a pricing request, Mr. Romano, Tronox's chief commercial officer, directed: "[B]e sure we are not undercutting the Chemour[s] price. There is some other activity going on over in North America with Valspar and I want to be sure we are not not [sic] seen as facilitating further price erosion." (PX1133 at 001 (Romano email to Bradley)).

246. In a March 2016 email, Tronox's Mr. Mouland wrote to two salespeople: "We will have to pass on this opportunity as I do not want to undercut a competitor. The price increase is taking hold and any attempt to get volume at the expense of price could undermine our progress." (PX1305 at 001 (Mouland email); PX7022 (Mouland, Dep. at 70-71)).

b. Product homogeneity

247. Tronox documents and testimony describe chloride TiO2 as a commodity product. (PX1004 at 015 (Tronox presentation) (TiO2 industry characterized by "commodity products"); PX0016 at 026 (Tronox White Paper); PX7014 (Quinn, Dep. at 38)).

248. Customers can switch between the chloride TiO2 produced by the five North American chloride TiO2 producers. (Young, Tr. 659-60; PX7030 (Arrowood, Dep. at 8-9); Vanderpool, Tr. 198; PX8000 (Malichky, Decl. at 002 ¶ 8)).

249. Customers believe that the sale of chloride TiO2 is a commodity business. (PX7033 (Post (AkzoNobel), Dep. at 79); *see also id.* at 97 (stating that "the behaviors of the industry [are] driven as a commodity"); Pschaidt, Tr. 1033; Arrowood, Tr. 1113-14).

250. Markets for homogenous products are more susceptible to coordination. One reason for this is that reactions by rivals to attempts to steal their business are likely to be strong, given that each firm's product is largely interchangeable with its rivals' products. (PX5000 (Hill Expert Report at 096 ¶ 220)).

c. Ability to learn competitors' actions

251. Tronox, Chemours, Kronos, and Venator are publicly traded companies. (Arndt, Tr. 1354-55; PX7035 (Christian Dep. at 15); PX7052 (O'Sullivan, Dep. at 13); PX8005 (Maiter, Decl. at 001 ¶ 1)).

252. Cristal is a privately held company. (PX7006 (Stoll, IHT at 121).

i. Public statements

253. Prior to the spinoffs of Chemours from DuPont in 2015 (F. 195) and Venator from Huntsman in 2017 (F. 198), disaggregated information on TiO2 was typically not available in the financial reports of DuPont and Huntsman. (PX7006 (Stoll, IHT at 119-21) ("[T]hey [DuPont] didn't break out in detail their titanium dioxide business. . . . [Y]ou could really gain no insight into their financial performance or other metrics in the way that they released earnings. After Chemours spun off . . . [t]hey became that business. They spun it off as TiO2. So in public information that's released, it's much more transparent the financials associated with TiO2 directly. . . . And as [for] Venator, same thing.")).

254. In 2015, Huntsman told investors during an investor conference that having more publically traded TiO2 companies will "[a]bsolutely" change the dynamics of the market. (PX9041 at 004 (Basic Materials Conference Transcript)).

255. In a June 2017 investor presentation, Venator explained that it anticipated a "[s]ignificant recovery in TiO2 prices" because, in part, there would be "[g]reater accountability for TiO2 stewardship by newly independent companies (Venator and Chemours)." (PX3000 at 004 (Venator presentation)).

256. In a 2017 Venator analyst day presentation, Venator referred to "Improved Fundamentals," including "[s]ignificant and ongoing consolidation. . . ." and "[g]reater industry transparency as companies become independently managed and accountable to shareholders." (PX3054 at 094 (Venator presentation)).

257. Tronox discusses its quarterly results in earnings calls. When discussing its quarterly results, Tronox discusses changes in sales volume, changes in the selling prices by region, margin information, and operation related information such as relative plant utilization rate and inventory levels. (Arndt, Tr. 1360-61).

258. Tronox's public statements to investors, including earnings calls, are made on behalf of Tronox as a whole. Tronox uses its best efforts to ensure that its statements to investors are accurate, complete, and not misleading. (Arndt, Tr. 1359).

259. Tronox and Cristal monitor and analyze public statements by competitors such as quarterly earnings updates, presentations at industry conferences, and ratings agency meetings. (PX7002 (Mouland, IHT at 33-34) (stating that market intelligence comes "primarily from the customers and then earnings calls" from competitors); PX1039 at 004 (Merturi email to Staton and Arndt) ("Moody's has put all rated TiO2 companies on review and at this stage Chemours and Huntsman have already discussed their price increase with them. Moody's has a perspective on price from our peers[.] It will look suspect at best if we continue to say we don't know yet."); PX1052 at 001-02 (McGuire email to Tronox sales executives circulating notes from a November 2016 Chemours earnings call, including Chemours' outlook of reduced inventories and stronger price environment); PX1053 at 001-03 (Arndt email to Tronox senior executives attaching an

August 2016 Chemours earnings call transcript, which projected continuing price increases through 2016 and discussed Chemours inventory situation); Romano, Tr. 2142-44; PX1054 at 001-04 (Engle email to Romano, Duvekot, Mouland describing "tidbits" from Huntsman transcript relating to inventories and utilization); PX2051 at 001 (Stoll email to Nahas stating: "It is interesting being here at the TZMI Conference this week in Hong Kong. There is much concern by all of the TiO2 producers about the price collapse and how much lower pricing will go.")).

260. Tronox's Mr. Engle, vice president of marketing, listens to competitors' earnings calls to learn about their production plans and other announcements and obtain competitive intelligence. (Engle, Tr. 2540-41; Engle, Tr. 2482 ("So the biggest source [of competitive intelligence] would be trade data and public filings or public announcements, investor presentations, things like that.")).

261. In a 2016 earnings call regarding Chemours' fourth quarter 2015, Chemours CEO, Mark Vergnano, stated that the industry was "at a place that we really need to drive this price increase" and that "what our driver is right now [is] to be able to get behind this price increase and move it through the industry." (PX9048 at 008).

262. In a 2016 earnings call regarding Chemours' second quarter 2016, Mr. Vergnano of Chemours stated his prediction that for "the rest of the year, you will see a cadence up in our price as you look at third quarter . . . . [S]o we feel good about where we are on the price side, and I think you will see continued movement because of the execution of these price increases for the rest of the year." (PX9056 at 009).

263. At a basic materials conference sponsored by Goldman Sachs, Huntsman's (now Venator) executive vice president stated: "Well, there's the April 1 effective price increase. It was roughly $235 a ton, nominated. And we have communicated and signaled that we would expect the realization on that price would be on the upper end of what we've been realizing over the last 3 or 4 quarters. That is closer to 2/3, 70% realization." (PX9060 at 003 (Huntsman Corp. at Goldman Sachs Basic Materials Conference Transcript)).

264. Mr. Arndt, Tronox's head of investor relations, pointed out in a written summary circulated to Tronox executives regarding Huntsman's second quarter 2016 earnings call that Huntsman stated it "continue[s] to be disciplined with [its] sales volumes in an effort to maximize the effective capture of the announced TiO2 price increase." (PX1055 at 001).

265. Cristal monitors and analyzes public statements by competing firms, such as quarterly earnings updates, and regularly prepares detailed analyses. (PX2059 at 002-10 (Cristal competitor earnings call analysis, November 2016); PX2060 at 002-13 (Cristal competitor earnings call analysis, August 2016); PX2061 at 001-16 (Cristal competitor earnings call analysis, March 2017); PX2062 at 001-15 (Cristal competitor earnings call analysis, May 2017); PX2278 at 004-14 (Cristal competitor profitability analysis, March 2013)).

266. Cristal monitors TiO2 competitors' public calls and circulates summaries among executives. (PX2049 at 001-04 (Cristal email providing "takeaways" from Tronox's and Chemours' conference calls, including information on production curtailments, capacity utilization, and planned price increases); PX2268 at 001 (Cristal email attaching Tronox's and Chemours' 2016 earnings calls presentations and setting forth "Key Messages" relating to projected pricing, low inventories, and motivation for price increases during 2017); PX2269 at 001 (Cristal email relating to competitor earnings reports describing, among other things, lower capacity utilization rates); PX2361 at 002-04 (Cristal email summarizing key comments from competitors' earnings calls on price increase announcements and implementation, inventory levels, plant utilization rates, and expectations for future pricing)).

267. Tronox's public disclosures include production-related information, such as information pertaining to plant utilization and inventories. (Arndt, Tr. 1361, 1369-70).

268. Tronox publicly announced its decision to reduce production at two of its TiO2 pigment plants, Hamilton and Kwinana, in a second quarter 2015 earnings call. (PX9006 at 003 (Tronox Q2 2015 earnings call) ("Production has been suspended at one of our six processing lines in Hamilton and one of our four processing lines at Kwinana . . . . Together, these processing line curtailments represent approximately 15% of total pigment production.")).

269. In its first quarter 2016 earnings call, Mr. Casey of Tronox was asked whether, "given that volume has picked up quite a bit and prices are moving up," Tronox planned to bring curtailed plants back to production. He answered: "We believe that a very disciplined approach to production, to managing supply relative to demand, is what has facilitated the recovery in our markets, and we intend to continue to be disciplined about that. So, we don't intend to bring back the full production instantaneously simply because we see the very first signs of price recovery." (PX9003 at 010 (Tronox Q1 2016 earnings call)).

ii. Customer-provided information

270. Tronox obtains intelligence regarding competitor actions from its customers. (PX7002 (Mouland, IHT at 13-14) ("[M]arket intelligence comes from [Tronox's] customer base, . . . the customers that [Tronox] ha[s], and then the prospective accounts that we're always looking at."); PX7002 (Mouland, IHT at 84) ("[A]ll of it pretty much comes from the customer."); PX7022 (Mouland, Dep. at 58) ("[I]t's my job to know what's going on out there, so what I expect from my [sales people] . . . is to make sure they have very good relationships with their accounts and we can solicit customer feedback across multiple data points.")).

271. Customer-provided competitive pricing information is used to obtain pricing approvals from management, and such information is included in reports provided to senior management. (F. 272-288; Mouland, Tr. 1145-46; PX7001 (Romano, IHT at 155-56); *see, e.g.*, PX2368 at 001-05 (Cristal North America weekly report)).

272. Tronox learns from its customers whether its competitors have announced price increases. (Mouland, Tr. 1155-56).

273. Tronox tries to "discern if [the customers are] telling the truth or if they're giving [Tronox] accurate information." (Romano, Tr. 2154).

274. Tronox does a "reasonably good" job of developing competitive intelligence. (PX7001 (Romano, IHT at 171); PX7046 (Romano, Dep at 89-90)).

275. Customer-provided competitive intelligence is used by Cristal and Tronox to make pricing decisions in customer negotiations. (PX2068 at 001 (Cristal email regarding approval for price response based on competitor pricing); PX2069 at 003 (Cristal Price Decision Form); PX1050 at 001 (Mouland email to Romano) (discussing Tronox's response to pricing from Cristal and Huntsman to Benjamin Moore); PX2070 at 001-03, *in camera* (recommending response based on customer-provided competitor pricing, stating "[w]e are very confident of his communication that they are [redacted] below us . . . ."); PX7046 (Romano, Dep. at 89-90) (stating that during negotiations "we obtain information from customers on whether or not we're competitive.").

276. In many instances, customers share specific competitor pricing information with Tronox sales representatives. (PX1048 at 001-02 (Duvekot email to Romano) (noting that a customer was "very open and showed many offers in writing"); Duvekot, Tr. 1311-13; PX1089, *in camera* (Doherty email to Mouland) ("Per [redacted], Purchasing Mgr, Kronos and DuPont have moved their price by [redacted]."); PX1088 at 001, *in camera* (Mouland email to Romano) (stating that a customer "is a straight shooter. When we do increase, she is requesting we get competitive with Chemours who are [redacted] below us"); PX1211 at 003, *in camera* (price approval request stating that a "[c]ustomer confirmed Kronos is taking them up [redacted]); PX1741 at 001, *in camera* (Mouland email to Romano) (price approval request citing Cristal's pricing of [redacted] per pound, and further noting that "[w]e also get a lot of useful market intel from [the customer]."); PX1157 at 001 (Mouland email to Duvekot) (describing specific prices offered to a customer by Huntsman (now Venator) and DuPont (now Chemours)); PX1735 at 002, *in camera* (Tronox Americas Weekly Report) (describing that Cristal is offering [redacted] per pound lower than Tronox at [redacted]).

277. When implementing a price increase in the market, part of Tronox's process is for the sales force to collect "competitive intelligence on [its] competitors' actions so [Tronox] can better evaluate the success rate of implementation. With that information," management will determine if any adjustment is needed. (PX1021 at 002 ("Price Increase Implementation Process"); PX7046 (Romano, Dep. at 89-90, 102); *see also* F. 210 (As part of Tronox's price increase implementation efforts, Tronox collects "competitive intelligence on [Tronox's] competitors' actions" to assess whether the other TiO2 producers are "maintain[ing] a disciplined approach.").

278. An internal Tronox email from 2016 stated that: "put[ting Tronox's] price in writing to the customer" serves as "a signal to competition." (PX1434 at 001-02 (Bondt email)).

279. Cristal obtains competitor pricing information from its customers. (PX2065 at 001, *in camera* (Florville email to Parks) ("I had a conversation with [a customer] this morning to talk about his meeting with Huntsman last night. [He] indicated that Huntsman offered [redacted] [per pound] for volume and that they would like him to respond to the offer ASAP."); PX2068 at 001, *in camera* (Weeks email to Snider and Gigou) ("Our refusal to . . . meet [redacted] [per pound] price resulted in [a customer] moving 5 trucks per month away from us and over to [redacted] (these were the five trucks we took from them last year).")).

280. Cristal is aware that price offers are communicated by customers to other competitors. In Mr. Stoll's experience, "information goes from competitor to customer to other supplier." (PX7006 (Stoll, IHT at 188)).

281. As an example of the communication referenced in F. 279, customers tell Cristal whether its price is higher than those from other suppliers and what the other suppliers' prices are. This information in turn is included in Cristal's weekly reports for North America. (PX7037 (Pickett, Dep. at 50, 93); PX7043 (Gigou, Dep. at 75-77)).

282. Cristal's redbook is a compilation of Cristal's market intelligence that summarizes everything that Cristal knows about its customers, such as what it knows "about how much they use, what products they use, and what applications they use it in. Cristal's redbook also includes Cristal's "best assessment of . . . demand [in] particular regions around the world." (PX7009 (Stoll, Dep. at 164)).

283. The data in Cristal's redbook is assembled by the Cristal sales and marketing teams. Cristal's redbook data tracks all major suppliers' sales volumes by customer and product. (PX7010 (Snider, Dep. at 33-34, 61-62, 66)).

284. Much of the market intelligence included in Cristal's redbook is derived from "conversations with [Cristal's] customers." (PX7009 (Stoll, Dep. at 165)).

285. Dr. Hill compared the data in Cristal's redbook with the actual data derived from producers' invoices. Dr. Hill found that market shares calculated from the redbook data were a "close match" to the actual market shares calculated from the invoice data. Dr. Hill concluded that the redbook data was "remarkably accurate . . . ." (Hill, Tr. 1833-35; PX5000 (Hill Expert Report at 098-99 ¶ 228 & Fig 36)).

286. Kronos obtains competitive intelligence from customers and the information is a data point that Kronos considers when making business decisions. (Christian, Tr. 756-57).

287. Kronos relies on its sales force to determine what customer-provided competitor information is legitimate information and what might be posturing for purposes of negotiation. (Christian, Tr. 928-29).

288. Chemours gets information about its competitors as a "direct result of [Chemours'] interaction with [its] customers." (PX7052 (O'Sullivan, Dep. at 31-32)).

d. Price elasticity

289. Price elasticity of demand is how responsive demand is to changes in price. Inelastic demand makes a market more susceptible to coordination because if prices of all firms were to rise, few sales would be lost, which makes the reward of coordinating greater. (Hill, Tr. 1803-04).

3. Views of industry participants and customers

290. On February 21, 2017, the chairman of Huntsman sent an email to Tronox's then-CEO Mr. Casey congratulating him on the agreement to acquire Cristal, which was announced that day (F. 24). Mr. Casey replied that the acquisition would be good for the merged firm and for its competitors as well. (PX1045 at 001 (stating, "I think it will be very good for our shareholders - and if today's market reaction is an indication, for yours, and Chemours' and Kronos' too.")).

291. Kronos, in a September 2017 public investor presentation, described higher concentration as part of the "[s]tructural improvements" in the industry that would lead to increased earnings. (PX3011 at 38 (Kronos presentation).

292. A July 2017 presentation to analysts by Venator's chairman, Peter Huntsman, and president, Simon Turner, described consolidation as a "key driver" of a "[m]ore sustainable cycle." (PX3054 at 14 (Venator presentation); *see also id.* at 19 (noting that consolidation of TiO2 producers, including Tronox/Cristal, will result in "[f]ewer, larger, more rational producers")).

293. True Value believes that the merger "does not bode well for True Value manufacturing." Mr. Vanderpool, division vice president of True Value, explained: "If you take capacity out of the marketplace, it's going to affect pricing in the marketplace. . . . [We're] going from five major suppliers down to four major suppliers, and we have a tough time figuring out how that benefits True Value manufacturing. . . . [redacted]. So we see raw material prices continue to go up and tightening in the market from allocation, and that's a very big concern of ours." (Vanderpool, Tr. 213-14).

294. "The acquisition of Cristal by Tronox is cause for concern for Ampacet." The merger causes "a 20% reduction in [its] supply base." (PX4130 (Santoro email); PX7040 (Santoro, Dep. at 122-23, 125-26)).

295. RPM, the producer of Rust-Oleum coatings, is concerned about the merger because "when you have less producers, it's not good for buyers." (PX7016 (DeCastro, Dep. at 127)).

D. Rebuttal

1. Entry

296. Based on producer invoice data and a 2016 TZMI study analyzed by Dr. Hill, chloride TiO2 sales by suppliers other than Tronox, Cristal, Kronos, Chemours, and Venator, account for a 0.5% share of the total North American chloride TiO2 market sales volume of 831,182 metric tons. (PX5000 (Hill Expert Report at 067-68 ¶ 152 & Fig. 25)).

297. The vast majority of TiO2 manufactured in China is sulfate TiO2. "[A]lmost no commercial grade chloride pigment is produced today" in China. (PX1036 at 006 (Tronox presentation); PX1091 at 011 (Tronox presentation) (identifying expected Chinese sulfate TiO2 capacity in 2020 as roughly 10 times greater than China's chloride TiO2 capacity); PX1033 at 002, *in camera* (Tan email to Engle) (actual chloride TiO2 production in China estimated to be [redacted] as compared to nameplate capacity[32] of [redacted]).

298. Chinese "exports have largely stayed within Asia-Pacific to serve low-grade sulfate pigment applications . . . ." (PX1395 at 008 (February 2017 Tronox "Q&A" for investors)).

299. The chloride process for TiO2 is environmentally cleaner than the sulfate process but technically more difficult to master and operate. (PX9020 at 027-30 (Chemical Economics Handbook)).

300. Lomon Billions is a TiO2 producer in China and is the fourth largest TiO2 producer globally by capacity. (Young, Tr. 680; Stoll, Tr. 2106; Romano, Tr. 2243).

301. Lomon Billions produces chloride TiO2 at a plant in Jiaozuo, China. The plant is designed for a nameplate capacity of 100,000 tonnes. (PX7054 (O'Malley Noe, Dep. at 48-49, 51); Christian, Tr. 828-30).

302. Lomon Billions' chloride TiO2 plant has been producing below its nameplate capacity of 100,000 tonnes. Lomon Billions produced a total of 60,000 tonnes of chloride TiO2 in 2017. (Engle, Tr. 2492; RX1642 at 005; PX7054 (O'Malley Noe, Dep. at 124); Quinn, Tr. 2412 ("I know that Lomon has been running their plants below nameplate capacity."); Turgeon, Tr. 2716 ("[T]hey are running below their nameplate capacity as of today.")).

303. Lomon Billions' sales of chloride TiO2 in the United States in 2017 was approximately 3,000 to 4,000 tonnes. (PX7054 (O'Malley Noe, Dep. at 102)).

---

32 "Nameplate capacity" refers to the amount of product that a plant is theoretically capable of producing, based on its design, as opposed to the amount that is actually produced. (Christian, Tr. 827-28, 831; Stoll, Tr. 2112; Malichky, Tr. 416).

304. Lomon Billions has a very limited presence in North America, with only a few employees located within North America, and access to a single, third-party operated warehouse for inventory. (PX7054 (O'Malley Noe, Dep. at 101, 112, 127-128)).

305. Lomon Billions does not offer technical service from North America. (PX7054 (O'Malley Noe, Dep. at 65)).

306. In February 2018, Lomon Billions announced in a press release that it had approved an investment of approximately $285 million to construct two new chloride TiO2 manufacturing lines at its existing chloride production plant in Jiaozuo, China, to provide an additional annual chloride pigment capacity of around 200,000 metric tons. The press release further stated that Lomon Billions expected commercial production from the new lines "during 2019." Lomon Billions also plans "[f]uture additional 300,000 tonne[s of] chloride capacity . . . most likely at a new coastal location in China." (RX0195; PX7054 (O'Malley Noe, Dep. at 48-51); RX1642 at 016).

307. Construction of a new TiO2 plant from scratch ("greenfield") takes at least four and a half years, which is an aggressive timeline that assumes everything proceeds according to plan. Chemours announced an expansion into Mexico in 2011, but the plant did not begin production until 2018. (Romano, Tr. 2139-41; PX1636; Christian, Tr. 793 ("[I]f you stumbled across a CP [chloride process] plant in the middle of a field and the owner's manual was laying there and the keys were there, it would still take you five to seven years to figure out how to make a quality CP grade on that plant.")).

308. Chemours does not view Chinese TiO2 production as directly competitive to its business in North America. "Most production in China is of low quality sulfate titanium dioxide, which serves less demanding applications than the [chloride] product Chemours produces." (PX8004 (O'Sullivan, Decl. at 002-03 ¶ 9)).

309. Lomon Billions' chloride TiO2 was unable to pass [redacted] qualification testing. [redacted] (Chinese manufactured chloride TiO2 "doesn't meet the performance [requirement] that we need for our finished product.")).

310. [redacted] conducted laboratory testing of Lomon Billions' chloride process TiO2 [redacted] and the product "did not pass, did not meet any of" [redacted] standards. [redacted].

311. [redacted] qualification process for chloride TiO2 products takes [redacted].

312. [redacted] has been evaluating chloride TiO2 products from Chinese producers. It has found that the quality is not yet satisfactory for its needs. [redacted] has further found that there is "no product availability. . . ." [redacted].

313. Kronos does not see chloride TiO2 from China in the markets in which it competes, and has observed that such products are used for "lower quality products." (Christian, Tr. 797-98).

314. In a strategy presentation prepared in November 2016, Tronox questioned [redacted] that Chinese capacity utilization will reach 87% by 2019, which is almost 20% better than historical performance, stating: "This seems technically impossible, as the Chinese generally overstate their plant capacity. . . . [redacted] also assumes chloride capacity in China will expand by [redacted] which also seems aggressive since almost no commercial grade pigment is produced today." (PX1036 at 006, *in camera*).

315. In a September 2017 investor presentation, Kronos noted the manageability of the threat of Chinese chloride TiO2 production, including as reasons: "[s]uperior chloride [process] technology [is] closely guarded by Western producers" and "[q]uality and reliability concerns." Kronos further explained: "Benefits of production in China such as low labor and environmental costs [are] not applicable to chloride technology" which "[r]equires uninterrupted power supply" and a "highly skilled labor force." (PX3011 at 019 (Kronos presentation)).

316. [redacted] Kronos came to the "very strong conclusion" that Lomon Billions is "struggling with their technology. They have safety concerns with their technology, and they are looking to acquire technology." (Christian, Tr. 805-06, *in camera*).

317. Based on published numbers showing utilization rates in Lomon Billions' chloride plant in the 30 to 40% range, Kronos believes that Lomon Billions is not successfully utilizing the chloride technology. Kronos doubts Lomon Billions will achieve its announced plan to bring a new plant online "inside a year or two, for 200, 250 million dollars, and [to produce] 200,000" tonnes. As Mr. Christian explained, "I think those numbers are . . . difficult to achieve. I think that that is an extremely low cost per metric ton. . . . [B]ased upon what we know, they're struggling with the technology they have now. So I don't know why, if you have additional capacity in the [chloride TiO2] plant that you own today, why you would build another one, and I don't think that that time frame is achievable or at that cost." (Christian, Tr. 808-10).

318. Kronos does "not foresee Lomon Billions being able to utilize the technology they have licensed to make a chloride process TiO2 that can compete in the U.S. market in the next five years." (PX8002 (Christian, Decl. at 006 ¶ 24)).

319. Kronos believes it is "highly unlikely" that Chinese chloride process TiO2 will constitute any threat to its business within the next two or three years. (Christian, Tr. 814-15).

320. Chemours does not project that Chinese chloride TiO2 producers, to the extent they further develop their process and quality, will affect the North American market anytime

within the next three to five years. (PX7052 (O'Sullivan, Dep. at 043) ("[W]e do our most rigorous planning in a three to five-year time horizon. Certainly outside of that horizon our anticipation would be the Chinese will be increasingly relevant in North America."); PX8004 (O'Sullivan, Decl. at 002-03 ¶ 9) (Chemours anticipates that Chinese chloride process titanium dioxide "will not affect its business plans in North America for at least 3 years.")).

321. In a 2015 email, then-Tronox CEO Mr. Casey wrote, "I think it is a very remote prospect that China will be producing chloride capacity of any magnitude in the next 3-5 years." (PX1065 at 001).

322. A 2016 Tronox strategy presentation, addressing the "China chloride outlook," noted that it is "[s]till expected to take a while for appreciable profitable tonnes to start flowing," and questioned why "[n]ewly installed" Chinese chloride plants had less than 10% utilization. The reasons Tronox identified included: "Legitimacy of base technology [is] questionable," "Chinese made adjustment to base technology," "Recommendation on equipment specs/sourcing ignored," "Limited commissioning support," and lack of "know-how/experience of running CP [chloride process] plant." (PX1000 at 018).

323. A Tronox TiO2 strategic plan presentation prepared in June 2016 observed that "China has built multiple chloride plants but struggles to commission them, suffering from poor profitability, uptime, and quality," although it expects China to "master the technology eventually." (PX1062 at 009 (Tronox 2017 TiO2 Strategic Plan)).

324. In a January 2017 update for the sales force regarding TiO2 market demand and supply developments, Tronox stated that "[i]t could take years before the Chinese chloride based TiO2 industry is mature and stable enough to bring the same quality and consistency as their international competitors." (PX1401 at 002).

325. In response to a German government request for information, Cristal stated: "It's been exceedingly difficult for the Chinese to acquire and successfully employ the proprietary chloride technology. Over time, the Chinese are expected to gradually progress with this transformation, but it's difficult to predict when, to what extent, and how fast this will occur. Very small inroads have been made to date." (PX2073 at 012 (Cristal's October 2016 response to Germany's competition authority questionnaire)).

326. In July 2017, Venator, which has worked with Lomon Billions in connection with a licensing arrangement for a single grade of TiO2, stated in an investor presentation that the "Chinese struggle with quality control, consistency of production, no automation and too much manual interruption - ultimately the know-how of how to run plants." Venator noted that it could work with a Chinese supplier for "2 years" and leave the plant with [the product] "being produced effectively," but then "3 months later," find the "process breaking down" and the product "more variable." (PX3027 at 024 (Venator presentation)).

327. Venator's July 2017 analyst day presentation described an array of "headwinds" facing Chinese TiO2 producers, including feedstock cost and availability and technology issues. (PX3035 at 020, 025 (Venator presentation)).

328. Low labor costs and relaxed environmental standards are not advantages that are applicable to chloride TiO2 production. (PX3011 at 019 (Kronos presentation); Christian, Tr. 796 ("[C]heap labor and relaxed environmental standards" are not applicable to chloride TiO2 as opposed to sulfate TiO2 "because [the latter is] much more labor-intensive and it generates a significant amount of waste or byproducts per ton of TiO2 . . . . So when you think about China as a potential competitor, a lot of their historic, perceived advantages over the western world just don't exist or at least aren't overly material in comparison to western producers.")).

329. A July 2017 Venator presentation noted: "Current prices for Chinese chloride slag feedstock have increased by 40% since Chinese New Year 2017." (PX3027 at 009).

330. The majority of the high-grade feedstock[33] that is used to run a chloride process TiO2 plant successfully is sourced from Australia and Africa. To the extent China masters chloride process technology in the future, it will still have to import feedstock, which is a large part of the cost structure of producing chloride process TiO2. (Christian, Tr. 793-94; PX3011 at 019).

331. Based on TZMI's 2016 producer cost study, Lomon Billions' Jinzhou plant in China has higher variable manufacturing costs than any plant in North America and is the highest cost chloride TiO2 plant in the world. (PX1663 at 133-53 (TZMI presentation) (detailing costs for North American chloride TiO2 plants and for the Jinzhou plant).

332. In a presentation to its lenders in September 2017, Tronox highlighted with regard to Chinese market dynamics several "Inflationary Pressures" including "Increasing feedstock cost"; "Wage growth"; and "Higher energy prices." (PX1438 at 019 (Tronox presentation)).

333. In November 2016, Tronox predicted that Chinese producers would be limited in their ability to grow exports of TiO2 because Chinese demand growth is expected to exceed Chinese production growth. (PX1006 at 015 (Tronox presentation) ("Chinese demand growth (5.3%) is expected to exceed Chinese production growth (4.2%)[,] which will limit their ability to grow exports.")).

334. In a 2016 third quarter earnings call, Mr. Casey of Tronox stated: "As demand grows domestically [in China], more and more supply will go into the domestic market, which means less will be available for the export market [and the] Chinese share in the global market we think is going to decline over the next several years." (PX9001 at 009 (Tronox Q3 2016 earnings call)).

33 High-grade feedstock is explained in more detail in F. 339.

335. In a 2017 fourth quarter earnings call, Mr. Romano of Tronox described Lomon Billions' plan to expand production by 200,000 tonnes in 2019 as "a bit aggressive on timeline." Mr. Romano further stated that supply and demand were "in balance" and Tronox did not "see that turning in 2019." Mr. Quinn added that "all the incremental expansion over the next 18 to 24 months, will really kind of just be soaked up by the incremental global growth. So we don't see that, that incremental expansion will significantly change the current dynamics." (PX9101 at 008 (Q4 2017 Tronox earnings call)).

336. North American customers do not view Chinese chloride producers as a reliable supply source for chloride TiO2 in the foreseeable future. [redacted], *in camera* ([redacted] cannot "count on [Lomon Billions] for incremental quantities of chloride TiO2" and "do[es] not see . . . other Chinese producers as realistic supply options for [redacted] U.S. plants"); [redacted], *in camera* ([redacted] has "no expectation that TiO2 from China will provide [it] with an economical competitive alternative to our domestic sources in the foreseeable future."); [redacted], *in camera* (Given the lower quality of Chinese chloride TiO2, the one to three years needed to qualify a grade of TiO2, [redacted] requirements for slurry TiO2, and the decreasing TiO2 capacity in China, "[redacted] does not expect Chinese TiO2 to be a viable alternative to North American supply for the foreseeable future"); [redacted], *in camera*.

2. Efficiencies

a. Feedstock

337. TiO2 "feedstock" refers to the raw material that gets transformed into TiO2 pigment. (Turgeon, Tr. 2580-81).

338. TiO2 feedstock includes TiO2-containing mineral sands products, the most common of which are ilmenite and rutile. (Turgeon, Tr. 2585-86; RX1014-005; RX1196-108; *see also* RX0171 (Stern Expert Report at 0018-19)).

339. Natural rutile is about 92 to 96% TiO2. Natural rutile is a high-value feedstock that can be directly converted into TiO2 pigment. (Turgeon, Tr. 2589-90, 2595).

340. Ilmenite is titanium oxide and iron oxide combined together. (Turgeon, Tr. 2589-90). Ilmenite contains about 35 to 65% TiO2 and is lower in TiO2 than natural rutile. (Turgeon, Tr. 2589-90).

341. Some ilmenite can be directly converted into TiO2 pigment. Other ilmenite must go through an intermediate step called an "upgraded process." This intermediate step creates a TiO2 pigment plant "feedstock." (Turgeon, Tr. 2596-97).

342. One way to convert ilmenite into feedstock is through smelting. (Turgeon, Tr. 2596-97). Smelting is a process where ilmenite is melted at high-temperatures in a furnace with anthracite, and the iron in the material is separated from the titanium. (Turgeon, Tr. 2596). The titanium product that results from smelting is referred to as "slag." Slag is a feedstock that can be used in a TiO2 pigment plant. (Turgeon, Tr. 2596-97).

343. Without further processing, ilmenite cannot be used to produce chloride TiO2. (Van Niekerk, Tr. 3913-14) ("[W]e need high-grade feedstock . . . , typically close to 90 percent TiO2 is required for our chlorinators and downstream processing in the pigment plant to work well.").

344. For a manufacturer to produce chloride TiO2, it needs to have access to high-grade feedstock. (Christian, Tr. 791).

345. Cristal does not presently produce enough feedstock to supply its TiO2 plants and purchases the additional feedstock its plants require. (Stoll, Tr. 2111).

346. Tronox is slightly "long" on high-grade feedstock. By Tronox's estimates, its supply of high-grade feedstock in 2018, as a "standalone" company, would exceed its demand by approximately [redacted].[34] (PX0010 at 219 (Tronox February 2017 board of directors presentation draft 2.9.2017) (estimating 2018 demand for "CP slag/NR/ SR" listed as [redacted] and supply listed as [redacted] resulting in [redacted] excess high-grade feedstock in 2018).

347. By Tronox's estimates, a combined Tronox and Cristal entity would be "significantly short on high grade feedstock," with an estimated deficit in 2018 of [redacted]. (PX0010 at 219, *in camera*) (Tronox February 2017 board of directors presentation draft 2.9.2017)).

348. "[E]ven with [the] Jazan [slagger] [F. 349] operating at nameplate capacity, [the combined Tronox and Cristal entity] would still be short of feedstock." (PX7038 (Van Niekerk. Dep. at 27-29)).

b. Jazan slagger

349. The Jazan slagger is an ilmenite smelting facility located in Jazan, Saudi Arabia. (Hewson, Tr. 1636; Van Niekerk, Tr. 3946-47).

350. The Jazan slagger is owned by Advanced Metal Industries Cluster Company Limited ("AMIC"). AMIC is a joint venture that is owned 50% by Cristal and 50% by Cristal's owner, TASNEE. (Hewson, Tr. 1636-37; Van Niekerk, Tr. 3899-3900).

351. AMIC built the Jazan slagger in order to supply Cristal with a source of high-grade feedstock for Cristal's chloride TiO2 production. (Hewson, Tr. 1637).

---

34 The abbreviation "kMT" is an acronym that "stands for kilo metric ton." https://www.acronymfinder.com/Kilo-Metric-Ton-(measurement)-(KMT).html.

352. The Jazan slagger is not operational today. (Hewson, Tr. 1637).

353. Cristal encountered significant problems with the furnaces when they attempted to commission the Jazan slagger in 2015. (Van Niekerk, Tr. 3900).

354. [redacted].

355. [redacted].

356. Respondents' Synergies White Paper, submitted on August 15, 2017 in connection with the FTC's investigation into the Acquisition, notes, [redacted].

357. Mr. Van Niekerk, senior vice president of strategy at Tronox, acknowledged that Tronox "cannot fully determine the impact of [the] design issues" with the Jazan slagger until it has "started up the furnace and experience[d] those limitations." (PX7038 (Van Niekerk, Dep. at 220-22)). *See also* PX1280 at 003 (Van Niekerk June 2, 2017 email attaching integration slides) [redacted].

358. Tronox may face challenges in activating the Jazan slagger because of its proximity to the Yemen border, where there is ongoing armed conflict. The United States Department of State has issued warnings against United States citizens traveling within certain miles of the Yemen border. (PX7012 (Mancini, Dep. at 120-23); PX7008 (Hewson, IHT at 87-88)).

359. In September 2016, a Cristal presentation to the TASNEE board's executive committee (including the chairman of TASNEE, the vice-chairman, and the CEO of TASNEE) outlined [redacted].

360. [redacted]

[redacted].

361. Tronox's Mr. Van Niekerk acknowledged in an email that the [redacted].

362. [redacted].

363. [redacted].

364. [redacted].

365. [redacted].

366. [redacted].

367. [redacted].

368. In February 2017, AMIC held a workshop regarding the Jazan slagger. (PX2295 (AMIC Workshop, February 2017)).

369. [redacted].

370. By February 2017, Cristal had completed several modifications to the Jazan slagger. (PX2295 at 068 (AMIC Workshop, February 2017)).

371. [redacted].

372. In June 2017, a TASNEE press release stated that "work is still ongoing to solve the technical problems" at the Jazan slagger, and projected a trial operation during the first half of 2018. (PX9029 (TASNEE Press Release on Jazan Slagger); PX7008 (Hewson, IHT at 101); PX7005 (Keegel, Dep. at 71)).

373. Tronox's February 21, 2017 agreement for the acquisition of Cristal (F. 24) does not include any provisions regarding a purchase of the Jazan slagger. Tronox has acknowledged that "[t]he Tronox-Cristal transaction does not include the Jazan Slagger." (PX0005 at 027 (Synergies White Paper); PX0009).

374. Tronox entered into an option agreement with AMIC with regard to the Jazan slagger on May 20, 2018. On March 15, 2018, while still negotiating the option agreement, Tronox entered into a technical services agreement ("TSA") with AMIC with respect to the Jazan slagger in order to help Cristal commission the slagger. (Van Niekerk, Tr. 3900-01, 3951; RX1603; PX1745).

375. Under the option agreement for the Jazan slagger (F. 374), Tronox has a five-year option to acquire the Jazan slagger. (Van Niekerk, Tr. 3901; RX1603 at 0052).

376. Pursuant to the terms of the option agreement for the Jazan slagger (F. 374), Tronox has agreed to loan AMIC approximately $125 million toward the efforts to make the Jazan smelter facility operational. If the slagger achieves certain levels of operational performance in the future, then Tronox is obligated to purchase the slagger and the $125 million would become part of the consideration paid by Tronox for Jazan. If the required performance levels are not met, then Cristal would pay back the loan to Tronox. (RX1603 at 0027-33, Section 5.14 (Option Agreement); PX7009 (Stoll, Dep. at 25-26); Van Niekerk, Tr. 4002; Quinn, Tr. 2374-75).

377. Tronox chose to pursue an option agreement for the potential purchase of the Jazan slagger because the slagger's current inoperable state makes its value uncertain, and Tronox did not want to acquire an asset that has not been proven to work. Also, Tronox's valuation of the facility was significantly less than Cristal's valuation. The Tronox board would "never allow" the purchase of a "$500 million plant" that is "not working" and has no track record," because "the risk would just be too high." (PX7014 (Quinn, Dep. at 075-76); PX7008 (Hewson, IHT at 75); PX7038 (Van Niekerk, Dep. at 74-75); Quinn, Tr. 2381).

378. A Tronox August 2017 Update on the negotiations over the Jazan slagger identified as part of the supporting rationale for acquiring the Jazan slagger the fact that the "Call Option removes risk to Tronox if Jazan demonstrates unsurmountable weaknesses." (PX1281 at 010).

379. There is no certainty that a purchase of the Jazan slagger will take place. (Quinn, Tr. 2375; PX1220 (option agreement)).

380. [redacted].

381. The KPMG Report (F. 427) identifies Tronox's anticipated improvements to Jazan as an assumption underpinning the synergy estimate: "[Jazan-related synergies] assume that the Jazan Slagger will reach the production levels projected by [Tronox]." (PX0006 at 005 (KPMG Report)).

c. Yanbu plant

382. Cristal's Yanbu plant is a chloride TiO2 plant in Saudi Arabia. (PX0005-015).

383. Tronox does not operate any TiO2 plants, or plants of any kind, in Saudi Arabia. (PX7012 (Mancini, Dep. at 71)).

384. The customers served by Cristal's chloride TiO2 plant in Yanbu are predominantly located in Saudi Arabia. None of the TiO2 grades produced at Yanbu are sold in North America. (PX7000 (Snider, IHT at 69-70); Hewson, Tr. 1608).

385. Respondents' Synergies White Paper (F. 356) states that Tronox expects to leverage "greater know-how" to "quickly repair the [Yanbu] facility and increase production at least to the plant's nameplate capacity of [redacted] metric tons," yielding an incremental [redacted] metric tons of additional chloride TiO2 production by Year 3 following the proposed acquisition. (PX0005 at 015, 018-19, *in camera* (Synergies White Paper)).

386. Mr. Mancini, Tronox chief integration officer, and Dick Dean, Tronox vice president of operations integration, created a 2-page document in February 2017, titled "Tronox Analysis of its Preliminary Yanbu Improvement Plan" (hereinafter, "Preliminary Yanbu Improvement Plan"). (PX1425 at 001-02)).

387. The Preliminary Yanbu Improvement Plan references implementing "best practices," and "operational excellence" principles, such as "The Tronox Way" (F. 388), to increase production, and contains estimates on the improvements Tronox expects in terms of output, quality, and costs. (PX1425 at 001-02 (Yanbu Improvement Plan)).

388. The Tronox Way refers to a standard of best practices developed by Tronox and used across its facilities that is intended to maximize output and lower the company's cost position. (Turgeon, Tr. 2648; Dean, Tr. 2998).

389. Although Mr. Mancini prepared the Yanbu Improvement Plan, Mr. Dean provided the estimates it contains. (PX7023 (Dean, Dep. at 18)).

390. The Preliminary Yanbu Improvement Plan states in part:

> Tronox plans to drive improvements at Yanbu by applying lessons learned at its nearly identical plant in Hamilton, Mississippi, USA. Incremental EBITDA will be generated as production increases (resulting in not only more tons to sell but a lower fixed cost per ton), quality improves (resulting in fewer low quality tons sold at a discount) and manufacturing efficiency improves, lowering variable cost per ton as less ore, process chemicals and energy is required in each ton of production.
>
> Production increases will be realized by (1) increasing line rates (the amount in metric tons of TiO2 that can be produced per line per hour) and (2) improving on stream time (the time that a line is operational and productive over the course of a year).

(PX1425 at 001).

391. When Mr. Dean took over managing Tronox's Hamilton, Mississippi plant in 2004, "it was not a plant that required turning around. It was a pretty good performing plant." (PX7023 (Dean, Dep. at 159-61)).

392. Mr. Dean's line rate projections in Tronox's Preliminary Yanbu Improvement Plan reflect what he believes Tronox will be capable of producing over a five year period, based on his technical knowledge and the projected improvements to be implemented at Yanbu. (PX7023 (Dean, Dep. at 22-23); Dean, Tr. 3109).

393. Mr. Dean's projected on-stream time improvements set forth in Tronox's Preliminary Yanbu Improvement Plan represent his judgment, based on his technical knowledge, of what Tronox will be able to achieve from one year to the next. (PX7023 (Dean, Dep. at 73-75); Dean, Tr. 3109).

394. Mr. Dean acknowledged there [redacted]

[redacted].

395. [redacted].

396. [redacted] described the culture at Tronox's plant in Hamilton as "one of a very engaged and interested workforce," adding "they're interested in the success of not only Hamilton but Tronox as a whole." [redacted].

397. A Tronox update on synergies, dated October 10, 2017, highlights [redacted].

398. [redacted].

399. Yanbu was built using Kerr-McGee's proprietary low pressure chloride TiO2 production technology.[35] (Dean, Tr. 2930, 2979; Hewson, Tr. 1609).

400. Tronox has experience with low-pressure chloride technology and employs low-pressure chloride technology at its plants in Mississippi and Australia. (Dean, Tr. 2930-31; Quinn, Tr. 2355).

401. [redacted].

402. Improving Yanbu is a priority for Cristal. (PX7042 (Gunther, Dep. at 30); PX7048 (Strayer, Dep. at 218)).

35 The difference between high-pressure and low-pressure technology is that "the mode of force that drives the process [with low pressure technology] is gravity. We have tanks at the beginning of the oxidation process where . . . the titanium tetrachloride is actually elevated up in the air, and as it's fed into the vaporization process, that height determines the maximum pressure that's going to be generated in the process. Other manufacturers actually pump the titanium tetrachloride in, and that can take it up to a much higher pressure." (Dean, Tr. 2929-30).

403. Cristal has the equipment it needs to run the Yanbu chloride TiO2 production plant at a capacity of [redacted] metric tons per year. (Hewson, Tr. 1633, *in camera*).

404. [redacted].

405. Cristal identifies Mr. van Beek as a "[l]ow pressure expert." (PX2379 at 005 (Strayer email attaching Yanbu organizational changes)).

406. [redacted].

407. Tony Blanchard, a Cristal employee, is working at Yanbu. Mr. Blanchard has operational experience from Cristal's Stallingborough, United Kingdom plant, as well a "[s]trong background on operational systems/processes." (PX2379 at 005 (Strayer email attaching Yanbu organizational changes)).

408. [redacted].

409. [redacted].

410. [redacted].

411. Cristal has been addressing issues at Yanbu and seeing improvement. The Yanbu TiO2 plant has improved its production performance in the past year. (Hewson, Tr. at 1626-28).

412. As of the first quarter of 2015, Yanbu was operating at a production rate of about [redacted] per year. (Hewson, Tr. 1620, *in camera*).

413. During 2017, Cristal has had [redacted] at Yanbu. Cristal's production at Yanbu during December 2017 reached [redacted]. (Hewson, Tr. 1627, 1636, *in camera*).

414. Cristal produced approximately 130,000 metric tons at Yanbu in 2017. (Dean, Tr. 2979-80).

415. In the second quarter of 2017, Cristal noted "[s]olid overall quality performance with improvement at Yanbu . . . ." (PX2493 at 005 (Morten email attaching Cristal manufacturing update); PX7048 (Strayer, Dep. at 100)).

416. A third quarter 2017 board update by Cristal noted "[i]mproving performance at Stall & Yanbu." (PX2471 at 004 (Gunther email attaching Cristal manufacturing update)).

417. Cristal acknowledges that Yanbu was on a positive trajectory in 2017. (PX7042 (Gunther, Dep. at 124-26); PX7048 (Strayer, Dep. at 218); *see also* PX2374 at 001 (Gunther email) ("the changes we have made in Yanbu are setting the plant on a positive trajectory already")).

418. Cristal's 2018 budget and strategic plan includes [redacted] at the Yanbu plant. (PX2373 at 018, *in camera* (Box email attaching 2018 Budget and Strategic Plan); PX7042 (Gunther, Dep. at 35-36), *in camera*).

419. Cristal's 2018 budget and strategic plan anticipates an increase of [redacted] in Yanbu's on-stream rate in 2018. (PX2373 at 006, *in camera* (Box email attaching 2018 Budget and Strategic Plan); PX7042 (Gunther, Dep. at 23-24), *in camera*).

420. Mr. Dean of Tronox acknowledged that Cristal probably does not need a merger to implement The Tronox Way practices such as shift handover protocols, workflow management protocols, meeting protocols, short interval control protocols, or operator checklists. Mr. Dean also acknowledged that loss accounting is a concept that is generally available and used by organizations other than Tronox. (Dean, Tr. 3102-06).

421. If the Acquisition did not occur, Cristal would "try to improve" the performance of the Yanbu plant, [redacted]. (PX7042 (Gunther, Dep. at 149-53), *in camera*).

422. If the Acquisition did not occur, Cristal would "still go down the track of the [redacted] [of output per year at Yanbu], and [redacted].

d. Cost savings

423. KPMG was hired to "provide consulting support" for the "sign-to-close period" of the Acquisition. (PX7045 (Nolan, Dep. at 43-44)).

424. The objective of KPMG's engagement was to assist Tronox with its assessment of the potential synergies Tronox anticipates in connection with the proposed acquisition of Cristal. (PX0006 at 003).

425. [redacted].

426. KPMG's conclusions were derived from "analysis of data room materials" provided by Tronox and Cristal, "as well as from [Tronox's] management team and their knowledge of [Cristal's] business from site visits." (PX0006 at 003).

427. KPMG prepared a report for Tronox (the "KPMG Report"). The report includes a letter to Tronox management stating that [redacted].

428. [redacted].

429. Respondents' proffered expert witnesses based their opinions as to likely output increases from improvements to Jazan and Yanbu upon the assertions, judgments, and/or expectations of Respondents, without any apparent independent verification. (*See, e.g.*, RX0170 (Shehadeh Expert Report at 0057-58); RX0171 (Stern Expert Report at 127-31); RX1258 (Imburgia Expert Report at 0016-17)).

430. Tronox has not evaluated how lowering its costs would affect TiO2 pricing, which is affected by many factors. Mr. Quinn, chief executive officer at Tronox, acknowledged that lowering Tronox's costs is unlikely to have an impact on TiO2 pricing. (Quinn, Tr. 2406).

431. "The synergies that are tied to a geographic location are the operational synergies . . . . [T]he overwhelming majority of those synergies are related to . . . non-U.S. assets." (Quinn, Tr. 2406-08).

IV. SUMMARY OF CONCLUSIONS OF LAW

1. The Commission has jurisdiction over Respondents and the Acquisition pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45, and Sections 7 and 11 of the Clayton Act. 15 U.S.C. §§ 18, 21(b).

2. Section 7 of the Clayton Act prohibits mergers or acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or . . . activity affecting commerce in any section of the country." 15 U.S.C. § 18.

3. It is not necessary to demonstrate certainty that a proposed merger will produce anticompetitive effects, or even that such effects are highly probable, but only that the loss of competition is a sufficiently probable and imminent result of the merger or acquisition.

4. Section 7 of the Clayton Act requires a prediction as to the likelihood of anticompetitive effects, and doubts are to be resolved against the transaction.

5. Congress enacted Section 7 to curtail anticompetitive harm in its incipiency.

6. To establish a prima facie case of a violation of Section 7, the plaintiff may rely on a presumption of anticompetitive effects by defining a relevant market, and showing that the transaction will lead to undue concentration in that market.

7. The plaintiff may bolster a prima facie case based on a market concentration presumption by adducing evidence showing that anticompetitive unilateral or coordinated effects are likely.

8. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to show that traditional economic theories of the competitive effects of market concentration are not an accurate indicator of the merger's probable effect on competition in the relevant market or that the procompetitive effects of the merger are likely to outweigh any potential anticompetitive effects.

9. Although the courts have not defined a precise standard that must be met to rebut a prima facie case, the courts advise that the more compelling the prima facie case, the more evidence the defendant must present to rebut the presumption successfully.

10. If the defendant successfully rebuts the presumption of a violation of Section 7, the burden of producing additional evidence of anticompetitive effect shifts to the plaintiff, and merges with the ultimate burden of persuasion, which remains with the plaintiff at all times.

11. The relevant market in which to assess the likely effects of the Acquisition is the sale of chloride TiO2 to North American customers.

12. Under the Merger Guidelines, a merger may substantially lessen competition if: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct; and (3) the merger is likely to enhance that vulnerability.

13. Complaint Counsel met its prima facie case by establishing a presumption of liability, by showing that the Acquisition will lead to undue concentration in the relevant market.

14. Complaint Counsel bolstered the presumption of anticompetitive effects with substantial evidence demonstrating that the North American chloride TiO2 market is vulnerable to coordinated conduct and that this vulnerability will be enhanced by the Acquisition. Therefore, the evidence demonstrates a likelihood of anticompetitive coordinated effects.

15. It is a central object of merger policy to obstruct the creation or reinforcement by merger of market structures in which tacit coordination can occur.

16. Tacit coordination, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.

17. Proof of prior tacit coordination is not necessary to demonstrate a reasonable probability of future coordination.

18. It is not necessary to demonstrate that market participants can form and enforce an agreement. Under the Merger Guidelines, coordinated interaction includes a range of conduct, and can involve parallel conduct in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms.

19. Issues of fact or law that do not affect the result in a case are not fairly deemed "material," for purposes of Section 557(c)(3)(A) of the Administrative Procedures Act, 5 U.S.C. § 557(c)(3)(A), or Rule 3.51(c)(1) of the Commission's Rules of Practice, 16 C.F.R. § 3.51(c)(1), notwithstanding that there may be allegations or evidence presented on such issues.

20. Even in highly concentrated markets, if there is sufficient ease of entry, enough firms can enter to compete with the merging firms, undercutting any of the likely anticompetitive effects of the proposed mergers.

21. Entry can be demonstrated either by new firms entering the relevant market or by expansion into the relevant market by existing firms.

22. Entry must also be proven to be likely, rapid enough, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern.

23. The burden of proving that entry will be timely, likely, and sufficient to deter or counteract anticompetitive effects is on the defendant.

24. The evidence fails to support Respondents' argument that entry or expansion by Chinese producers is likely, or that such entry will be timely or sufficient to counteract the likely anticompetitive effects of the Acquisition.

25. Cognizable efficiencies are defined as merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.

26. To be cognizable, an asserted efficiency must represent a type of cost saving that could not be achieved without the merger and the estimate of the predicted saving must be reasonably verifiable by an independent party.

27. The law requires a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those efficiencies represent more than mere speculation and promises about post-merger behavior.

28. An anticompetitive merger cannot be justified on the basis of asserted efficiencies outside the relevant market.

29. It is incumbent upon the merging firms to substantiate efficiency claims, so that it is possible to verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.

30. Because the Acquisition would create a highly concentrated market, the law requires proof of extraordinary efficiencies.

31. Claimed efficiencies must be reasonably verifiable by an independent party, and cannot be based solely on the judgment of business executives. Otherwise, the efficiencies defense might swallow the whole of Section 7 of the Clayton Act.

32. Respondents failed to meet their burden of demonstrating cognizable efficiencies.

33. The evidence proves that the planned Acquisition may substantially lessen competition in the relevant market for the sale of chloride TiO2 in North America in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.

34. Upon determining that a merger violates Section 7 of the Clayton Act, the appropriate remedy is to issue an order enjoining the merger. 15 U.S.C. § 21(b).

ORDER

I.

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

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

B. "Cristal" means The National Titanium Dioxide Company Limited (Cristal), its directors, officers, employees, agents, representatives, successors, and assigns; the joint ventures, subsidiaries (including Cristal USA), partnerships, divisions, groups, and affiliates controlled by The National Titanium Dioxide Company Limited (Cristal), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Cristal USA" means Cristal USA Incorporated, its directors, officers, employees, agents, representatives, successors, and assigns; the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Cristal USA Incorporated, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "TASNEE" means The National Industrialization Company (TASNEE), its directors, officers, employees, agents, representatives, successors, and assigns; the joint ventures, subsidiaries (including Cristal), partnerships, divisions, groups, and affiliates controlled by The National Industrialization Company (TASNEE), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Proposed Acquisition Agreement" means the "Transaction Agreement Dated as of February 21, 2017 between The National Titanium Dioxide Company Limited, Tronox Limited and, solely for the purposes of Articles I, II, VIII, IX and XIII, Cristal Inorganic Chemicals Netherlands Coöperatief W.A."

II.

IT IS FURTHER ORDERED that:

A. Respondent Tronox and Respondents Cristal, TASNEE, and Cristal USA shall terminate the Proposed Acquisition Agreement, and cease and desist from taking any actions, directly or indirectly, to consummate the Proposed Acquisition Agreement.

B. Respondent Tronox shall cease and desist from acquiring Cristal, in whole or in part, including, but not limited to, any stock, assets, share capital, equity, or other interest in or related to Cristal, directly or indirectly, from Respondents Cristal, TASNEE, or Cristal USA.

C. Respondents Tronox, Cristal, TASNEE, and Cristal USA shall return all confidential information received, directly or indirectly, from one another and destroy all notes relating to such information.

D. Respondents shall submit a verified written statement within 15 days of the Order becoming final certifying compliance with the requirements of Paragraphs II.A. and II.C. relating to terminating the acquisition agreement and returning/destroying each other's confidential information, with sufficient detail and supporting documentation to allow the Commission to determine independently that Respondents are in compliance.

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

LOUISIANA REAL ESTATE APPRAISERS BOARD

Docket No. 9374. Order, July 5, 2018

Order rescheduling the oral arguments in this Matter.

ORDER RESCHEDULING ORAL ARGUMENT

On April 24, 2018, the Commission issued an Order providing that the Oral Argument regarding Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense would be held on August 13, 2018. The Commission has now determined, for good cause shown, pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), to reschedule the Oral Argument to August 27, 2018; to extend the deadline for a Commission decision; and to change the date on which the evidentiary hearing will begin. Accordingly, the second, third and fourth ordering paragraphs of the April 24, 2018 Commission Order are modified to read as follows:

IT IS 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 27, 2018, at 2 p.m.;

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 24, 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 November 6, 2018, at 10:00 a.m.

By the Commission.

IN THE MATTER OF

OTTO BOCK HEALTHCARE NORTH AMERICA, INC.

Docket No. 9378. Order, July 9, 2018

Order denying respondent's motion to withdraw the Matter from adjudication for the purpose of considering a consent settlement.

OPINION AND ORDER OF THE COMMISSION

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 5 of the FTC Act and 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 ("MPK") sold to prosthetic clinics in the United States. In its Answer to the Complaint, Respondent denied that the merger harmed consumers or competition, and asserted affirmative defenses, including, *inter alia*, an averment that Otto Bock's "planned divestiture of the microprocessor controlled prosthetic knee business of Freedom addresses any conceivable anticompetitive effect." Am. Ans. at Seventh Affirmative Defense. Discovery has been completed, and the hearing before the administrative law judge is scheduled to begin on July 10, 2018.

On June 19, 2018, Respondent filed a Motion to Withdraw Matter from Adjudication for Consideration of Proposed Settlement ("Respondent's Motion"). Respondent's Motion contends that an asset purchase agreement to divest Freedom's microprocessor knee business to [redacted] would resolve any anticompetitive concerns asserted in the Complaint. Respondent seeks an order withdrawing the matter from adjudication and staying all proceedings before the administrative law judge while the Commission evaluates a proposed consent order based on the proposed asset purchase agreement. Finding that there is a reasonable possibility of settlement, Chief Administrative Law Judge D. Michael Chappell certified Respondent's Motion to the Commission, pursuant to procedures specified in Commission Rule of Practice 3.25(c), 16 C.F.R. § 3.25(c).

Complaint Counsel oppose Respondent's Motion. Complaint Counsel contend that [redacted] and would not remedy the effects of the allegedly unlawful merger. Complaint Counsel's Response to Respondent's Motion to Withdraw Matter from Adjudication for Consideration of Proposed Settlement at 2, 6 ("Complaint Counsel's Response"). According to Complaint Counsel, [redacted] *Id.* at 6. Moreover, Complaint Counsel maintain, [redacted]

[redacted]. *Id.* at 7.

Rule 3.25(c) leaves the determination of whether to grant a motion to withdraw to the Commission's discretion. Federal Trade Commission, Rules of Practice, 74 Fed. Reg. 20205, 20206 (May 1, 2009). That discretion is informed in part by the Commission's policy favoring, and the public interest in, expeditious resolution of the Commission's adjudicative proceedings. *See* Order Denying Respondents' Motion to Stay and Temporarily Withdraw this Matter from Adjudication, *In re Tronox Ltd*, Docket No. 9377 (FTC May 16, 2018) ("Tronox Order"); *see also* 16 C.F.R. §§ 3.1, 3.11(b)(4), 3.41, 3.46, 3.51-52. When the Commission issued its Complaint, it found reason to believe that Otto Bock and Freedom had executed a merger agreement in violation of the FTC Act, and had consummated a merger in violation of the FTC Act and the Clayton Act, and it is now in the public interest that the allegations in the Complaint be resolved expeditiously.

Here we are not persuaded to withdraw the matter from adjudication. Respondent and Complaint Counsel have very different opinions regarding the adequacy of the current divestiture proposal, and the related factual disputes appear significant. As things currently stand, the potential for quick, successful resolution of remaining issues and acceptance of a consent agreement is not sufficient to warrant withdrawal, particularly given that the hearing before the administrative law judge is set to begin imminently.

Negotiations between Complaint Counsel and Respondent appear to be ongoing. Complaint Counsel state that that they offered a counter-proposal to an earlier [redacted] on April 18, but have heard no response. Complaint Counsel's Response at 2. Although Respondent's motion attached a subsequently executed asset purchase agreement, Respondent's Motion suggests the possibility of addressing Complaint Counsel's concerns through a variety of mechanisms including [redacted]. Respondent's Motion at 8. Under these circumstances, the appropriate next step is further negotiation between Respondent and Complaint Counsel, not withdrawal of the matter from adjudication. As we recently stated in another adjudicative proceeding, "[S]ettlement discussions should be with Complaint Counsel, not the Commission." Tronox Order at 2.

Accordingly,

IT IS HEREBY ORDERED that Respondent's Motion to Withdraw Matter from Adjudication for Consideration of Proposed Settlement is **DENIED**; and

IT IS FURTHER ORDERED that the evidentiary hearing in this proceeding shall commence on July 10, 2018, as previously scheduled.

By the Commission.

IN THE MATTER OF

LOUISIANA REAL ESTATE APPRAISERS BOARD

Docket No. 9374. Order, July 19. 2018

Order staying the proceedings pursuant to an Order of the Court of Appeals for the Fifth Circuit.

ORDER STAYING ADMINISTRATIVE PROCEEDING

On April 10, 2018, the Commission issued an Opinion and Order[1] that denied Respondent's motion to dismiss the complaint, and dismissed Respondent's third and ninth affirmative defenses.[2] On April 19, 2018, Respondent filed a petition for review of the Commission Opinion and Order with the United States Court of Appeals for the Fifth Circuit. On April 20, 2018, Respondent filed a motion to stay proceedings in this matter pending appellate review of its Petition. On June 6, 2018, the Commission denied that motion.[3] On June 11, 2018, Respondent filed a motion to stay this proceeding pending appeal with the Court of

Appeals for the Fifth Circuit. On July 17, 2018, the Court of Appeals for the Fifth Circuit issued the attached Order granting that Motion until further order of that court. Accordingly,

IT IS HEREBY ORDERED that all proceedings before the Commission and the Administrative Law Judge in this matter, including the Oral Argument currently scheduled for August 27, 2018, be, and they hereby are, stayed until further order of the Court of Appeals for the Fifth Circuit and the Commission.

By the Commission.

---

1 *In the Matter of Louisiana Real Estate Appraisers Board, Docket No. 9374*, Opinion and Order of the Commission (April 10, 2018), at 21, *available at* https://www.ftc.gov/system/files/documents/cases/d09374_opinion_and_order_of_the_commission_04102018_redacted_public_version.pdf.

2 Answer of Respondent Louisiana Real Estate Appraisers Board to the Complaint (June 19, 2017), at 12, *available at* https://www.ftc.gov/system/files/documents/cases/d09374lreabanswer.pdf. Affirmative Defense No. 3 avers 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), while Affirmative Defense No. 9 avers that the Respondent "is immune from federal antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943)."

3 Commission Order Denying Stay Pending Appellate Review (June 6, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/d09374_lreab_order_denying_stay_pending_appellate_review_06062018.pdf.

Interlocutory Orders, Etc.

Attachment

Case: 18-60291 Document: 00514559151 Page: 1 Date Filed: 07/17/2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-60291

LOUISIANA REAL ESTATE APPRAISERS BOARD,

Petitioner

v.

FEDERAL TRADE COMMISSION,

Respondent

Petition for Review of an Order of the
Federal Trade Commission

Before DAVIS, OWEN, and ENGELHARDT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Petitioner's opposed motion to stay administrative proceedings pending review is GRANTED until further order of this court.

Interlocutory Orders, Etc.

IN THE MATTER OF

IMPAX LABORATORIES, INC.

Docket No. 9373. Order, August 15, 2018

Order scheduling oral argument in this Matter.

ORDER SCHEDULING ORAL ARGUMENT

Complaint Counsel have filed their Appeal Brief perfecting their appeal from the Initial Decision in this matter; the Respondent has filed its Answering Brief; and Complaint Counsel must file their Reply Brief on or before August 24, 2018. 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), however, provides that the Commission may extend for good cause any of the time periods relating to an appeal from an Initial Decision, and a new Member of the Commission will take office in the near future. The Commission therefore has determined to conduct the Oral Argument in this matter on October 11, 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. Complaint Counsel 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 October 4, 2018, at 5 pm.

By the Commission, Commissioner Ohlhausen not participating.

Interlocutory Orders, Etc.

IN THE MATTER OF

ALIMENTATION COUCHE-TARD INC.
AND
CROSSAMERICA PARTNERS LP

Docket No. C-4635. Order, August 16, 2018

Letter approving application of Alimentation Couche-Tard Inc. and CrossAmerica Partners LP to divest two retail fuel outlets to Northern Tier Retail LLC, a wholly-owned subsidiary of Andeavor Corporation.

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-4635*

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"), received on May 15, 2018 and amended on July 10, 2018 ("Petition"). Pursuant to the Decision and Order in Docket No. C-4635, ACT requests prior Commission approval of its proposal to divest two retail fuel outlets to Northern Tier Retail LLC ("Northern Tier"), a wholly-owned subsidiary of Andeavor Corporation.

After consideration of ACT's Petition and other available information, the Commission has determined to approve the proposed divestiture to Northern Tier 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 Northern Tier in connection with the Petition and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Ohlhausen not participating.

Interlocutory Orders, Etc.

IN THE MATTER OF

ALIMENTATION COUCHE-TARD INC.
AND
CROSSAMERICA PARTNERS LP

Docket No. C-4635. Order, August 29, 2018

Letter approving application of Alimentation Couche-Tard Inc. and CrossAmerica Partners LP to divest seven retail fuel outlets to Molo Oil Company and Twin City Petroleum & Property LLC and one retail fuel outlet to Twin City.

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-4635*

Dear Mr. Gelfand:

This is in reference to the petitions for the approval of the proposed divestiture of certain assets filed by Alimentation Couche-Tard Inc. and CrossAmerica Partners LP (collectively "ACT") received on June 6, 2018, and July 10, 2018 (collectively "Petitions"). Pursuant to the Decision and Order in Docket No. C-4635, ACT requests prior Commission approval of its proposal to divest seven retail fuel outlets to Molo Oil Company ("Molo") and Twin City Petroleum & Property LLC ("Twin City") and one retail fuel outlet to Twin City.

After consideration of ACT's Petitions and other available information, the Commission has determined to approve the proposed divestitures to Molo and Twin City as set forth in the Petitions. In according its approval, the Commission has relied upon the information submitted and the representations made by ACT, Molo, and Twin City in connection with the Petitions and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Ohlhausen not participating.

Interlocutory Orders, Etc.

IN THE MATTER OF

AGILENT TECHNOLOGIES, INC.

Docket No. C-4292. Order, October 4, 2018

Letter approving application of Agilent Technologies, Inc. to allow the cross-license of certain intellectual property between Agilent and Analytik Jena AG.

LETTER ORDER APPROVING CROSS-LICENSE

Matthew C. Parrott, Esq.
Gibson, Dunn & Crutcher LLP

Re: *In the Matter of Agilent Technologies, Inc., Docket No. C-4292*

Dear Mr. Parrott:

This is in reference to the Application for Approval of Proposed Cross-License of certain intellectual property between Agilent Technologies, Inc. and Analytik Jena AG. Pursuant to Rule 2.41(f) of the Commission's Rules of Practice, the Commission has determined to approve the Application. In according its approval to Agilent's Application, the Commission has relied upon the information submitted by Agilent, and the Commission has assumed that information to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

IMPAX LABORATORIES, INC.

Docket No. 9373. Order, November 1, 2018

Order granting non-party Endo Pharmaceuticals Inc.'s motion for leave to produce a copy of the *in camera* testimony Endo witness, Dr. Robert Cobuzzi, provided at trial in the captioned action to the MDL Plaintiffs in the litigation pending in the Northern District of Illinois styled as *In re Opana ER Antitrust Litigation*, 14-cv-10150.

ORDER GRANTING NON-PARTY ENDO PHARMACEUTICALS INC.'S MOTION TO PRODUCE CERTAIN *IN CAMERA* MATERIALS TO MDL PLAINTIFFS

Non-party Endo Pharmaceuticals, Inc. ("Endo") moves for leave to produce a copy of the *in camera* testimony of Endo witness, Dr. Robert Cobuzzi, provided in the evidentiary hearing in the above-captioned proceeding, to the MDL Plaintiffs[1] in the litigation pending in the Northern District of Illinois styled as *In re Opana ER Antitrust Litigation*, 14-cv-10150.[2] Endo explains that Dr. Cobuzzi's testimony was requested in discovery in that litigation, and that Endo agreed to produce a copy subject to the confidentiality protections of the Protective Order in that case.

Neither Complaint Counsel nor Impax, the only parties in the FTC's administrative proceeding, objected to Endo's motion. Although some of the material Endo seeks to release arguably could discuss information Impax regards as confidential, *see* Tr. 2525-26, Impax has had more than ten business days' notice of Endo's motion and has raised no objection. *Cf.* 16 C.F.R. § 3.31 at Appendix ¶ 11 (requiring ten business days' notice before, in response to a discovery request in another matter, a party may produce confidential material submitted by another party or a third party). Under these circumstances, we see no reason to prevent Endo from releasing the testimony of its witness as described, and for the purpose set forth, in Endo's motion. Accordingly,

IT IS ORDERED that Non-Party Endo Pharmaceuticals Inc.'s Motion to Produce Certain *In Camera* Materials to MDL Plaintiffs is hereby **GRANTED**; and

IT IS FURTHER ORDERED that orders in this administrative proceeding providing for *in camera* treatment remain in effect for all other purposes.

By the Commission.

---

1 The MDL Plaintiffs are Direct Purchaser Plaintiffs Value Drug Company; Meijer, Inc. and MeijerDistribution Inc.; End-Payor Plaintiffs Plumbers and Pipefitters Local 178 Health & Welfare Trust Fund, Louisiana Health Service & Indemnity Company, d/b/a Blue Cross and Blue Shield of Louisiana, Fraternal Order of Police, Miami Lodge 20, Insurance Trust Fund, Wisconsin Masons' Health Care Fund, Pennsylvania Employees Benefit Trust Fund, International Union of Operating Engineers, Local 138 Welfare Fund and Mary Davenport; and Retailer Plaintiffs Rite Aid Corporation, Rite Aid Hdqtrs. Corp., CVS Pharmacy, Inc., Walgreen Co., The Kroger Co., Safeway, Inc., HEB Grocery Company, L.P. and Albertson's LLC.

2 The pertinent testimony appears in the transcript of this administrative proceeding at Tr. 2526:14 through 2538:18 and at Tr. 2608:12 through 2623:19.

Interlocutory Orders, Etc.

IN THE MATTER OF

1-800 CONTACTS, INC.

Docket No. 9372. Order, November 7, 2018

Order to extend the time period for issuing a final decision and order until November 14, 2018.

ORDER EXTENDING TIME PERIOD FOR ISSUING FINAL DECISION AND ORDER

In order to give full consideration to the issues presented by the appeal in this proceeding, the Commission has determined, pursuant to Rule 4.3(b), 16 C.F.R. § 4.3(b), to extend the time period for issuing a final decision and order until November 14, 2018.

IT IS SO ORDERED.

By the Commission, Commissioner Wilson not participating.

Interlocutory Orders, Etc.

IN THE MATTER OF

BENCO DENTAL SUPPLY CO., HENRY SCHEIN, INC., AND PATTERSON COMPANIES, INC.

Docket No. 9379. Order, November 26, 2018

Opinion and Order denying Respondent Patterson's Motion for Summary Decision.

OPINION AND ORDER OF THE COMMISSION

By Commissioner Rebecca Kelly Slaughter, for the Commission:

This case involves the distribution of dental supply products to dental practices in the United States. The Respondents, Benco Dental Supply Co. ("Benco"), Henry Schein, Inc. ("Schein"), and Patterson Companies, Inc. ("Patterson"), are full-service distributors that sell consumable dental supplies and equipment to dentists and dental practices. Consumables include gloves, bibs, cement, and sterilization and prevention products, while equipment includes such items as x-ray machines, lights, compressors, and dental chairs.

The Commission's Complaint alleges that the Respondents have violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, by coordinating and agreeing among themselves not to offer discounted prices or otherwise negotiate with certain groups of customers known as "buying groups," "group purchasing organizations," "GPOs," or "buying clubs." We refer to these organizations herein as "buying groups."

Approximately 30 days before the scheduled trial date, Respondent Patterson filed a Motion for Summary Decision (the "Motion") pursuant to Rule 3.24 of the Commission's Rules of Practice. Patterson's Motion concerns Patterson only. Patterson asserts that Complaint Counsel's evidence is insufficient to allow a reasonable trier of fact to conclude that Patterson conspired with the other Respondents to restrict discounting to buying groups. Complaint Counsel oppose the Motion. For the reasons stated in this Opinion, we deny Patterson's Motion.

I. COMPLAINT ALLEGATIONS AND PROCEDURAL BACKGROUND

On February 12, 2018, the Commission issued a four-count administrative complaint against Benco, Schein, and Patterson. The Complaint charges all three Respondents with three counts of restraint of trade (conspiracy) under Section 5 of the FTC Act for an alleged concerted scheme to refuse to negotiate with, or offer discounts to, buying groups. The first count charges the Respondents with a conspiracy under the rule of *per se* illegality, while the second and third counts charge the same conduct as an "inherently suspect" violation and a violation of the truncated rule of reason, respectively. Additionally, the Complaint charges Respondent Benco with one count of unfair methods of competition, based on an alleged invitation to collude.

We summarize the Complaint's allegations briefly. The Respondents collectively control approximately 85 percent of the sale of all dental products and services made through distributors in the United States. Compl. ¶ 2. Respondents sell to, among other buyers, a fragmented customer base of independent dentists. *Id.* Historically these small and discrete customers predominated; but in recent years, buying groups have begun to take root, offering independent dentists the opportunity to combine their purchasing power and obtain more favorable pricing for the supplies and equipment they purchase. *Id.* at ¶¶ 3-4. One advantage of such buying groups is that they allow independent dentists the opportunity to seek lower prices without having to become part of a larger dental practice, corporate dental provider, or other entity. *Id.* at ¶ 4.

According to the Complaint, the Respondents feared that buying groups would drive down prices and threaten their profit margins. *Id.* at ¶ 5. Rather than compete independently for the business of buying groups, Respondents allegedly responded to this threat by agreeing with one another not to provide discounts or otherwise negotiate with buying groups composed of independent dentists. *Id.* at ¶ 8. According to the Complaint, the Respondents' executives engaged in high-level communications with each other during the period 2012-2014 to reach, implement, and police their agreement. *Id.* at ¶¶ 31, 35-73 (summarizing purported conspiratorial communications). The conspiracy allegedly began no later than July 2012 as to Respondents Benco and Schein, and no later than February 2013 as to Respondent Patterson. *Id.* at ¶¶ 32, 36. In keeping with the agreement, Respondents' executives allegedly informed their sales forces not to provide discounts or compete for the business of such groups. *Id.* at ¶ 9. In 2013, the Complaint alleges, Respondent Benco invited Burkhart Dental Supply ("Burkhart"), a regional distributor, to join the agreement. *Id.* at ¶ 11.

The Complaint alleges that the Respondents' conduct has had the purpose, tendency, and effect of, *inter alia*, injuring consumers by restraining price competition, distorting prices, limiting the ability of independent dentists to obtain discounts, and eliminating competitive bidding for sales to buying groups. *Id.* at ¶ 75.

The Respondents deny the substantive allegations of the Complaint.

In support of the Motion, Patterson asserts that a "mountain" of uncontroverted evidence shows that it competed vigorously against Benco and Schein on price and service during the alleged conspiracy period, PMSD[1] at 1; that the record contains numerous sworn denials of

1 We use the following abbreviations in this opinion:

Compl.:	Complaint
PMSD:	Memorandum in Support of Patterson's Motion for Summary Decision
PSMF:	Statement of Material Facts as to Which There Is No Genuine Dispute in Support of Respondent's Patterson Companies, Inc.'s Motion for Summary Decision
PRB:	Respondent Patterson's Reply in Support of its Motion for Summary Decision
CCOppB:	Complaint Counsel's Opposition to Respondent Patterson Companies, Inc.'s Motion for Summary Decision
CCSMF:	Complaint Counsel's Statement of Disputed Material Facts as to Which There Is a Genuine Issue for Trial Part 1: Statement of Material Facts as to Which There Exists a Genuine Issue for Trial

conspiracy by all of the relevant executives, *id.* at 3; and that Complaint Counsel lack sufficient evidence in the face of those denials to create a genuine issue of material fact for trial, *id.* at 3-4.

II. STANDARD FOR SUMMARY DECISION

We review Patterson's Motion pursuant to Rule 3.24 of our Rules of Practice, which provides standards analogous to those that apply to a motion for summary judgment under Federal Rule of Civil Procedure 56. *See McWane, Inc. & Star Pipe Prods., Ltd.*, 2012 WL 4101793, at *5 (F.T.C. Sept. 14, 2012); *Polygram Holding, Inc.*, 2002 WL 31433923, at *1 (F.T.C. Feb. 26, 2002). A party moving for summary decision must show that "there is no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* 16 C.F.R. § 3.24(a)(2).

As with a summary judgment motion, the party seeking summary decision "bears the initial responsibility of . . . identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotations omitted). Provided the movant meets this burden, the "party opposing the motion may not rest upon the mere allegations or denials of his or her pleading," but must instead "set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. § 3.24(a)(3); *see also Celotex*, 477 U.S. at 323-24.

In evaluating the existence of a dispute for trial, we are required to resolve all factual ambiguities and draw all justifiable inferences in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *McWane, Inc.*, 2012 WL 4101793, at *5.

Below, we discuss specific legal principles that govern summary decision in antitrust conspiracy cases.

A. The Sherman Act

Section 5 of the FTC Act prohibits "unfair methods of competition," including conduct that violates the antitrust laws.[2] Violations of Section 1 of the Sherman Act also violate Section 5 of the FTC Act, and the law that has developed under Section 1 is relevant herein. To state a claim under Section 1 of the Sherman Act, a complainant must show that (1) "there was a contract, combination, or conspiracy—or, more simply, an agreement"; and, if so, (2) "the contract, combination, or conspiracy unreasonably restrained trade in the relevant market." *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011) (citation omitted). "[A] restraint

---

CX: Complaint Counsel's Exhibits
RX: Respondent Patterson's Exhibits
IH: Investigational Hearing Transcript
Dep.: Deposition Transcript

2 *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953).

may be adjudged unreasonable either because it fits within a class of restraints that has been held to be 'per se' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" *Realcomp*, 635 F.3d at 825 (citing *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 457-58 (1986)). The *per se* rule summarily condemns certain types of agreements because of their pernicious effects on competition and lack of any redeeming virtue. Agreements subject to the *per se* rule include: price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940); market division, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (per curiam); and certain group boycotts, *Northwest Wholesale Stationers v. Pac. Stationery and Printing Co.*, 472 U.S. 284, 293-95 (1985), *FTC v. Superior Ct. Trial Lawyers Ass'n,* 493 U.S. 411 (1990).

As the Supreme Court has emphasized, "protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws." *United States v. Gen. Motors Corp.*, 384 U.S. 127, 148 (1966). Thus, courts have condemned as illegal *per se* a number of horizontal agreements affecting price, even if they did not directly fix prices. *See, e.g., Catalano, Inc. v. Target Sales*, 446 U.S. 643 (1980) (per curiam) (agreement to standardize credit terms offered to a purchaser); *Sugar Institute v. United States*, 297 U.S. 553 (1936) (agreement to adhere to previously announced prices and terms of sale); *United States v. United Liquors Corp.*, 149 F. Supp. 609, 613 (W.D. Tenn. 1956), *aff'd*, 352 U.S. 991 (1957) (agreement to adopt common classifications of customers entitled to discounts, and standardize the percentage of functional discounts). To establish a horizontal price-fixing scheme, a plaintiff need only demonstrate the existence of an agreement, combination, or conspiracy among actual competitors with the purpose or effect of "raising, depressing, fixing, pegging or stabilizing" the price of a commodity. *Socony-Vacuum Oil Co.*, 310 U.S. at 223. Thus, "an agreement to eliminate discounts" is a type of agreement that "falls squarely within the traditional *per se* rule against price fixing." *Catalano*, 446 U.S. at 648.

Collusive boycotts of customers designed to affect price are also illegal *per se.* In *Superior Court Trial Lawyers Association*, the Supreme Court addressed an agreement reached by a group of court-appointed counsel in the District of Columbia to cease providing representation to defendants until the District increased their compensation. 493 U.S. at 421. The Court observed that the purpose of the agreement was to obtain higher fees and that it was implemented by a concerted refusal to serve an important customer. *Id.* at 422-23. Thus, the horizontal arrangement was "unquestionably a 'naked restraint' on price and output" and illegal *per se*. *Id.* (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.,* 468 U.S. 85, 110 (1984)).

B. Summary Judgment in Sherman Act Conspiracy Cases

"The existence of an agreement is '[t]he very essence of a section 1 claim.'" *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004) (quoting *Alvord-Polk, Inc. v. Schumacher & Co.*, 37 F.3d 996, 999 (3d Cir. 1994)). To show an agreement, the plaintiff must demonstrate that the defendants shared a "unity of purpose or a common design and understanding, or a meeting of minds." *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946); *see also, e.g., Insulate SB, Inc. v. Advanced Finishing Sys., Inc*., 797 F.3d 538, 543 (8th Cir. 2015).

An agreement need not be express to violate the Sherman Act. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948). "The crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (quotation marks and brackets omitted) (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)). Moreover, the plaintiff non-movant's evidence on summary judgment may be direct or circumstantial. *In re Publ'n Paper Antitrust Litig.,* 690 F.3d 51, 63 (2d Cir. 2012); *see also Erie Cty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 867–68 (6th Cir. 2012) ("An agreement, either tacit or express, may ultimately be proven either by direct evidence of communications between the defendants or by circumstantial evidence of conduct that, in the context, negates the likelihood of independent action and raises an inference of coordination."). Thus, the non-movant does not have to submit direct evidence of agreement, *i.e.*, the so-called smoking gun, but can rely solely on circumstantial evidence and reasonable inferences drawn therefrom. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993). Indeed, "it is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators . . . and from other circumstantial evidence." *City of Tuscaloosa v. Harcros Chems.*, 158 F.3d 548, 569 (11th Cir. 1998) (citation omitted); *see also ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 553 (8th Cir. 1991) ("[I]t is axiomatic that the typical conspiracy is rarely evidenced by explicit agreements, but must always be proved by inferences that may be drawn from the behavior of the alleged conspirators.") (internal quotations omitted); 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1410c, at 73 (4th ed. 2017) (an agreement "can exist without any documentary trail and without any admission by the participants").

In a concentrated market, evidence of parallel behavior by market participants, without more, is insufficient to establish a Section 1 violation. *Twombly*, 550 U.S. at 553-54. To survive a motion for summary judgment, a plaintiff who relies on such ambiguous evidence "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984)). Put another way, there must be evidence "that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 768; *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 (3d Cir. 2010). The plaintiff, however, need not demonstrate that the inference of conspiracy is the sole inference. *In re Publ'n Paper Antitrust Litig*., 690 F.3d at 63. Rather, the inference of conspiracy need only be "reasonable in light of the competing inferences of independent action or collusive action." *Matsushita*, 475 U.S. at 588.

Summary judgment for a defendant is generally not appropriate where a plaintiff has produced direct evidence of an agreement. *See Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300 (11th Cir. 2003); *Petruzzi's IGA Supermarkets,* 998 F.2d at 1233; *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 441 (9th Cir. 1990). We need not draw a bright line between direct and circumstantial evidence, however. *See In re Publ'n Paper Antitrust Litig.*, 690 F.3d at 63. Instead, we are to evaluate whether the record evidence *as a whole* suffices to support an inference of concerted action. *Intervest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 160 (3d Cir. 2003).

The case law thus instructs that, in ruling on the summary decision motion by Patterson, we evaluate the record as a whole in the light most favorable to Complaint Counsel to determine whether there exists a genuine dispute of any material fact. In the absence of such a disputed material fact, a tribunal would also decide whether the law and facts compel a decision for Patterson. Because Patterson's Motion only addresses whether it participated in an agreement with the other Respondents, we limit our analysis to this issue. *See Celotex*, 477 U.S. at 323 ("a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion.").

III. EVIDENCE OF AN AGREEMENT

In order to succeed in its motion for summary decision, Patterson must demonstrate that, upon review of the evidence in the light most favorable to Complaint Counsel, there is no genuine dispute that Patterson behaved independently rather than pursuant to an agreement with Benco and Schein. Complaint Counsel may defeat summary decision by pointing to specific facts that would allow a trier of fact to reasonably infer an agreement between the Respondents, hence creating a genuine issue for trial. In this section, we discuss Complaint Counsel's evidence.

Complaint Counsel's primary evidence consists of email communications between senior executives of Patterson and Benco regarding sales to buying groups; they assert these communications constitute "direct and unambiguous evidence" of conspiracy. CCOppB at 15-18. Direct evidence is evidence that is explicit and requires no inferences to establish the proposition being asserted. *See, e.g., Champagne Metals v. Ken-Mac Metals*, 458 F.3d 1073, 1083 (10th Cir. 2006); *but cf. In re Publ'n Paper Antitrust Litig.*, 690 F.3d at 64 ("All evidence, including direct evidence, can sometimes require a factfinder to draw inferences to reach a particular conclusion, though perhaps on average circumstantial evidence requires a longer chain of inferences.") (quotation omitted).

In addition to these communications, Complaint Counsel point to other evidence, including email communications and text messages, that they say provide (1) internal confirmation of the existence of an agreement; (2) evidence that Patterson complied with the agreement; and (3) evidence that Patterson monitored the other firms' compliance with the agreement. CCOppB at 15-18; CCSMF ¶¶ 20-30, 33-48, 51-52.

Finally, Complaint Counsel proffer circumstantial, "plus factor" evidence that they claim supports an inference of a conspiracy. Courts evaluate plus factor evidence to decide summary judgment motions when an antitrust plaintiff relies on parallel behavior by the defendants to support a finding of conspiracy.[3] *See, e.g., Williamson Oil*, 346 F.3d at 1301; *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001). The plus factor analysis seeks to ensure that courts

3 Plus factors are unnecessary if there is direct evidence of an agreement. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 (3d Cir. 2010). As discussed above, Complaint Counsel have adduced what they contend is direct evidence sufficient to defeat Patterson's motion. Without reaching that contention, we discuss the evidence of plus factors for the sake of completeness.

punish concerted action and not merely the "unilateral, independent conduct of competitors." *In re Flat Glass Antitrust Litig.*, 385 F.3d at 360 (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999)). Although most cases that apply plus factor analysis involve consciously parallel pricing, the analysis is equally useful for a claim of conspiracy that involves, as this one does, putatively parallel refusals to bid for sales to certain types of customers. *See, e.g., SD3, LLC v. Black & Decker (U.S.) Inc*., 801 F.3d 412, 427-31 (4th Cir. 2015), *as amended on reh'g in part* (Oct. 29, 2015); *Petruzzi's IGA Supermarkets*, 998 F.2d at 1243.

We briefly elaborate on Complaint Counsel's evidence as follows, though we need not conclude whether the evidence is direct or circumstantial for the purpose of resolving this motion.[4]

A. Inter- and Intra-Firm Communications

In February 2013, Chuck Cohen, Benco's Managing Director, learned that Patterson was planning to discount to the buying group New Mexico Dental Cooperative ("NMDC"). CCSMF ¶ 20. In response, Cohen wrote to several Benco officials, "We don't recognize buying groups . . . . I'll reach out to my counterpart at Patterson to let him know what's going on in NM." *Id*. Cohen emailed Patterson's President, Paul Guggenheim, forwarding an email in which NMDC had announced its intention to partner with Patterson. CX0056-001. Cohen wrote to Guggenheim:

> Just wanted to let you know about some noise I've picked up from New Mexico. FYI: Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy.

CCSMF ¶ 21.

[redacted] Guggenheim forwarded Cohen's email to Patterson's Vice Presidents of Sales (Dave Misiak) and Marketing (Tim Rogan). CCSMF ¶ 24. Guggenheim then responded to Cohen a few hours later: "Thanks for the heads up. I'll investigate the situation. We feel the same way about these." *Id.* at ¶ 25. [redacted]

4 Whether the proffered evidence is direct or circumstantial is an issue that need not be resolved in order to rule on the motion. *See In re Publ'n Paper Antitrust Litig.*, 690 F.3d at 64 (a tribunal need not draw a "bright line" between direct and circumstantial evidence to decide summary judgment motion).

5 [redacted]

[redacted] Three days later, Patterson informed NMDC that it would not partner with the buying group. CCSMF ¶ 27. [redacted]

That same month, Atlantic Dental Care ("ADC") approached Patterson's Chesapeake, Virginia, branch manager seeking a bid. CCSMF ¶ 42. Patterson's Misiak directed the region to reject ADC, saying, "[C]urrently we do [not] participate with group purchasing organizations. . . . Confidential and not for discussion . . [.] our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me." *Id.* at ¶ 43. Guggenheim later learned that Benco bid on ADC and won the account. *Id.* at ¶ 45. On June 6, 2013, Guggenheim reached out to Cohen, replying to the February 2013 email in which Cohen had communicated Benco's no-buying-group policy. *Id.* Guggenheim asked:

> Reflecting back on our conversation earlier this year, could you shed some light on your business agreement with Atlantic Dental Care? ... I'm wondering if your position on buying groups is still as you articulated back in February?
>
> Let me know your thoughts . . . Sometimes these things grow legs without our awareness.

CX0095-001. In an email response, Cohen explained that [redacted]

Cohen also confirmed that, "[a]s we've discussed, we don't recognize buying groups." *Id.*[7] He further assured Guggenheim that [redacted]

6 [redacted]

7 Large group practices, sometimes referred to as dental service organizations ("DSOs"), are distinct from buying groups in that the former have multiple locations combined under a single ownership structure, while the latter seek to aggregate the purchases of practices that remain independently owned. *See* [redacted] The Respondents recognized this distinction as critical to how they treated the entities. *See, e.g.*, CX0011-003 (Ryan (Benco) email: "We don't allow [large group] pricing unless there is common ownership. Neither Schein nor Patterson do either.").

[redacted] *Id.* Guggenheim replied, "[redacted] Just wanted to clarify where you guys stand." *Id.* [redacted] After receiving Cohen's email, Guggenheim recalled [redacted]

In October 2013, the Texas Dental Association ("TDA") created the TDAPerks buying group. CCSMF ¶ 49. Patterson executives discussed TDAPerks with their competitors and coordinated with the other Respondents on whether the parties would attend the TDA annual trade show, which is an important source of revenue for TDA. CCSMF at ¶ 50; *see also* CX0110-003 (Patterson "discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level"). [redacted] Benco's Texas regional manager wrote that he would call the Patterson manager about whether Patterson pulled out of the TDA annual meeting, adding that, "[l]ast time I spoke with him about three weeks ago, they were out, but considering options." CX1289-001. [redacted] In January 2014, Patterson's Misiak and Schein's VP & General Manager Dave Steck had a 14-minute phone call about attendance at the TDA trade show. CCSMF at ¶ 51. Steck emailed Misiak two weeks later, saying, "I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple of days," apparently referring to a decision on whether to pull out of the TDA annual meeting. *Id.*[8] Misiak forwarded Steck's email to his colleague Tim Rogan (Patterson): "He already told me they were out. Full blown!" Rogan responded: "That sucks. You should call him," and suggested a "'[t]hought I could trust you' type of conversation." *Id.* [redacted]

Patterson's internal communications also discussed the company's position on buying groups. In August 2013, Patterson's Vice President of Marketing, Tim Rogan, wrote: "We don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry." CCSMF at ¶ 29. In June 2014, Neal McFadden, Patterson's President of Special Markets, sent a text message to a former colleague who was working for a buying group. The text message stated, "[W]e've signed an agreement that we won't work with GPO's." *Id.* at ¶ 30.

Benco's internal communications discuss the Respondents' positions on buying groups as well. In May 2015, Benco's Patrick Ryan turned down a buying group called Dentistry Unchained, stating internally, "[t]he best part about calling these [buying groups] is I already KNOW that Patterson and Schein have said NO." *Id.* In July 2015, Ryan wrote to a Benco sales representative who was concerned about losing an account to a buying group, saying, "[w]e don't allow [volume discount] pricing unless there is common ownership. Neither Schein nor Patterson do either." *Id.* at ¶ 31. Regarding the TDA, a Schein executive wrote, "[t]he good thing here is that [Patterson], Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." *Id.* at 11 n.61.

8 *See also* CX2884-001 ("I have to get back to PDCO on whether or not we are attending the TDA.").

For purposes of its Motion, Patterson does not appear to contest the authenticity of the above-described email communications and text messages. Instead, Patterson vigorously contests Complaint Counsel's interpretation of the communications and offers alternative explanations.[9] However, Patterson's alternative explanations largely confirm the existence of a material factual dispute rather than detract from one. In any event, as we discuss further below, taking the evidence as a whole in the light most favorable to Complaint Counsel, a reasonable trier of fact could conclude that Patterson agreed to join a boycott of buying groups.

B. Compliance and Monitoring Evidence

Complaint Counsel point to evidence pertaining to compliance with and monitoring of the alleged agreement. Complaint Counsel assert that Patterson's executives repeatedly instructed its salesforce not to do business with buying groups during the alleged conspiracy period, and identify approximately a dozen Patterson emails to support this assertion. CCSMF ¶¶ 33-41. Complaint Counsel also assert that Patterson routinely rejected buying groups during the conspiracy. CCSMF ¶ 59. For its part, Patterson explains that [redacted]

Complaint Counsel also offer evidence that they say demonstrates that Patterson monitored and enforced against cheating by the other Respondents. *See* CCOppB at 17-18; CCSMF ¶¶ 43-44 (Misiak wrote to a branch manager that "our 2 largest competitors stay out of these [buying groups] as well. If you hear differently and have specific proof please send that to me"; Misiak wrote to Guggenheim that "I'm concerned that Schein and Benco sneak into these co-op bids and deny it"); CCSMF ¶ 45 (Guggenheim email to Cohen: "Reflecting back on our conversation earlier this year, could you shed some light on your business agreement with Atlantic Dental Care?").

---

9 For example, Patterson argues that Cohen's email to Guggenheim ("Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups . . .") [redacted] PMSD at 16. Guggenheim's response, in turn, [redacted] ("We feel the same way about these."), [redacted] Supporting this interpretation, Guggenheim testified that he did not view Cohen's statement as a commitment from Benco, but rather a piece of [redacted] *Id.* at 17; PRB at 6. Patterson also argues that McFadden's text message ("we've signed an agreement not to work with GPOs") [redacted] PRB at 8.

C. Plus Factors

Complaint Counsel further adduce "plus factors" to support an inference of conspiracy. Complaint Counsel seek to rely on four plus factors recognized by courts: 1) a common motive to conspire; 2) evidence that the defendant acted contrary to its unilateral self-interest; 3) a high level of inter-firm communications; and 4) abrupt changes in conduct. *See Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005), *rev'd on other grounds*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *In re Publ'n Paper Antitrust Litig.*, 690 F.3d at 62; *In re Domestic Drywall Antitrust Litig*., 163 F. Supp. 3d 175, 255-56 (E.D. Pa. 2016).

Below, we discuss each plus factor separately for clarity's sake, but we remain mindful that we must evaluate the evidence "as a whole to see if together it supports an inference of concerted action." *Intervest, Inc. v. Bloomberg, L.P.*, 340 F.3d at 160.

1. Respondents' Motive to Conspire

Complaint Counsel posit that the Respondents, including Patterson, had a common motive to conspire. Economic logic suggests that the buying groups could aggregate their purchasing power to demand bigger discounts on their supplies and equipment than what individual dentists or small practices could demand; such discounts could cut into the distributors' margins. Complaint Counsel have marshalled evidence to show that this is what the Respondents feared. *See, e.g.*, [redacted]; CX1149-002 (thread comment from Benco's Ryan: "GPOs are what [ruined] the medical supply business [redacted] If this door is ever opened in dental, its [*sic*] all over for all of us. . . . [redacted]).

Complaint Counsel argue this evidence supports the position that Respondents shared a motive to resist discounting without risking the loss of business to one another.

2. Actions Against Patterson's Unilateral Economic Self Interest

Complaint Counsel offer evidence that, although Patterson and the other Respondents *collectively* had a motive to conspire and to refuse to deal with buying groups, Patterson acted against its *unilateral* self-interest in refusing to sell to them. CCOppB at 21-23.

For example, Complaint Counsel point to deposition testimony that [redacted] *see also* CX3089-001 to -002 (Patterson losing "high quality / high producing clients" to Kois, a buying group, and "the cut is deep to us all"; "many of our best doctors are Kois followers, so I think this is a precarious situation for us as a company"); CX0093-001 (noting a concern that Patterson may lose a "big chunk of business" by not bidding on a GPO

RFP); CX3043-001 (regarding the threat of existing customers joining Smile Source, a buying group: "Don't underestimate the impact they can have . . . scary," then "I totally agree. We're already suffering under that Synergy Dental Partners buying group here and Smile Source will only make it worse.").[10]

Complaint Counsel also offer the analysis of an expert economist, Dr. Robert C. Marshall, to support their contention that Patterson acted against its unilateral self-interest by declining to bid for buying groups.[11] Dr. Marshall opined that,

[redacted]

10 Other emails suggest that the distributors understood that it was in their individual best interest to compete for buying groups' business at times. For example, Misiak's email ("I'm concerned that Schein and Benco sneak into these co-op bids and deny it.") makes sense only if he believed that Schein and Benco had an incentive to sell to the buying groups. CX0092-001. *See also* [redacted]

11 Patterson argues that because Dr. Marshall's opinion is unsworn, we should not consider it in opposition to summary decision. PRB at 3. "Subsequent verification or reaffirmation of an unsworn expert's report, either by affidavit or deposition," however, "allows the court to consider the unsworn expert's report on a motion for summary judgment." *DG&G, Inc. v. FlexSol Packaging Corp. of Pompano Beach*, 576 F.3d 820, 826 (8th Cir. 2009) (brackets and quotations omitted); *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 539 (4th Cir. 2015), *as amended* (June 24, 2015) (accord); *Maytag Corp. v. Electrolux Home Products, Inc.*, 448 F. Supp. 2d 1034, 1065 (N.D. Iowa 2006), *aff'd*, 224 Fed. App'x 972 (Fed. Cir. 2007) ("an unsworn expert report may be considered at summary judgment where the opinions therein are otherwise adopted or reaffirmed in an admissible affidavit or deposition testimony by the expert"). Dr. Marshall was deposed at length about his report and reaffirmed his findings throughout. *See, e.g.*, RX2963 at 262-63; RX2964 at 42-43, 101-02. Accordingly, his expert report is properly considered on a motion for summary decision.

[redacted]

Finally, to support the argument that Patterson was acting against its own interests, Complaint Counsel contrast Patterson's actions during the alleged conspiracy period with its behavior afterward. Specifically, Complaint Counsel state that in 2016, a year after the Commission began its investigation into the Respondents' alleged agreement and the Texas Attorney General settled related charges with Benco, Patterson's stance changed, and it began to pursue business from buying groups. *See* CCOppB at 12 & n.68 ("Normally I would . . . stat[e] that we do not participate in buying groups for multiple reasons . . . . Given our recent discussion with Smile Source are we looking at talking with Buying Groups now?"). In [redacted], less than a year after it refused Dentistry Unchained, Patterson offered the group discounted pricing, reasoning: "[W]e must start stretching—This seems to be the only way for now to insert ourselves into the mix with these GPO's." CCSMF ¶ 66.

3. Unexplained Communications with Competitors

As discussed above in Section III.A, Complaint Counsel offer evidence of high-level contacts between the Respondents' executives, during which they exchanged views about their intentions not to bid for particular buying groups. In an appropriate case, such contacts can constitute a "plus factor" that tends to exclude the inference that the defendants acted independently. *See, e.g.*, *In re Publ'n Paper Antitrust Litig.*, 690 F.3d at 65 (finding inference of conspiracy permissible because, among other reasons, defendants engaged in private phone calls and meetings at which they disclosed their pricing intentions before those decisions were publicly announced); *Gainesville Utils. Dep't v. Florida Power & Light Co.*, 573 F.2d 292, 300-01 (5th Cir. 1978) (finding that parallel activity plus numerous communications between rival firms' high-level executives, including notifications to each other about refusals to serve customers in the other's territory, point strongly to existence of conspiracy).

Here, Complaint Counsel have submitted evidence they assert demonstrates that Respondents' inter-firm communications were not mere information exchanges, but were intended to elicit mutual assurances of non-competition. For example, Complaint Counsel note that Cohen's original impetus for reaching out to Guggenheim about NMDC was that he had learned that the buying group was touting a potential partnership with Patterson. CCOppB at 5; CX0055-004. Afterward, [redacted] CCSMF ¶ 22. Complaint Counsel suggest that Cohen veiled his outreach to Guggenheim to avoid suspicion. *See* CCOppB at 5-6. Complaint Counsel also offer evidence that Benco's personnel understood that they had a channel to Patterson that they could use if necessary. When Benco executive Patrick Ryan learned that another distributor, Burkhart, was discounting to buying groups, he wrote to Cohen: "CHUCK – maybe what you should do is make sure you tell Tim

[Sullivan, President of Schein] and Paul [Guggenheim] to hold their positions as we are." CCSMF ¶ 32.

4. Evidence of Patterson's Changes of Conduct

Complaint Counsel point to an additional "plus factor" in the form of evidence of changes in Patterson's conduct. Courts have held that abrupt changes in conduct can serve as a "plus factor" because they tend to show that a market participant's conduct was not independent. In *Toys "R" Us, Inc. v. FTC,* 221 F.3d 928 (7th Cir. 2000), toy manufacturers abruptly decided to stop dealing with warehouse clubs based on direct negotiations between the toy manufacturers and Toys "R" Us, which was attempting to organize a boycott of the clubs. The Seventh Circuit found that it was "suspicious" for the manufacturers to deprive themselves of a profitable sales outlet. *Id.* at 935-36. The court affirmed that this was a horizontal agreement. *Id.*; *see also In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d at 255-56 (within weeks of each other, drywall manufacturers all changed policy and refused to issue "job quotes" that had been in use since the 1980s).

Based on Mr. Guggenheim's testimony, Complaint Counsel assert that [redacted] in February 2013 when Cohen sent his initial email to Guggenheim. CCOppB at 25 (citing [redacted]). Complaint Counsel assert that after the February 2013 Cohen-Guggenheim correspondence, however, Patterson instructed its salesforce to reject buying groups and, in fact, repeatedly rejected buying group customers. *Id.* at 25-26. Complaint Counsel also point to the change of conduct that took place after the alleged conspiracy ended – namely, that in 2016 Patterson did provide discounts to some buying groups. *Id*. at 12, 27. Complaint Counsel also identify two apparent shifts in Patterson's approach to ADC, as discussed above in Section III.A: (1) Patterson's rejection of ADC in February 2013 after the Cohen-Guggenheim correspondence; and (2) Patterson's effort to re-engage with ADC after a June 2013 Cohen-Guggenheim exchange in which Benco clarified its view that ADC was not a buying group. CCOppB at 26-27.

IV. ANALYSIS

Complaint Counsel insist that it has proffered direct and unambiguous evidence of an agreement, including the Cohen-Guggenheim email exchange. CCOppB at 13-18. In support of its Motion, Patterson has, in significant part, offered competing interpretations of Complaint Counsel's evidence and disputed whether it is direct evidence. PMSD at 16-19; PRB at 11-12. At summary decision, we need not choose among the competing interpretations or decide whether the evidence is direct or circumstantial. We need only determine whether the record *as a whole* offers sufficient evidence of an agreement to create a genuine issue of material fact. *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir. 2002); *see also Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1224 (2d Cir. 1994) ("When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper.").[12]

12 In *High Fructose Corn Syrup*, Judge Posner explained that a "trap to be avoided" is to suppose that "if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat

We find that the record contains evidence of an agreement sufficient to create a genuine issue for trial.

A. Inter- and Intra-Firm Communications and Monitoring and Compliance Evidence

We find that it is a plausible interpretation of the evidence that Cohen contacted Guggenheim in the hope of obtaining Guggenheim's assurance that Patterson would not bid for the business of buying groups, an assurance that Cohen elicited by offering his own assurance on Benco's behalf. Moreover, the intra-firm communications could support an inference that Patterson understood that Benco and Schein had joined it in declining to bid for buying groups. *See, e.g.*, CCSMF ¶ 43 (quoting a Patterson document stating, "Confidential and not for discussion . . [.] our 2 largest competitors stay out of these as well").

Furthermore, the inter- and intra-firm communications could support an inference that Patterson believed it had channels through which it could raise with Benco its concerns about potential sales to buying groups. Regarding Benco's potential sponsorship of the TDA trade show, Patterson's Rogan suggested a "[t]hought I could trust you" conversation, which could imply a sense of mutual obligation to boycott buying groups. *Id.* at ¶ 51. Regarding Benco's bid to ADC, Guggenheim wrote directly to his counterpart, Cohen, to inquire whether Benco's policy toward buying groups had changed. CX3301-001. Cohen's elaborate response to Guggenheim, in which he described in detail why ADC was not a buying group, could support the inference that Cohen felt obligated to explain this apparent shift to Guggenheim and to remain compliant with the original assurance he provided not to deal with buying groups. *See Twombly*, 550 U.S. at 556 n. 4 (noting that "conduct that indicates the sort of restricted freedom of action and sense of obligation" is "generally associate[d] with agreement") (citation and original brackets omitted).

In an oligopolistic market such as this one, it is plausible that Benco, Schein, and Patterson would find it in their individual interests to watch each other "like hawks," and perhaps even mimic one another's behavior.[13] However, the June 2013 Guggenheim-Cohen exchange regarding ADC, which revisits the assurances that each gave to refuse to compete for buying groups, could support an inference that Patterson sought to monitor or foster compliance with a conspiracy.[14] Patterson's apparent desire to avoid documenting the assurances against

---

summary judgment. It is true that zero plus zero equals zero. But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party. Otherwise what need would there ever be for a trial?" 295 F.3d at 655.

13 *See In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 873, 879 (7th Cir. 2015) (Posner, J.). Of course, consciously parallel behavior by competitors in a concentrated market without a meeting of the minds is not, by itself, unlawful. *Twombly*, 550 U.S. at 553-54 (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)).

14 Patterson contends that Guggenheim only sought to gain [redacted] by his June 2013 email to Cohen. PRB at 12. However, Patterson's dispute of the meaning of the evidence does not support its claim for summary decision because it either suggests a genuine issue of material fact or it fails to view the evidence in the light most favorable to the non-moving party, which is not the appropriate standard on summary decision.

competition for buying groups' business underscores their oddity. CCSMF ¶ 43 ("Confidential and not for discussion . . [.] our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me."); *see also* CX3300-001 ("Please discuss live and no further emails [on this topic]"); CCSMF ¶ 35 ("We don't sell to buying groups. Let's talk live.").

Patterson asserts that its communications with competitors cannot support a finding of conspiracy because all of the communications involving particular buying groups took place after Patterson independently decided not to negotiate with those groups. PMSD at 29. Specifically, Patterson notes that [redacted] *Id.* at 16. Patterson also asserts that [redacted] *Id.* at 26. In addition, Patterson claims that [redacted] *Id.*

We find Patterson's argument unpersuasive. First, Patterson's factual assertions regarding the timing of key decisions are disputed. Complaint Counsel claim that, although Patterson's branch manager cancelled the meeting with NMDC before the Cohen-Guggenheim exchange, he expressed his intention to schedule a different meeting with NMDC and to continue partnering with the group. CCOppB at 6 n.30 (citing CX4090). It was not until three days after the exchange that Patterson informed NMDC that it would not be partnering with the buying group. *Id.* at 6. Further, with respect to the communications regarding whether ADC was a buying group, Complaint Counsel have provided evidence that, even though Patterson did not bid for that business initially, Guggenheim instructed his salesforce after the exchange with Cohen to [redacted] *Id.* at 26. Thus, there is a factual dispute regarding whether Patterson's communications about particular buying groups or transactions occurred prior to the relevant Patterson decision.

Second, viewed in the light most favorable to Complaint Counsel, a factfinder could reasonably conclude that Patterson's communications with its rivals regarding past decisions helped ensure its continued adherence to a conspiracy when presented with future business opportunities. In other words, confirming that Benco or Schein stuck to a boycott could influence Patterson's decision to continue doing the same when approached by buying groups in the future. Indeed, Complaint Counsel have provided evidence from which a reasonable trier of fact could find that the Respondents' inter-firm communications actually influenced Patterson's business decisions. Guggenheim's email response to Cohen's NMDC email appears to have preceded an outpouring of instructions from Patterson's upper management to its sales staff not to deal with buying groups and to monitor Benco and Schein's engagements with buying groups. CCSMF ¶ 33 ("Confidential and not for discussion . . [.] our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me."); *id.* ¶¶ 34-40 (email from Misiak: "My guidance has been to politely say no [to buying groups] and

w[ea]ther the storm with these"; email from Rogan: "We don't sell to buying groups. Let's talk live"; email from McFadden (President of Special Markets): "As a rule we are trying our best to steer clear of all buying groups").

Third, even if *Patterson* had already reached its decision not to deal with a particular buying group, a factfinder could reasonably infer that its inter-firm communications encouraged Benco and Schein to continue to refuse to negotiate with buying groups. Benco and Schein executives made it clear that Patterson's assurances were relevant to their decision not to sell to buying groups. CCSMF ¶ 31 ("We don't allow [volume discount] pricing unless there is common ownership. Neither Schein nor Patterson do either."). Regarding the TDA, a Schein executive wrote, "[t]he good thing here is that [Patterson], Benco and us are on the same page regarding these buying groups/consortiums." *Id*. at 11 n.61.

Patterson also proffers evidence that its representatives met with and evaluated buying groups during the conspiracy period, but this evidence does not compel summary decision in Patterson's favor. Complaint Counsel need not prove that the parties to a conspiracy complied perfectly with it. *See In re High Fructose Corn Syrup*, 295 F.3d at 656 (counseling against the "trap" on summary judgment of "failing to distinguish between the existence of a conspiracy and its efficacy"). In any event, the parties sharply dispute the extent to which Patterson sold to buying groups during the alleged conspiracy period. *Compare* PMSD at 24 (Patterson "met with and evaluated whether to sell to 'buying groups' – and sold to them when it made sense to Patterson, and did not, when it did not") *with* CCSMF ¶ 59 ("Patterson routinely rejected buying groups during the conspiracy") *and* CCSMF ¶ 30 ("[W]e've signed an agreement that we won't work with GPO's.").

Patterson's other claims of non-compliance also do not preclude an inference of a conspiracy. Patterson points to evidence that it competed vigorously against Benco and Schein for market share during the alleged conspiracy period. Among other examples, this evidence includes efforts to [redacted] competitors with price cuts and better service; to [redacted] them to Patterson; to [redacted]; and to [redacted] PMSD at 1; PSMF ¶¶ 21-32. Patterson argues that this evidence is inconsistent with a conspiracy and demonstrates its independent decision-making and procompetitive conduct. PMSD at 24-25. In response, Complaint Counsel point out that Patterson's evidence describes competition for DSOs and independent dentists, not buying groups. CCOppB at 27-28. DSOs and independent dentists are outside the scope of the alleged conspiracy, say Complaint Counsel, and hence competition for their business is not material. *Id.* We agree. Respondents' vigorous competitive give-and-take for the business of independent dentists and DSOs could be seen as highlighting, by way of contrast, the unusual nature of their conduct in declining to compete for buying groups.

When viewed in the light most favorable to Complaint Counsel, as they must be at the summary decision stage, the inter- and intra-firm communications, combined with the other evidence of Patterson's monitoring and compliance efforts during the alleged conspiracy period, provide support for a reasonable trier of fact to find that the Respondents shared a "unity of purpose or a common design and understanding, or a meeting of minds." *Am. Tobacco Co.*, 328

U.S. at 810. *See Paramount Pictures*, 334 U.S. at 142 ("It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement."); *White v. R.M. Packer Co.*, 635 F.3d 571, 576 (1st Cir. 2011) (tacit agreement can be shown by "uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable") (quotation omitted); *see also United States v. Beaver*, 515 F.3d 730, 738 (7th Cir. 2008) (upholding jury's conspiracy verdict in part based on monitoring evidence); *In re Plywood Antitrust Litig.*, 655 F.2d 627, 634 (5th Cir. 1981) (same).[15]

B. Plus Factors

Complaint Counsel identify four plus factors that they contend support the inference of a conspiracy. Patterson substantially disputes this conclusion with respect to each of the four factors. For the reasons describe below, we find that the plus factor evidence put forward by Complaint Counsel further militates against summary decision.

1. Respondents' Motive to Conspire

First, Complaint Counsel maintain that Respondents shared a motive to resist discounting without risking the loss of business to one another. CCOppB at 19-20. Complaint Counsel have marshalled evidence that Patterson perceived buying groups as a threat and was concerned about its competitors' willingness to compete for buying group business. *See* Section III.C.1. Patterson does not specifically assert that it did not have a common motive to conspire with Benco and Schein. Instead, it produces evidence to show that it generally had independent and legitimate reasons to refuse business with buying groups, including [redacted]. PMSD at 11-12; PSMF ¶¶ 16-19; PRB at 9-10.

Patterson's asserted independent reasons arguably might be a plausible basis for Patterson to decline to bid for buying group business, but such reasons are insufficient to preclude a finding that Patterson had a collective interest to conspire with Benco and Schein. Viewing the record as a whole, a factfinder could conclude that buying groups were undesirable for the reasons Patterson claims *and also* a threat to each Respondent's margins if the others chose to compete. If indeed buying groups posed such a threat, a factfinder could also reasonably infer that a conspiracy with Benco and Schein could minimize the threat. *See* [redacted]

15 The Ninth Circuit's discussion in *Esco Corp. v. United States*, 340 F.2d 1000 (9th Cir. 1965), is also instructive. There, the court provided an example of competitors who meet and state in round-robin fashion what they plan to charge for their products, while simultaneously denying that they intend to fix prices. *Id.* at 1007. The competitors leave the meeting and all charge the same price for their products. Observing that "[a] knowing wink can mean more than words," *id.*, the court reasoned that, while such facts would not compel an inference of conspiracy, they also would not compel an inference of no conspiracy, and the case is appropriate for disposition by a factfinder. *Id.; see also United States v. Foley*, 598 F.2d 1323, 1332 (4th Cir. 1979) (upholding conspiracy verdict when real estate broker announced his intention to raise commissions, stating that he did not care what the others did, and each competitor raised its commissions in tandem).

[redacted]

Moreover, antitrust defendants are not entitled to summary judgment "merely by showing that there is a plausible explanation for their conduct." *In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38, 61-62 (E.D. Pa. 2007) (quoting *Intervest, Inc. v. Bloomberg, LP.*, 340 F.3d at 160). "Indeed, if solid economic reasons existed for refusing service to [potential customers], there was no reason for communicating with a competitor about the refusal[.]" *Gainesville Utils. Dep't v. Florida Power & Light Co.*, 573 F.2d at 301. We conclude, therefore, that there is evidence from which a trier of fact could find that the Respondents had a common motive to conspire.

2. Actions Against Patterson's Unilateral Economic Self Interest

For a second plus factor, Complaint Counsel submit that Patterson acted against its *unilateral* self-interest in refusing to sell to the buying groups. As one court explained, action against self-interest requires "a showing that the defendants' behavior would not be reasonable or explicable (*i.e*. not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade – that is, that the defendants would not have acted as they did had they not been conspiring in restraint of trade." *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d at 572.

Complaint Counsel offer sufficient evidence from which a fact finder could conclude that Patterson took actions against its unilateral self-interest in declining to deal with buying groups, including (1) admissions by Patterson officials about lost buying group business, *see* [redacted]; CX3089; CX0093; CX3043, (2) an economic analysis of lost profits, *see* [redacted], and (3) a change in Patterson's behavior before and after the alleged conspiracy. *See* CCOppB at 12 & n.68; CCSMF ¶ 66.

Patterson asserts that Complaint Counsel's allegation of actions against self-interest "suffer[s] from severe hindsight bias." PRB at 13. Patterson points to evidence that the Kois buying group was [redacted] *Id.* at 9-10 (citing RX3023 (Kois Sr. Dep.) at 125-27). Burkhart, another dental supplier not alleged to be part of the conspiracy, had also rejected Kois initially. PRB at 13. Patterson also disputes the validity and utility of Dr. Marshall's analysis, calling it "sleight-of-hand." *Id.* at 3. Patterson points out that Dr. Marshall's case studies involved Kois and Smile Source, *not* the two specific buying groups – NMDC and ADC – that the company had discussed in emails with Benco, and asserts that some of the examples do not pertain to the alleged conspiracy period. *Id.* Patterson further argues that Dr. Marshall's sample size of dentists is insufficient and that [redacted] *Id.* at 3-4.

Complaint Counsel's evidence of Patterson's actions against self-interest may reasonably be subject to differing views. Nonetheless, resolving ambiguities in favor of Complaint Counsel, as we must on summary decision, we find that Complaint Counsel's evidence identified above

tends to exclude the possibility that Patterson acted independently in declining to compete for the business of buying groups.[16] *See Petruzzi's IGA Supermarkets*, 998 F.2d at 1244-46 (holding that the defendants' failure to bid on each other's accounts raised an inference of a conspiracy). Patterson does not dispute that some of its "high quality / high producing clients" joined Kois, CX3089, yet the company did not bid for Kois business. Furthermore, the fact that Patterson and Benco did not specifically discuss Kois and Smile Source does not defeat the inference that Complaint Counsel seek, because the emails *did* discuss the parties' respective policies vis-à-vis buying groups generally. Accordingly, we find that this plus factor weighs against summary decision.

3. Unexplained Communications with Competitors

Third, Complaint Counsel assert that the proffered evidence of high-level, inter-firm communications between the Respondents' executives amount to unexplained communications with competitors, a plus factor that tends to exclude the inference that the defendants acted independently. Patterson maintains that the inter-firm communications in this case are too few and innocuous to serve as plus factor evidence. PRB at 15-16. To be sure, courts have held "sporadic exchanges of shop talk" by lower-level employees insufficient to defeat summary judgment in price-fixing cases. *See, e.g.*, *In re Baby Food Antitrust Litig.*, 166 F.3d at 125. However, the exchanges here go beyond shop talk and, as discussed in Section IV.A above, could be interpreted as efforts to elicit assent and encourage adherence to an agreement. Accordingly, we find that this plus factor could contribute to an inference of conspiracy.

4. Evidence of Patterson's Change of Conduct

Finally, Complaint Counsel contend that Patterson's change of conduct amounts to a plus factor. As noted above, the parties disagree sharply over the extent to which Patterson did, or did not, decline to deal with buying groups during the alleged conspiracy. *See* Section IV.A. They also disagree over the extent to which Patterson's hesitance to deal with such groups represented a change in its policies.

Complaint Counsel proffer evidence that [redacted] in early 2013 and was actively negotiating with NMDC. CCOppB at 25; CCSMF ¶¶ 19-20, 23. After the February 2013 Cohen-Guggenheim exchange, according to Complaint Counsel, Patterson executives instructed employees to refuse buying group business and they complied. CCOppB at 25; CCSMF ¶¶ 33-41. Complaint Counsel also submit evidence that Patterson changed course on ADC twice after Cohen-Guggenheim exchanges in February and June 2013, first to decline the ADC opportunity because Patterson believed it to be a buying group and second to seek to re-engage with ADC upon learning that Benco did not regard ADC as a buying group. CCOppB at 26-27; CCSMF ¶¶ 42-48. By contrast, Patterson points to evidence that it was reluctant to deal with buying groups and refused

16 In the absence of a well-founded motion to exclude Dr. Marshall's testimony as unreliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), we find that Patterson's critique of his methods and conclusions is appropriate for cross-examination at trial rather than a basis for summary decision.

to do business with them even before the alleged conspiracy. PMSD at 11; PRB at 2; PSMF ¶¶ 51-54. At the same time, Patterson claims, [redacted] *Id*. at 13-14.

The trial in this matter should help resolve the parties' disagreement over whether Patterson changed its behavior as part of an agreement with its competitors not to deal with buying groups. What is clear at this point, however, is that the factual disputes reflected by the parties' divergent positions on this question raise an issue of fact appropriate for resolution at trial.

C. Sworn Statements

Having surveyed the record evidence above, we now address Patterson's argument that, at summary decision, some types of record evidence are not rebuttable by others. Specifically, Patterson argues that, without sworn rebuttals from Complaint Counsel, the "hundreds" of sworn denials of conspiracy from "every witness in the case" compel summary decision in its favor. PMSD at 3 (citing *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) ("Facing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce significant probative evidence by affidavit or deposition that conspiracy existed if summary judgment [is] to be avoided") (citation omitted)). If Patterson reads the relevant case law to preclude a non-movant from relying on unsworn record evidence, such as contemporaneous emails and text messages, to defeat summary decision, that reading is erroneous.[17]

In *Celotex*, 477 U.S. at 324, the Supreme Court confirmed that a non-moving party may use any part of the evidentiary record, "except the mere pleadings themselves," to oppose summary judgment. Here, as required by our Rule 3.24(a)(2), Complaint Counsel filed a

17 Patterson's reliance on *City of Moundridge* is misplaced for several reasons. As a procedural matter, the opinion to which Patterson cites was rendered on the plaintiffs' motion for preliminary injunction, not a motion for summary judgment. 429 F. Supp. 2d at 117, 127, 129-30. In a subsequent opinion, the court granted the defendants' motion for summary judgment because the plaintiffs could not show that the defendants discussed pricing or made pricing decisions based on information exchanges. *City of Moundridge v. Exxon Mobil Corp.*, 2009 WL 5385975, at *9 (D.D.C. Sept. 30, 2009), *aff'd*, 409 F. App'x 362 (D.C. Cir. 2011). In this case by contrast, as discussed above, there is evidence from which a trier of fact could find that Respondents discussed their refusal to deal with buying groups and made decisions based on these communications. Moreover, the Seventh Circuit case, *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, from which *City of Moundridge* takes the language quoted by Patterson, is inapposite to the situation before us. 582 F.2d 1068 (7th Cir. 1978). There, the plaintiff sought an inference of conspiracy solely from allegations that (1) the defendant rejected the plaintiff's bid in favor of a bid with less favorable terms, and (2) the defendant's explanation for its decision was inconsistent with its prior course of dealing. *Id.* at 1069-70. Only after holding that these allegations by themselves were insufficient to support a finding of conspiracy did the court go on to make the statement quoted in *City of Moundridge*. *Id.* at 1070. In the instant case, we have before us not only allegations that could support a showing of conspiracy, but also sufficient evidence from which a reasonable trier of fact could infer an agreement, something that was entirely lacking in *Lamb's Patio Theatre*.

Statement of Disputed Material Facts as to Which There Is a Genuine Issue for Trial that was supported by numerous record cites to documentary evidence and deposition testimony. As *Celotex* instructs, these documents and this testimony may be used in an effort to rebut Patterson's sworn denials and to defeat summary decision.

Patterson is also incorrect when it argues that, in the face of sworn denials, a conspiracy may be shown only by direct evidence, such as an admission by a conspirator. As discussed above, a plaintiff may defeat summary decision by producing evidence from which such an agreement can be inferred. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d at 655; *see also City of Tuscaloosa v. Harcros Chems.*, 158 F.3d at 569. Consequently, the sworn denials of conspiracy do not compel summary decision in Patterson's favor.

IV. CONCLUSION

Complaint Counsel have provided evidence showing that Patterson and the other Respondents exchanged communications emphasizing their policies against negotiating with buying groups; discussed coordinating with each other in internal documents; monitored each other's actions; and contacted each other to confirm continued compliance with those policies. Complaint Counsel also have provided evidence supportive of findings that Patterson had an economic motive to conspire; acted contrary to its own self-interest; and severed ongoing discussions with and shifted policies concerning buying groups. Based on this evidence, a trier of fact reasonably could conclude that Patterson conspired with the other Respondents to refrain from negotiating with buying groups. Patterson vigorously debates the significance and implication of Complaint Counsel's evidence and offers countervailing evidence of its own, but in doing so, it does no more than underscore the material issues of disputed fact in this case. Those issues are properly resolved at trial. We therefore deny Patterson's Motion for Summary Decision.

Accordingly,

IT IS ORDERED THAT Respondent Patterson's Motion for Summary Decision is **DENIED.**

By the Commission.

IN THE MATTER OF

BENCO DENTAL SUPPLY CO., HENRY SCHEIN, INC., AND PATTERSON COMPANIES, INC.

Docket No. 9379. Order, November 26, 2018

Order identifying facts, which are deemed established for purposes of this proceeding.

ORDER SPECIFYING FACTS WITHOUT SUBSTANTIAL CONTROVERSY

Pursuant to Rule 3.24(a)(5) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.24(a)(5), the Commission hereby specifies the following statement of facts that appear without substantial controversy. Accordingly,

IT IS ORDERED that the following facts shall be deemed established for purposes of this proceeding:

1. Patterson has been distributing dental equipment (e.g., X-Ray and CAD/CAM machines, digital radiography sensors, and integrated operatory treatment centers), and consumable supplies (gloves, cotton rolls, rinse cups, disposable syringes) for over 140 years. *See* https://www.pattersoncompanies.com/who-we-are/default.aspx#section=history.

2. Patterson has more than 70 local branches. *See* https://www.pattersoncompanies.com/who- we-serve/default.aspx#section=animal.

3. [redacted] Patterson Exhibit 5 (PDCO 00023794, slide 21).

4. [redacted] CX0317 (Rogan IH Tr. 140:14-141:16).

5. Corporate dental practices, known as "dental service organizations" ("DSOs"), [redacted] Patterson Exhibit 5 (PDCO 00023794, slide 39).

6. In some cases, corporate DSOs buy local practices and employ the dentists. *See* http://www.oralhealthworkforce.org/wp-content/uploads/2017/09/OHWRC_Trends_in_Dental_Service_Organization_Model_2017.pdf.

7. In recent years, [redacted] Patterson Exhibit 5 (PDCO 00023794, slide 49).

8. [redacted] Patterson Exhibit 4 (McFadden 6-21-2018 FTC Dep. 97:6–25; 138:5–22); Patterson Exhibit 2 (Rogan 7-13-2018 FTC Dep. 220:10–221:8).

9. Patterson launched its Special Markets division in [redacted] 2013 to manage large accounts. Patterson Exhibit 47 (PattersonDental 00024687); Patterson Exhibit 48 (PattersonDental 00024688).

10. [redacted]

CX0158-001, 002 (PDCO 00031277-78).

11. Neal McFadden testified at his deposition that [redacted] Patterson Exhibit 4 (McFadden 6-21-2018 FTC Dep. 76:25-77:3).

12. [redacted]

[redacted]

CX0056-004-005 (BDS-FTC00009445-6).

13. On February 8, 2013, Benco's Charles Cohen sent Patterson's Paul Guggenheim a message forwarding an email chain including the email from [redacted]. Cohen's message read, in part: "Just wanted to let you know about some noise I've picked up from New Mexico. FYI: Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy." CX0056-001 (BDS-FTC00009442).

14. A few hours later, Guggenheim replied to Cohen, in part: "Thanks for the heads up. I'll investigate the situation. We feel the same way about these." CX0090-001 (PDCO 00010912).

15. In early 2013, Patterson's Chesapeake branch manager was approached by Atlantic Dental Cooperative ("ADC"). CX0093-001 (PDCO 00051886).

16. [redacted] *Id.*; Patterson Exhibit 1 (Fruehauf 7-10-2018 FTC Dep. 114:7–115:6).

17. [redacted] David Misiak sent Patterson's [redacted] an email message [redacted]. That message read, in part:

> These co op situations can be very challenging so stay connected. You may have to help him at the meeting communicate our position verbally to the reps. It's in their best interest long term as well not to take our business in that direction. When I get these calls directly I politely say that I appreciate the opportunity, but currently we [don't] participate with group purchasing organizations. Be cautious so that reps don't miss communicate our position.
>
> Continue to help Devon stay out of this with grace. [redacted]
>
> [redacted]

CX0093-001 (PDCO 00051886) (emphasis in original); *see also* Patterson Exhibit 14 (Misiak 7-25-2018 FTC Dep. 128:1– 128:10).

18. On June [redacted] 2013, Patterson's Paul Guggenheim, [redacted] sent an email to Benco's Chuck Cohen. The email read, in part:

> Reflecting back on our conversation earlier this year, could you shed some light on your business agreement with Atlantic Dental Care? [redacted] I'm wondering if your position on buying groups is still as you articulated back in February?
>
> Let me know your thoughts ….Sometimes these things grow legs without our awareness!

CX0095-001 (PDCO 00010955).

19. [redacted] Chuck Cohen sent an email to Paul Guggenheim. That email read, in part:

> As we've discussed, we don't recognize buying groups. [redacted]

CX3412-001 (PDCO 00010959).

20. [redacted] Paul Guggenheim sent an email to Chuck Cohen. That email read, in part: "[redacted] Just wanted to clarify where you guys stand." CX3301-001 (PATTERSON0001594).

21. On August **{4,}** 2013, Patterson's Tim Rogan sent an email to [redacted] That message read, in part: "We don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry." CX0106-001 (PDCO 00027980).

22. On September 3, 2013, David Misiak sent an email message to [redacted] The message read, in part:

> [redacted]
>
> My guidance has been to politely say no [to buying groups] and w[ea]ther the storm with these.

CX3074-001 (PDCO 00021091).

23. On November 20, 2013, Patterson's Tim Rogan sent an email message to Patterson employee [redacted]. That email read, in part: "We don't sell to buying groups. Let's talk live." CX3168-001 (PDCO 00028046).

24. On October 23, 2014, Neal McFadden sent an email message [redacted] The message read, in part: "As a rule we are trying our best to steer clear of all buying groups." CX3128-001 (PDCO 00026075).

25. Patterson declined to work with Kois Buyers Group. CX0321 (Kois, Jr. IH Tr. 76:15-77:7); CX3084-001 (PDCO 00029940).

26. [redacted] CX3045-001 (PDCO 00026110).

27. That same day, Neal McFadden sent an email to Anthony Fruehauf. That email read, in part: "does he own all these offices - - if not then he is a GPO - - we don't deal with GPO's – [redacted] *Id.*

28. [redacted]

Patterson Exhibit 54 (PDCO 00026237).

29. Smile Source approached Patterson in late 2013. Patterson declined to work with Smile Source. CX0147-001 (PDCO 00021163); CX0297-001 (PDCO 00021213).

30. Patterson Exhibit 61 (Mauer 8-9-2018 FTC Dep. 54:3-56:9; 64:4-9); Patterson Exhibit 14 (Misiak 7-25-2018 FTC Dep. 154:23– 156:2); Patterson Exhibit 8 (Lepley 7-24-18 FTC Dep. 37:9–13); Patterson Exhibit 62 (Rogan IH Tr. 397:16-399:19).

31. In October 2013, the Texas Dental Association ("TDA") created the TDAPerks buying group. Patterson Exhibit 166 (PattersonDental00033124).

32. 

Patterson Exhibit 186 (PATTERSON 0000941).

33. On Dave Steck, identified as "Vice President & General Manager" of Henry Schein Dental, sent an email to Patterson's David Misiak with the subject "Texas." The message read, in part: "I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple of days." CX0112-001 (PDCO 00013330).

34. That same day, David Misiak sent an email forwarding that message and stating: "He already told me they were out. Full blown!" Patterson's Tim Rogan replied: "That sucks. You should call him. 'Thought I could trust you' type of conversation." CX0112-001 (PDCO 00013330).

35. [redacted] Patterson had chosen not to attend TDA's 2014 annual meeting. Patterson Exhibit 186 (PATTERSON 0000244, PATTERSON 0000941).

36. A few weeks before TDA's annual meeting, Cohen (Benco) emailed Sullivan (Schein) and Guggenheim (Patterson) on the same chain, forwarding an article promoting TDAPerks. CX1062-001 (BDS-FTC00001789). Guggenheim created a calendar entry to call Cohen about the article. CX0101-001 (PDCO 00011057).

37. [redacted] Patterson Exhibit 53 (PDCO 00026064).

38. In depositions in this matter, Patterson employees have denied participating in a conspiracy with Benco and Schein to boycott "buying groups." Patterson Exhibit 13 (Anderson 7-19-2018 FTC Dep. 161:23–162:23); Patterson Exhibit 7 (Guggenheim 7-17-2018 FTC Dep. 400:24–404:11); Patterson Exhibit 14 (Misiak 7-25-2018 FTC Dep. 314:18–316:2); Patterson Exhibit 2 (Rogan 7-13-2018 FTC Dep. 257:20–22, 261:17–19); Patterson Exhibit 8 (Lepley 30(b)(6) 7-24-2018 FTC Dep. 111:7–113:16); Patterson Exhibit 64 (Nease 6-15-2018 FTC Dep. 127:19–22; 134:24–135:10).

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

CHINA NATIONAL CHEMICAL CORPORATION, ADAMA AGRICULTURAL SOLUTIONS LTD., AND MAKHTESHIM AGAN OF NORTH AMERICA, INC. D/B/A ADAMA

Docket No. C-4610. Order, November 28, 2018

Letter approving the substitute monitor and the substitute monitor agreement.

LETTER ORDER APPOINTING MONITOR

Peter Guryan, Esq.
Simpson Thacher & Bartlett LLP

Re: *In the Matter of China National Chemical Corporation et al.*, Docket No. C-4610.

Dear Mr. Guryan:

This is to notify you that, pursuant to Paragraph IV.F. of the Decision and Order issued in *In the Matter of China National Chemical Corporation et al.*, Docket No. C-4610, the Federal Trade Commission has appointed Monitoring Trustee Partners B.V. as the substitute monitor and approved the substitute monitor agreement executed by Respondents and Monitoring Trustee Partners B.V.

By the direction of the Commission.

Attachment

MONITOR AGREEMENT

This Monitor Agreement (this "Agreement"), entered into this 19 day of October, 2018, by and among Monitoring Trustee Partners B.V. ("MTP" or the "Monitor") and China National Chemical Corporation Limited, ADAMA Agricultural Solutions, Ltd., and Makhteshim Agan of North America, Inc. (collectively "ChemChina") (MTP and ChemChina together, the "Parties") provides as follows:

WHEREAS the Federal Trade Commission (the "Commission"), in the Matter of China National Chemical Corporation Limited, ADAMA Agricultural Solutions, Ltd., and Makhteshim Agan of North America, Inc., File No. 161-0093, has accepted or will shortly accept for public comment an Agreement Containing Consent Orders incorporating a Decision and Order and an Order to Maintain Assets (collectively, the "Orders"), which, among other things, requires ChemChina to divest certain pesticide assets, as defined in the Orders, and contemplates the appointment of a Monitor to monitor ChemChina'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 ChemChina's compliance with the terms of the Orders, and Monitor has consented to such appointment;

WHEREAS, the Orders further provide that ChemChina 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 ChemChina, is not effective for any purpose, including but not limited to imposing rights and responsibilities on ChemChina 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 ChemChina's compliance with the divestiture, asset maintenance obligations, and other related requirements of the Orders. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

1.2 Access to Relevant Information and Facilities. Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to ChemChina's

personnel, 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 ChemChina's compliance with the obligations of ChemChina 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. ChemChina shall cooperate with any reasonable request of Monitor. Monitor shall give ChemChina 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 ChemChina's operations. At the request of the Monitor, ChemChina shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of ChemChina who have knowledge relevant to the proper discharge of its responsibilities under the Orders.

1.3 Compliance Reports. ChemChina 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 ChemChina files such report with the Commission.

1.4 Confidentiality. Monitor shall:

(a) maintain the confidentiality of all confidential information provided to the Monitor by ChemChina, the acquirer of the CP Assets, any supplier or customer of ChemChina, 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 or the European 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 ChemChina 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) maintain a record and inform the Commission of all third parties (other than representatives of the Commission) to whom Confidential Information has been disclosed;

(d) 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

(e) 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 ChemChina 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 ChemChina to return or destroy materials that

ChemChina 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 ChemChina'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 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, ChemChina, or any director, officer, employee, agent, consultant or affiliate of the Monitor or ChemChina, 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 the ChemChina, 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 ChemChina of its intention to do so, and provide an estimate of the anticipated costs.

2.2 Monitor Compensation. ChemChina 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 CP Assets, all work in connection with the negotiation and preparation of this Agreement, and all reasonable and necessary travel time.

(a) In addition, ChemChina 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 security taxes, unemployment insurance, worker's compensation, disability insurance, and the like.

2.3 Monitor's Indemnification; Limitation on Liability. ChemChina 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 ChemChina and Monitor concerning ChemChina'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 ChemChina 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) ChemChina'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 ChemChina 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 ChemChina 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, ChemChina 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 ChemChina to disclose any material or information that is subject to a legally recognized privilege or that ChemChina 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 ChemChina or Monitor without the consent of ChemChina 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.

MONITOR
Monitoring Trustee Partners

Jan Jaap Snel
Managing Director,
Monitoring Trustee Partners

Respondent
China National Chemical Corporation Limited

Chen Hongbo
Executive Director, China National Agrochemical Co. Limited

Interlocutory Orders, Etc.

IN THE MATTER OF

WATSON PHARMACEUTICALS INC., ACTAVIS INC., ACTAVIS PHARMA HOLDING 4 EHF., AND ACTAVIS S.Á.R.L.

Docket No. C-4373. Order, December 17, 2018

Order granting the Petition of Teva Pharmaceutical Industries Ltd. as the successor to Watson Pharmaceuticals Inc. and Actavis Inc.to Reopen and Modify Decision and Order for the limited purpose of modifying and setting aside the Commission's Decision and Order, dated December 14, 2012, as it applies to Teva's agreement to supply the abuse-resistant opioid painkiller morphine sulphate naltrexone extended release capsu]es (brand name Embeda®) to Pfizer Inc.

ORDER REOPENING AND MODIFYING ORDER

On October 22, 2018, Teva Pharmaceutical Industries Ltd. ("Teva") filed a petition ("Petition") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51(b) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.51(b), requesting that the Commission reopen and modify the Commission's order in Docket No. C-4373 ("Order"). Teva is the successor to Watson Pharmaceuticals Inc. ("Watson") and Actavis Inc. ("Actavis"), the Respondents to the Order. Teva filed the Petition at the request of Pfizer Inc. ("Pfizer").

The Order remedied the anticompetitive effects in twenty-one pharmaceutical markets resulting from Watson's acquisition of Actavis, including the market for extended release acute pain treatment served by branded Embeda®,[1] which Pfizer and Actavis were developing and manufacturing prior to the acquisition pursuant to an exclusive agreement. At the time of the acquisition, Pfizer had recalled Embeda, but was planning to reintroduce it to the market after reformulating the product. Watson was one of only a few companies that appeared likely to enter with a generic version of Embeda. As part of the Commission's remedy, Watson/Actavis and Pfizer amended the Development and Manufacturing Services Agreement between Actavis and Pfizer ("Agreement") in several respects, including to remove impediments to entry by a generic Embeda (*e.g.*, by eliminating Actavis' right of first refusal to market an authorized generic) and to foster Pfizer's relaunch of Embeda and eventual independence from supply from Actavis (*e.g.*, by transferring manufacturing rights back to Pfizer). The Order provided that Pfizer would continue to have a supply of Embeda from Actavis to allow Pfizer to relaunch Embeda pursuant to the amended Agreement, but consistent with limiting continuing

1 The Order refers to Embeda® as Morphine Sulphate Naltrexone Extended Release Products. Order ¶ I.FFF.

entanglements to the extent deemed necessary, included a four-year limitation on the Respondents' obligation to supply Embeda to Pfizer following its relaunch of Embeda.[2]

In January 2015, Pfizer reintroduced Embeda to the market, and in February 2016, exercised its right to extend the supply of Embeda pursuant to the amended Agreement for two one-year periods. Despite its best efforts, however, Pfizer will be unable to complete the manufacturing technology transfer to another manufacturing site before expiration of the extended supply term of Embeda on December 31, 2018. The reason is because extended release products like Embeda are complex and difficult to manufacture, and Embeda, which includes morphine sulphate, has abuse deterrent properties that make manufacturing especially difficult. According to the Petition, Pfizer needs a further extension of the supply of Embeda to allow it to complete its ongoing efforts to transfer the manufacture of Embeda to another manufacturing site. However, this extension is prevented by the Order language limiting extensions of the supply term to four years after relaunch.

In August 2016, Teva acquired Allergan, which included the merged Watson/Actavis, and became a successor-Respondent under the Order. Teva's Petition states that Teva is planning to launch a generic version of Embeda in the foreseeable future.[3] However, there currently is no FDA-approved generic version of Embeda on the market, and if Pfizer will be unable to continue to market branded Embeda upon the expiration of Teva's supply of Embeda, which will leave health care providers and their patients with no supply of Embeda as an option for acute pain treatment. At Pfizer's request, Teva and Pfizer have negotiated a further extension of the amended Agreement (*i.e.*, the Proposed Fourth Amendment to the Development and Manufacturing Services Agreement, which would extend the term of Teva's supply of Embeda beyond the Order's four-year limit).

In its Petition, Teva requests that the Commission eliminate the Order's four-year limit on the term of Embeda supply by Actavis (now Teva) based on changed conditions of fact and because the proposed modification would be in the public interest. For the reasons stated herein, the Commission has determined to grant Teva's Petition.

BACKGROUND

The Order arose from settlement of the Commission's investigation into Watson's acquisition of Actavis in 2012. At the time of the investigation, Watson was one of a limited number of likely potential suppliers of a generic equivalent of Pfizer's branded product, Embeda. Pfizer was in an exclusive Development and Manufacturing Services Agreement with Actavis to produce Embeda. Embeda is an extended-release opioid pain reliever that has specific abuse-deterrent technology and is difficult to manufacture. Actavis had previously supplied Pfizer from an Actavis site, but at the time of the Order Pfizer had recalled Embeda and was working

2 *See* Order ¶ I.III.6 (Definition of Morphine Sulphate Naltrexone Extended Release Product Assets (*i.e.*, Embeda) includes a four-year limit on Pfizer's right to extend supply agreement from date of first commercial sale of Embeda as reformulated and relaunched).

3 Petition at 6, 12.

with Actavis to remediate issues with the product so Pfizer could reintroduce it from the Actavis site.

The Order's purpose, *inter alia*, was to "to create a viable and effective competitor, that is independent of Respondents" in the "research, Development, and manufacture" and the "distribution, sale, and marketing" of Embeda and its generic equivalents.[4] To remedy the effects of the acquisition in the relevant acute pain treatment market, the Commission required the merging parties to restructure the Agreement in such a way as to protect the potential competition between Pfizer's Embeda (and any authorized generic version of this product) and Watson's generic equivalent of Embeda that was in development. The Order provided Pfizer with what appeared to be sufficient time to resolve the manufacturing issues that had caused the recall of Embeda, re-introduce Embeda from the Actavis site, and move production of this difficult-to-manufacture product away from its competitor, Watson/Actavis. It was anticipated that Pfizer would need a significant amount of time to do this, and four years appeared to be sufficient at the time. As a part of the Commission's remedy, Watson/Actavis and Pfizer removed certain provisions in the Agreement in order to allow Watson to develop, manufacture, and market a generic Embeda. The Order's limitation on the continued supply of Embeda to Pfizer pursuant to the Agreement assured this would not act as a disincentive for Watson/Actavis to continue to develop and introduce its own directly competing product. Accordingly, the Order limited the supply term to four years after Pfizer's reintroduction of Embeda to the market.

Thus, the Order required the Respondents, in relevant part, to grant Pfizer: (i) an extended-term supply agreement to enable Pfizer to reintroduce Embeda to the market, but limited Pfizer's right to extend the supply to four years after relaunch, and provide Pfizer with time to relocate production after the relaunch of Embeda; (ii) the option to move production of Embeda out of the Respondents' site at the time of Pfizer's choosing; (iii) assistance from the Respondents with the transfer of the manufacturing technology related to Embeda to an alternate manufacturing site; (iv) the right to terminate the agreement at will; and (v) protections from the Respondents unilaterally terminating the agreement.[5]

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.[6] A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes either eliminate the need for the order or make continued application of it inequitable or harmful to competition.[7]

---

4 Order ¶ IV.E.

5 Order ¶¶ IV.A. and I.III.

6 *See Supplementary Information, Amendment to* 16 CFR 2.51(b), ("Amendment"), 65 Fed. Reg. 50636, August 21, 2000.

7 S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter"); *see also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992).

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. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.[8] In the case of "public interest" requests, FTC Rule of Practice § 2.51(b), 16 C.F.R. § 2.51(b), requires an initial "satisfactory showing" of how the modification would serve the public interest before the Commission determines whether to reopen an order.

A "satisfactory showing" requires, with respect to public interest requests, that the petitioner make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a "satisfactory showing" if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.[9] This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. In addition, this showing must be supported by evidence that is credible and reliable.

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,[10] and the burden remains on the requester in all cases to demonstrate why the order 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.[11] All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.[12]

THE PUBLIC INTEREST WARRANTS REOPENING AND MODIFYING THE ORDER

The Commission has determined that the public interest requires that the Order be reopened and modified to eliminate the Order's four-year limit on the term of Embeda supply by Actavis (now Teva) to Pfizer. Because the Commission has determined that Teva has made a satisfactory showing that the public interest would be served by the modification Teva requests in its Petition, there is no need for the Commission to consider whether changed conditions of fact would justify the requested Order modification.

The Commission finds that since the Order was issued, Pfizer reintroduced Embeda in 2015 from an Actavis manufacturing site and has been actively working to move production of Embeda to an alternate manufacturing site. Although Pfizer has performed many of the steps

8 Hart Letter at 5; 16 C.F.R. § 2.51.
9 16 C.F.R. § 2.51.
10 *See Louisiana-Pacific*, 967 F.2d at 1376-77 (reopening and modification are independent determinations).
11 *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).
12 16 C.F.R. § 2.51(b).

necessary to gain FDA approval to manufacture Embeda at this alternate site, it has not successfully completed all of these steps. Further, Pfizer will not complete this manufacturing transfer before the current term of the supply agreement with Teva expires.

Teva has also continued to develop Watson's generic equivalent of Embeda as contemplated by the Order, and states in its Petition that it plans to introduce its generic version of Embeda in the foreseeable future.[13] Teva thus remains a potential competitor to Pfizer in the relevant Complaint market.[14] Both Pfizer's progress toward moving production of Embeda away from its competitor and Teva's progress toward producing a generic version of Embeda demonstrate significant progress toward achieving the independent competition in the relevant acute pain treatment market contemplated by the Order.

Teva has demonstrated that the modification to the Order it requests in its Petition – eliminating the four-year limit on the supply of Embeda to Pfizer – would serve the clear public interest in achieving the contemplated remedial purposes of Order, and that the continued application of the Order's four-year limit on the term of Embeda supply would be harmful to the public interest. The purpose of the Order is to maintain competition in the market for the Embeda product and generic equivalents of Embeda. However, Pfizer will not complete the process of gaining FDA approval for an alternate manufacturing site before the current Embeda supply term expires. If Pfizer is unable to obtain a sufficient further extension of the supply agreement, Embeda will not remain on the market because there currently are no FDA-approved therapeutic equivalents of Embeda – a result directly contrary to the remedial purposes of the Order.

Accordingly, the Commission has determined to reopen and modify the Order to eliminate the four-year limitation on the Respondents' obligation to supply Embeda to Pfizer.

CONCLUSION

Having found that it is in the public interest to grant Teva's Petition, 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 Paragraph I.III.6. of the Order is revised to remove the language that is struck through below:

> rights to extend the requirement for Respondents to supply the Morphine Sulphate Naltrexone Extended Release Product to Pfizer ~~for term not to exceed four (4) years from the date of first commercial sale of the Morphine Sulphate Naltrexone Extended Release Product as reformulated and relaunched after the Acquisition Date~~; *provided, however,* that, if the relaunch of the Morphine Sulphate Naltrexone Extended Release Product does not occur within three (3) years of the date of the Morphine Sulphate Naltrexone

13 Petition at 6, 12.
14 *See* Complaint ¶ 24.

Extended Release Product Divestiture Agreement, then this requirement for Respondents' to supply such Product to Pfizer shall expire three (3) years from the date of the Morphine Sulphate Naltrexone Extended Release Product Divestiture Agreement; . . .

IT IS FURTHER ORDERED that Paragraph I.III.6. of the Order now reads:

rights to extend the requirement for Respondents to supply the Morphine Sulphate Naltrexone Extended Release Product to Pfizer; *provided, however,* that, if the relaunch of the Morphine Sulphate Naltrexone Extended Release Product does not occur within three (3) years of the date of the Morphine Sulphate Naltrexone Extended Release Product Divestiture Agreement, then this requirement for Respondents' to supply such Product to Pfizer shall expire three (3) years from the date of the Morphine Sulphate Naltrexone Extended Release Product Divestiture Agreement; . . .

By the Commission, Commissioner Wilson recused.

IN THE MATTER OF

WATSON PHARMACEUTICALS INC., ACTAVIS INC., ACTAVIS PHARMA HOLDING 4 EHF., AND ACTAVIS S.Á.R.L.

Docket No. C-4373. Order, December 17, 2018

Letter Order approving the Fourth Amendment to the Development and Manufacturing Services Agreement.

LETTER ORDER APPROVING AMENDMENT

Maria A. Raptis, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP

Re: *In the Matter of Watson Pharmaceuticals Inc., et al., Docket No. C-4373*

Dear Ms. Raptis:

This letter responds to the Petition of Respondent Teva Pharmaceutical Industries Ltd. to Reopen and Modify Decision and Order ("Petition") filed on October 22, 2018. The Petition was placed on the public record for comments until November 23, 2018, and no comments were received. In its Order Reopening and Modifying Order, issued on December 17, 2018, the Commission reopened and modified the Decision and Order as requested in the Petition.

The Commission also approved the Proposed Fourth Amendment to the Development and Manufacturing Services Agreement as requested in the Petition. In according its approval, the Commission has relied upon the information submitted and the representations made in the Petition and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Wilson recused.

Interlocutory Orders, Etc.

IN THE MATTER OF

1-800 CONTACTS, INC.

Docket No. 9372. Order, December 19, 2018

Order granting in part respondent's motion to exceed the word count limits set forth in Commission Rule 3.22(c), 16 C.F.R. § 3.22(c).

ORDER EXTENDING WORD COUNT LIMITATIONS

On December 10, 2018, Respondent 1-800 Contacts filed an Application for a partial stay of the Commission Final Order in this matter.[1] On December 11, Respondent filed a Motion requesting that the Commission permit its Application; Complaint Counsel's Answer, if any; and Respondent's Reply, if any, to exceed the word count limits set forth in Commission Rule 3.22(c), 16 C.F.R. § 3.22(c).[2] In particular, Respondent requests that the Commission increase the word limit for its Application and for Complaint Counsel's Answer to 5,350 words, and that the Commission increase the word limit for Respondent's Reply to 2,500 words. Respondent advises that Complaint Counsel do not oppose the Motion.

Commission Rule 3.56(d), 16 C.F.R. § 3.56(c), which governs applications for stay of Commission Final Orders, does not include a word count limit. Therefore, the word count limits set forth in Commission Rule 3.22(c) for motions other than dispositive motions apply to applications for stay, answers thereto, and replies in support of such applications. Commission Rule 3.52(k), 16 C.F.R. § 3.52(k), provides, with respect to appellate briefs, that "[e]xtensions of word count limitations are disfavored, and will only be granted where a party can make a strong showing that undue prejudice would result from complying with the existing limit." The same principles apply to all other filings in adjudicative proceedings. Here, however, the parties are following an abbreviated schedule with respect to Respondent's Application "[i]n order to

avoid conflicts with religious holidays and the New Year's holiday."[3] Consequently, Respondent filed its Application on December 10, 2018, sixteen days before it was due, and Complaint Counsel's Answer was due December 18, 2018. Respondent has advised that its Application contains 5,332 words, and it would be unfair to require Complaint Counsel to adhere to a lower word count limit. No such basis, however, exists for a corresponding increase in the word count limit for any Reply that may be filed. Accordingly,

IT IS ORDERED THAT Respondent's Application and Complaint Counsel's Answer may each contain up to 5,350 words; and

---

1 *See* Respondent 1-800 Contacts, Inc.'s Application For A Stay Pending Review By A United States Court of Appeals (Dec. 10, 2018), https://www.ftc.gov/system/files/documents/cases/121018respondentappstaypendingreviewuscourtappeals593147_.pdf.

2 *See* Respondent's Unopposed Motion To Exceed the Word Count Limit in 16 C.F.R. § 3.22(c) (Dec. 11, 2018), https://www.ftc.gov/system/files/documents/cases/121118respondentunopposedmotion593161.pdf.

3 *See* Joint Motion Regarding the Schedule For Respondent's Application For Stay (Dec. 10, 2018), https://www.ftc.gov/system/files/documents/cases/121018jointmotionrespappforstay593148pdf.pdf.

IT IS FURTHER ORDERED THAT any Reply that may be filed may contain no more than 1,500 words, as provided by Commission Rule 3.22(c), 16 C.F.R. § 3.22(c).

By the Commission, Commissioner Wilson not participating.

Interlocutory Orders, Etc.

IN THE MATTER OF

IMPAX LABORATORIES, INC.

Docket No. 9373. Order, December 28, 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. 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, December 28, 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. 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, December 28, 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, including the deadline for filing the Initial Decision, be fully stayed for the duration of the shutdown and for an additional five business days thereafter. Accordingly,

IT IS SO ORDERED.

By the Commission.

IN THE MATTER OF

BENCO DENTAL SUPPLY CO., HENRY SCHEIN, INC., AND PATTERSON COMPANIES, INC.

Docket No. 9379. Order, December 28, 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 Administrative Law Judge shall have the discretion to adjust any applicable deadlines as warranted. Accordingly,

IT IS SO ORDERED.

By the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

PHYSICIAN'S TECHNOLOGY, LLC

FTC File No. 172 3129 – Decision, July 10, 2018

RESPONSE TO MARK YOUNG, SR.'S PETITION TO QUASH A CIVIL INVESTIGATIVE DEMAND DATED MAY 8, 2018

By SLAUGHTER, Commissioner:

Mark Young, Sr. ("Young") has petitioned to quash a civil investigative demand for his testimony. For the reasons stated below, the Commission grants the petition in part with respect to Mr. Young's first claim for relief and will modify the CID accordingly. In all other respects, the petition is denied.

I. Background

On May 8, 2018, the Commission issued a civil investigative demand to Mr. Young as part of an investigation into the advertising and marketing of a product known as Willow Curve. Advertising for Willow Curve represents that it uses low levels of laser light to relieve pain, reduce inflammation in the body, and heal damaged joints. Mr. Young serves as the CEO of Western Communication. Western Communication is a full-service advertising agency that from 2013 to 2016 was involved in advertising Willow Curve on behalf of its primary distributor, a company called Physician's Technology. Although the Commission previously issued a CID to Western Communication seeking documents and interrogatory responses, the CID at issue to Mr. Young calls solely for his testimony.

Mr. Young raises two objections. *See* Pet. at 7. First, he claims that four of the CID specifications are overbroad because they lack limiting date ranges or nexus to the acts and practices being investigated. Pet. at 8-9. Second, Mr. Young contends that he is entitled to respond fully to any questions that could potentially elicit "his understanding of legal advice provided to Physician's Technology by its attorneys" and that he will "immediately end any investigative hearing" if the FTC staff attempts to prevent him from responding "truthfully and completely" about the circumstances of his communications with Physician's Technology and its counsel. *Id.* at 6, 10; *see also* Pet. Ex. B at 3.

II. Analysis

A. The Challenged Specifications Are Relevant To The Subject-Matter Of The Investigation.

Mr. Young challenges Specifications 1, 2, 3.f., and 12, claiming they lack limiting date periods or are not tied to the marketing of Willow Curve. Pet. at 8-9; *see also* Pet. Ex. A at 3-5

(CID specifications). In summary, Specification 1 asks Mr. Young to testify about the history and business of his company, Western Communication. Specification 2 calls for testimony about the roles and responsibilities of Western Communication employees. Specification 3 asks him about his or Western Communication's relationships with several identified individuals and entities. One of these individuals is Mark Young, II, Mr. Young's son, who ran a telephone call center that marketed Willow Curve. Finally, Specification 12 asks Mr. Young about government or consumer complaints. Each of these specifications contains the preface that the topic is "[w]ithout regard to time period." Pet. Ex. A at 3-5.

Mr. Young objects, arguing that because Western Communication was founded in 1995, a response to Specifications 1 and 2 could cover this entire period. Pet. at 9. For Specification 12, Mr. Young claims that due to the lack of a temporal limit, it could reach any monitoring of and responses to consumer or government complaints about any product at any point in time in history. *Id.* He also contends that Specification 3.f. would require him to testify about all aspects of his relationship with Mark Young, II over his son's entire life span. *Id.*

"Relevance" for purposes of an administrative investigation is broader than in district court discovery. To be relevant, a request need only relate to "the investigation," which may be defined "generally." *FTC v. Invention Submission Corp.*, 965 F. 2d 1086, 1090 (D.C. Cir. 1992). Traditionally, the Commission's resolution provides this definition. *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 & n.26 (D.C. Cir. 1977) (*en banc*); *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980). As such, the resolution serves as a type of boundary, defining the subjects that relate to the investigation and thus are within the scope of a proper and enforceable inquiry.

In this case, the CID provides substantial information about the nature of the conduct under investigation. It includes both the Commission's resolution and a separate description of the subject of the investigation. Taken together, we find these statements sufficient to define the scope of information relating to, and thus relevant to, the investigation.

The Commission's resolution authorizes FTC staff to investigate whether entities that are engaged "directly or indirectly in the advertising or marketing of dietary supplements, foods, drugs, devices, or any other product or service intended to provide a health benefit" are "misrepresenting the safety or efficacy" on the grounds that such conduct could amount to "unfair or deceptive acts or practices or in the making of false advertising . . . in violation of Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52." Pet. Ex. A at 8.

The CID itself provides an even more specific description of the investigation—namely, to determine whether Physician's Technology, Mr. Young, or his company "made false, deceptive, or unsubstantiated representations about the health benefits . . . and the diagnostic capabilities of the product known as the Willow Curve, and about the refund policies and source or commercial nature of any advertising or endorsements for this product." Pet. Ex. A at 3; *see also* Pet. at 5.

To determine whether Specifications 1, 2, 3.f., and 12 request relevant information, we must interpret the challenged specifications within the context of the provided descriptions of the

investigation and the CID as a whole. *FTC v. Rockefeller*, 441 F. Supp. 234, 240–41 (S.D.N.Y. 1977), *aff'd*, 591 F.2d 182 (2d Cir. 1979) ("[R]elevance is measured by comparing the specifications of the subpoenas with the resolutions of the Commission, which announced the purpose and scope of the inquiry."). In doing so, we reject Mr. Young's argument with respect to Specifications 1, 2 and 12. The main thrust of his argument is that the specifications, unbounded by any date limitation, encompass irrelevant information unrelated to Western Communication's relationship with Physician's Technology. But even information about events or complaints that pre- or post-date Western Communication's relationship with Physician's Technology "may be relevant" to the subject matter of staff's investigation. *Rockefeller*, 441 F. Supp. at 241 (citing *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1375 (2d Cir. 1971). For instance, testimony on Specifications 1, 2, and 12 could provide information on products similar to Willow Curve that were also marketed by Western Communication or advertising or marketing techniques that were used to promote other products, in addition to Willow Curve.

The same analysis applies to Specification 3.f, which inquires about Mr. Young's relationship with his son. In context, it appears plain that the specification is focused on the business relationship between father and son. However, to clarify its relevance to the investigation, we grant Mr. Young's petition in part and modify Specification 3 as follows, with additional text indicated in brackets:

> Specification 3: Without regard to time period, your and the Company's [business] relationship to the following persons or entities, and any communications, interactions, and business dealings relating to the Willow Curve product between you or the Company and the following persons or entities: . . .
>
> f. Mark Young, II.

We do not modify the challenged specifications in any other respect.

B. Mr. Young Must Appear At The Investigational Hearing And Comply With Commission Rules.

Mr. Young also advances the novel argument that he should be permitted to testify as to communications over which Physician's Technology has asserted attorney-client privilege. He asserts that it would be "fundamentally unfair" for staff to prevent him from "testifying truthfully and completely" about Western Communication's involvement in preparing advertising for Physician's Technology because it "would deprive him of the ability to provide facts supporting his and Western Communication's defenses that they had no prior knowledge of any alleged lack of substantiation for claims about the Willow Curve device." Pet. at 9, 10. Mr. Young also claims that the mere prospect of being recalled for testimony after Physician's Technology's privilege claims are resolved presents an unreasonable burden. Pet. at 10-11.

The Commission has promulgated rules that govern how an investigational hearing should be conducted and how objections should be raised in the course of such a hearing. 16 C.F.R. § 2.9 ("Rights of witnesses in investigations"); *see also* 16 C.F.R. §§ 2.7(f) ("Investigational hearings"); 2.7(g) ("Depositions").

We start with Rule 2.9(b)(5), which provides that the Commission's hearing official shall conduct the hearing "in a manner that avoids unnecessary delay, and prevents and restrains disorderly or obstructionist conduct." 16 C.F.R. § 2.9(b)(5). In turn, Rules 2.9(b)(1) and (b)(2) set expectations for conduct by the witness and counsel. For instance, objections may be raised but only "in a nonargumentative and nonsuggestive manner," after which the witness must still answer the question. 16 C.F.R. § 2.9(b)(2). The Rules also include explicit protections for material subject to claims of "protected status;" that is to say, privileged material. *See* 16 C.F.R. § 2.7(a)(4). The hearing official shall not require a witness to testify to such information and counsel "may instruct a witness not to answer only when necessary to preserve a claim of protected status." 16 C.F.R. § 2.9(b)(2).

Here, there is an "unresolved" assertion of privilege by an entity that will not be present at the investigational hearing. Pet. at 2. Given the special protections afforded to privileged material, it is not unreasonable if the hearing officer desires to avoid disclosure of communications that are arguably subject to a valid privilege. For instance, the hearing officer can formulate questions in a way intended to avoid such disclosures and stop the witness from providing a response if it appears the answer will potentially reveal privileged material. Counsel could lodge an objection, but the witness would still be required to answer, following any instruction from the hearing officer not to divulge information protected by a potentially valid claim of privilege. *See* 16 C.F.R. § 2.9(b)(2) ("Following an objection, the examination shall proceed and the testimony shall be taken, except for testimony requiring the witness to divulge information protected by the claim of protected status."). FTC staff may make clear on the record that it is not soliciting purportedly protected information through this hearing. The fact that a witness may have a mix of protected and unprotected material that is relevant to an investigation does not make testifying at a hearing designed to elicit the unprotected information unfair.

If, at the end of the hearing, counsel believes clarification of any answer is necessary as a result of the witness being unable to share privileged information, he or she could request permission from the hearing officer to allow the witness to provide such clarification. 16 C.F.R. § 2.9(b)(4). The hearing officer would be required to explain his or her decision on such a request on the record and allow counsel the opportunity to respond. *Id.*

It is true that Mr. Young may be recalled to testify once any privilege issues are resolved. *See* 16 C.F.R. § 2.9(b)(3). Should that happen, the hearing official must provide written notice of the date of the reconvened hearing, after which the witness has five days to file a petition to limit or quash the hearing. *Id.*; *see also* 16 C.F.R. § 2.10(a)(3). A failure to file such a petition or to reappear are grounds for the Commission to seek judicial enforcement. 16 C.F.R. § 2.9(b)(3). As such, Mr. Young's claim that the potential of being recalled imposes an undue burden on him is premature, resting as it does on multiple assumptions about events that have not yet occurred. Pet. at 10-11. If Mr. Young is in fact recalled to testify, he may file a petition to limit or quash at that time.

For these reasons, we conclude Mr. Young must appear at the hearing and comply with Commission rules.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Mark Young, Sr.'s Petition to Quash Civil Investigative Demand be, and hereby is, **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED THAT Mark Young, Sr., shall comply in full with the Commission's Civil Investigative Demand, as modified herein, and shall appear ready to testify on the specified topics at the designated location on July 20, 2018, at 8:30 a.m., or other such date, time, and location as staff may determine.

By the Commission.

Responses to Petitions to Quash

FULLY ACCOUNTABLE, LLC
AND
ELEVATED HEALTH, LLC

FTC File No. 172 3195 – Decision, November 18, 2018

RESPONSE TO FULLY ACCOUNTABLE, LLC AND ELEVATED HEALTH, LLC'S PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMANDS DATED SEPTEMBER 10, 2018

By WILSON, Commissioner:

Fully Accountable, LLC ("Fully Accountable") and Elevated Health, LLC ("Elevated Health") petition to quash or limit civil investigative demands ("CID") for testimony issued by the Commission as part of the Commission's investigation of Fully Accountable and its relationships with various internet marketers of dietary supplements and other products. Fully Accountable seeks to quash or limit a CID seeking testimony by a company representative pursuant to FTC Rule 2.7(h), 16 C.F.R. § 2.7(h). Elevated Health, an affiliate of Fully Accountable, did not receive a CID. Nonetheless, it seeks to quash or limit a CID for testimony issued to Sarah Scava, a former employee of Fully Accountable with ties to Elevated Health.[1] For the reasons stated below, we deny the petitions.

I. Background

The challenged CIDs arise from the Commission's ongoing investigation of Fully Accountable, a company based in Fairlawn, Ohio. Fully Accountable provides back office services to internet marketers, including accounting, bookkeeping, and general business consulting. It also helps its clients to obtain and manage credit card payment processing accounts.

The Commission's investigation has focused on the services Fully Accountable provides to two groups of entities and the nature of Fully Accountable's relationships with these entities. The first group, called "Group A," consists of clients of Fully Accountable and includes several companies that market or have marketed dietary supplements online, including a supplement that purportedly reduces cognitive decline and related conditions. The second, called "Group B," includes several companies that appear to be affiliates of Fully Accountable. The purpose of the investigation is to determine whether, in providing services to these groups or others, Fully Accountable has engaged in unfair or deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C.

1 Petitioners have not attached the challenged CIDs to their petitions. To assist the reader, we have therefore appended the CIDs hereto as Orders Exhibit 1 (CID issued to Fully Accountable) and Exhibit 2 (CID issued to Sarah Scava). Because of its relevance to resolution of the pending petitions, the CID for documents issued to Fully Accountable on September 21, 2017 is attached as Order Exhibit 3. Citations to text in these exhibits refer to Bates numbers appearing in the bottom margins.

Responses to Petitions to Quash

On September 21, 2017, the Commission issued a CID to Fully Accountable seeking the production of documents and interrogatory responses. Order Ex. 3. The CID included a "Subject of Investigation," which describes the subject of the investigation as follows:

> Whether Fully Accountable, the Group A Entities, or the Group B Entities . . . *and related entities and individuals*, have made or participated in making, in any respect, false, misleading, or unsubstantiated representations in connection with the marketing of consumer products, in violation of Sections 5 and 12 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45 and 52, or have engaged in deceptive or unfair acts or practices by charging or participating in the charging, in any respect, for consumer products without consumers' authorization, in violation of Section 5 of the FTC Act, and whether Commission action to obtain monetary relief would be in the public interest.

See Order Ex. 3 at 6 (emphasis added).

The CID defined "Fully Accountable" to include "its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, members, employees, agents, consultants, and other persons working for or on behalf of the foregoing, including, but not limited to, Christopher Giorgio and Rachel Scava." Order Ex. 3 at 12. The CID similarly defined the Group A and Group B Entities to encompass several specifically identified corporate entities as well as their related entities and individuals.[2] *Id.* at 13-14.

At Fully Accountable's request, FTC staff modified the CID to allow the company to produce its documents and interrogatory responses on rolling deadlines spanning a four-week period in October and November 2017. Despite these modifications and extensions, Fully Accountable failed to produce *any* documents and its interrogatory responses omitted required details about its ownership, leadership, and organizational structure. Additionally, it provided only evasive answers to several interrogatory requests.

When Fully Accountable refused to address these deficiencies, the Commission instituted CID enforcement proceedings in the Northern District of Ohio. *See Federal Trade Commission v. Fully Accountable, LLC*, No. 5:18-mc-00054-SL (N.D. Ohio June 8, 2018). On August 13, 2018, the district court issued an order directing Fully Accountable to comply fully with the CID within 10 days. Fully Accountable made supplemental productions and submitted to the Commission a certificate of compliance. After FTC staff examined the supplemental productions, they determined that deficiencies remained. Accordingly, on September 21, 2018, the Commission filed a status report with the district court stating that the Commission does not "agree at this time that Fully Accountable has complied in full[,]" and further informed the court

2 Like the definition for "Fully Accountable" the definitions for Group A and Group B also included any "wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, successors, and affiliates, and all directors, officers, members, employees, agents, consultants, and other persons" working on behalf of several specified individuals. Order Ex. 3 at 13-14.

that it had "undertaken additional investigational steps to assess the completeness of the production and to move the matter forward generally." *Id.*, Doc. 15.

The two CIDs at issue constitute part of the "additional investigational steps" referenced in the Commission's status report. The CID issued to Fully Accountable requires the company to designate a witness to appear and testify at an FTC investigational hearing on seven topics. The designated topics include a description of the steps Fully Accountable took to comply with the earlier CID. Other topics include a description of Fully Accountable's relationship with a former employee, Sarah Scava, and with petitioner, Elevated Health, a firm that may be affiliated with or related to Fully Accountable.[3] *See* Order Ex. 1 at 6. A separate CID asks Sarah Scava to testify on 13 topics. Among other topics, the CID requires Ms. Scava to describe her relationship to Fully Accountable and Elevated Health as well as Elevated Health's relationships to Fully Accountable and other entities. *See* Order Ex. 2 at 6-7.

As required by FTC Rule 2.7(k), 16 C.F.R. 2.7(k), FTC staff and counsel for Fully Accountable – Rachel Scava – conferred by telephone on September 24, 2018. A few days later, counsel Rachel Scava called FTC staff, and stated that she also represented Sarah Scava. In a series of telephone calls between September 28 and October 3, 2018, she conferred with staff regarding possible modifications to the CID issued to Sarah Scava. During these telephone calls, FTC staff also offered to conduct the investigational hearing on a Saturday near Sarah Scava's personal residence, an offer that was rejected. Rachel Scava did not inform staff that she also represents Elevated Health until she filed the instant petition on behalf of that company, and did not meet or confer with staff, as required by the FTC's Rules of Practice, at any point in connection with Elevated Health.

II. Fully Accountable's CID is Relevant and Does Not Impose an Undue Burden

A. The CID Calls for Relevant Testimony.

Fully Accountable's principal challenge is to the relevance of the designated topics to the subject matter of the ongoing investigation. It contends that Specifications 6 and 7 – which call for testimony about the company's relationships with Elevated Health and Sarah Scava – fall outside the scope of the Commission's investigation. Fully Accountable Pet. 5-6. It also contends that Specifications 3, 4, and 5 – which require Fully Accountable to testify about the company's efforts to comply with the earlier CID, its document preservation practices, and its records management systems – is "overly broad," because, according to Fully Accountable, it provided the same information in its response to the earlier CID. *Id.* at 7. Fully Accountable also contends that Specifications 3, 4, and 5 fail to limit the topics to the subject matter of the inquiry and that its "business practices as a whole are not the subject of the inquiry and it's [sic] business practices are not reasonably relevant to the investigation." *Id.*

As courts have long observed, the purpose of an FTC investigation is to learn whether there is reason to believe that the law has been or is being violated and, if so, to ascertain

3 A search of public records shows that Sarah Scava registered Elevated Health LLC with the Ohio Secretary of State on December 20, 2016.

whether the issuance of a complaint would be in the public interest. *See FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (*en banc*) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)). In this context, the standard for relevance of administrative compulsory process is broad and more "relaxed" than in an adjudication. *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992). A CID request need not be limited to that information necessary to prove specific charges; to the contrary, it may call for documents and information that are relevant "to the investigation" – a boundary that may be broadly defined by the agency. *Id.*

Applying these standards here, we conclude that Fully Accountable's objections are meritless. Specifications 6 and 7 plainly and obviously relate to the FTC's investigation into Fully Accountable and its relationships with its clients, affiliates, and related companies and individuals. Those topics raised in the CID will help determine the existence and extent of the relationships between and among Fully Accountable, Sarah Scava, and Elevated Health. Specifications 3, 4, and 5 are also clearly relevant to assessing Fully Accountable's responses to the FTC's investigation. To advance the Commission's mission, FTC staff must be allowed latitude in taking steps to explore relevant topics by issuing supplemental process and taking testimony, particularly where, as here, a company has been lax in responding to the Commission's informational needs. These facts have particular relevance here, where Fully Accountable's responses to the earlier CID made its own document management a key issue and required the Commission to seek judicial intervention. Indeed, the procedures that a company has adopted – or failed to adopt – in documenting its business practices as well as its efforts to respond to process are relevant in *any* investigation.

Fully Accountable's sweeping claim that "FA business practices as a whole are not the subject of the inquiry and it's [sic] business practices are not reasonably relevant to the investigation[,]" cannot be squared with the long established standards for relevance in administrative investigations. Fully Accountable appears to claim that the FTC may not investigate a systemic or enterprise-wide practice. But the question whether a particular practice pervades an organization is independent of the question whether a request for information about that practice qualifies as legally relevant; indeed, enterprise-wide practices are often the subject of Commission investigations. To the extent that the CID here asks Fully Accountable about the company's practices for document management, control, or disposal, these requests seek relevant information about why requested information was not provided in response to the initial CID.

B. The CID Does Not Impose Undue Burden.

Fully Accountable also asserts that the CID for testimony imposes undue burden because it requires the company to duplicate its responses to the original CID. It cites Specifications 1 and 2, which call for testimony about "the Company's responses to the Interrogatories set forth in the CID issued September 21, 2017[,]" and the "documents produced by the Company in response to the CID issued September 21, 2017." Fully Accountable Pet. 8-9. These objections are meritless.

We acknowledge that testifying in an investigational hearing imposes burdens, including the time and expense of legal preparation, disruption of normal business operations, travel time

and expense, and commitment of personal time. Every CID places some degree of burden on the recipient, and is "necessary" to further an agency's inquiry and the public interest. *See*, *e.g.*, *Texaco*, 555 F.2d at 882. But the standard for establishing that a CID imposes an *undue* burden on the recipient is a high one. Thus, to meet this standard, a CID recipient must show that a CID "threatens to unduly disrupt or seriously hinder" its normal business operations. *Id.*; *see also EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986). Fully Accountable has not made such a showing.

In any investigation, a CID recipient's responses to interrogatories and document production specifications may leave questions unanswered. To enable FTC staff to move an investigation forward and ultimately to make appropriate recommendations to the Commission, FTC staff may need to convene an investigational hearing to further develop the facts. For this reason, the FTC Rules of Practice lay out detailed provisions for investigational hearings, including how they are to be conducted and the rights of witnesses. *See* 16 C.F.R. §§ 2.7(f), 2.9. The need to convene investigational hearings is particularly important in this instance, given the questions that have been raised about the adequacy of Fully Accountable's search for responsive materials and its document preservation practices. Because testimony provides a crucial opportunity for Commission staff to obtain information and test a company's responses in real time, we find that the value to the Commission of investigational hearings outweighs any reasonable burdens they may impose.

III. As a Third Party, Elevated Health Is Not Entitled to File a Petition to Quash an FTC CID

Elevated Health, LLC seeks to quash or limit the CID issued to Sarah Scava on September 10, 2018. As an initial matter, we note that Elevated Health is mistaken in asserting that the CID in question was issued to Elevated Health, with Sarah Scava designated as the individual to provide testimony on behalf of the entity. *See* Elevated Health Pet. 3-4. In fact, the Commission did not issue a CID to Elevated Health. It issued the CID to Sarah Scava personally to testify on the basis of her own knowledge of the designated topics. *See* Order Ex. 2 at 1, 3, 6 (specifying Sarah Scava as CID recipient).

Given these circumstances, Elevated Health may not seek to limit or quash Ms. Scava's CID. Section 20(c) of the FTC Act, 15 U.S.C 57b-1(c), authorizes the Commission to issue a CID to "any person" the Commission has reason to believe has documents, tangible things, or information relevant to unfair or deceptive acts in or affecting commerce. In turn, Section 20(f)(1) states that after being served with a CID, "such person" may file a "petition for an order by the Commission modifying or setting aside the demand." 15 U.S.C. § 57b-1(f)(1). Section 20(f) makes no provision, however, for such a petition to be filed by any person other than the person served with the CID. *Id.* Because Elevated Health's petition is not properly before the Commission, we decline to consider any of the arguments it advances in support of its petition to quash or limit.

Even if Elevated Health could file such a petition, Elevated Health's failure to comply with the requirement that it meet and confer with FTC staff prior to filing means that its arguments are not properly before the Commission. The Commission takes this procedural

requirement seriously, as shown by two separate provisions in the Commission's Rules. Rule 2.7(k) cautions that "[t]he Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process." 16 C.F.R. § 2.7(k). Rule 2.10 then directs CID recipients to include with any petition to limit or quash a statement describing the circumstances and attendees at the conference with staff and further provides that "[f]ailure to include the required statement may result in a denial of the petition." 16 C.F.R. § 2.10(a)(2). While Rachel Scava met and conferred with FTC staff regarding the CID issued to Sarah Scava, we are informed that she stated that she was doing so on behalf of Ms. Scava, not Elevated Health. We thus understand that FTC staff was not even aware Rachel Scava represented Elevated Health until she filed the instant petition on behalf of the company. Nor has Elevated Health presented any "extraordinary circumstances" justifying a departure from these rules. Accordingly, the Commission declines to consider Elevated Health's arguments in support of its petition to quash or limit.

In any event, the arguments advanced by Elevated Health would not call for any limitations on the scope of inquiry for testimony set forth in the CID. Elevated Health's petition presents a number of repetitive arguments that, taken together, amount to the following objections: (1) the CID is unreasonable because Ms. Scava is no longer involved with the subject company, *see*, *e.g.*, Elevated Health Pet. 7; (2) the CID is unreasonable because it seeks information about entities and individuals outside of the scope of the investigation, *see id.* at 8-9, 11, 14, 16, 17; and (3) the CID's requests for testimony are unduly burdensome and Sarah Scava should be permitted to respond in writing. *See id.* at 10-15, 17.

These objections provide no basis for limiting or quashing the CID. It is entirely permissible for Commission staff to seek testimony from individuals formerly involved with subject companies, including former employees. Moreover, for the reasons discussed above, neither Sarah Scava nor Elevated Health falls outside of the scope of the investigation, which extends to entities and individuals "related" to Fully Accountable. *See*, *e.g.*, Order Ex. 2 at 1, 5-6, 10-12 (resolutions); *see also Invention Submission Corp.*, 965 F.2d at 1090. Furthermore, the Commission is well within its rights in this instance to elect to require live testimony as an investigatory tool pursuant to the FTC Act and its implementing regulations. *See* 15 U.S.C. § 57b-1(c)(1); 16 C.F.R. §2.7(f).

IV. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Fully Accountable, LLC's Petition to Limit or Quash Civil Investigative Demand be, and hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Elevated Health, LLC's Petition to Limit or Quash Civil Investigative Demand is not properly before the Commission, and accordingly is **DENIED.**

IT IS FURTHER ORDERED THAT Sarah Scava shall comply in full with the Commission's Civil Investigative Demand and shall appear ready to testify on the specified

topics at the designated location on **November 29, 2018** at **9:00 a.m.**, or at other such date, time, and location as FTC staff may determine.

IT IS FURTHER ORDERED THAT Fully Accountable, LLC shall comply in full with the Commission's Civil Investigative Demand and shall appear ready to testify on the specified topics at the designated location on **November 30, 2018** at **9:00 a.m.**, or at other such date, time, and location as FTC staff may determine.

By the Commission, Chairman Simons recused.

TABLE OF COMMODITIES
VOLUME 166

Page(s)