FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS JULY 1, 2021, TO DECEMBER 31, 2021

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DURING THE PERIOD
JULY 1, 2021 TO DECEMBER 31, 2021

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Took oath of office May 2, 2018

CHRISTINE S. WILSON, *Commissioner*
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Appointed June 8, 2020

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JULY 1, 2021, TO DECEMBER 31, 2021

IN THE MATTER OF

MOVIEPASS, INC., HELIOS AND MATHESON ANALYTICS, INC., MITCHELL LOWE, AND THEODORE FARNSWORTH

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 4 OF THE RESTORE ONLINE SHOPPERS' CONFIDENCE ACT.

Docket No. C-4751; File No. 192 3000
Complaint, October 1, 2021 – Decision, October 1, 2021

This consent order addresses MoviePass, Inc.'s representation of their movie subscription service. The complaint alleges that Respondents violated Section 5(a) of the Federal Trade Commission Act by deceptively preventing subscribers from using the subscription service as advertised and failing to take reasonable measures to secure consumers' data. The complaint also alleges that respondents violated Section 4 of the Restore Online Shoppers' Confidence Act by failing to clearly and conspicuously disclose all material terms of the transaction before billing through a negative option feature. The consent order prohibits Respondents from misrepresenting their service and data practices and stipulates that any businesses controlled by the Respondents must implement information security programs.

Participants

For the *Commission*: *Thomas B. Carter* and *Zachary A. Keller*.

For the *Respondents*: *Alan Nisselson* and *Leslie S. Barr [Windels Marx Lane & Mittendorf, LLP.]* and *Jason Gonzalez, Neal Gauger* and *Tina Sciocchetti [Nixon Peabody, LLP.]*.

COMPLAINT

The Federal Trade Commission, having reason to believe that MoviePass, Inc., a corporation, Helios and Matheson Analytics, Inc., a corporation, Mitchell Lowe, individually and as an officer of MoviePass, Inc., and Theodore Farnsworth, individually and as an officer of Helios and Matheson Analytics, Inc. (collectively, "Respondents"), have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. § 45, and the Restore Online Shoppers' Confidence Act

("ROSCA"), 15 U.S.C. § 8403, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent MoviePass, Inc. is a Delaware corporation with its principal place of business at 350 Fifth Avenue, Suite 5330, New York, New York 10118. Respondent MoviePass is a subsidiary of Helios and Matheson Analytics, Inc., which acquired a controlling interest in August 2017 and more than 90 percent of the company by April 2018.

2. Respondent Helios and Matheson Analytics, Inc. ("Helios") is a Delaware corporation with its principal place of business also at 350 Fifth Avenue, Suite 5330, New York, New York 10118.

3. Respondent Mitchell Lowe ("Lowe") is the Chief Executive Officer of Respondent MoviePass. Individually or in concert with others, he controlled or had the authority to control, or participated in the acts and practices of Respondent MoviePass, including those relating to its advertising, marketing, public relations, data security, customer service, and the acts and practices alleged in this complaint. At all times material to this complaint, his principal office or place of business was the same as that of Respondents MoviePass and Helios.

4. Respondent Theodore Farnsworth ("Farnsworth") was the Chief Executive Officer of Helios until September 2019. Individually or in concert with others, he controlled or had the authority to control, or participated in the acts and practices of Respondents MoviePass and Helios, including those relating to Respondent MoviePass's advertising, marketing, public relations, customer service, and the acts and practices alleged in this complaint. At all times material to this complaint, his principal office or place of business was the same as that of Respondents MoviePass and Helios.

5. Respondents MoviePass and Helios (collectively, "Corporate Respondents") have operated as a common enterprise while engaging in the unlawful acts and practices alleged below. Corporate Respondents have conducted the business practices described below through interrelated companies that have common ownership, managers, employees, and office locations. Because these Corporate Respondents have operated as a common enterprise, each of them is jointly and severally liable for the acts and practices alleged below. Lowe and Farnsworth have formulated, directed, controlled, or had the authority to control, or participated in the acts and practices of the common enterprise alleged in this complaint.

6. Respondents have advertised, offered for sale, sold, and distributed services to consumers, including the MoviePass movie viewing subscription service.

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

RESPONDENTS' BUSINESS PRACTICES

8. In 2011, Respondent MoviePass launched a "MoviePass" subscription service that allowed consumers to view movies at their local theaters for a monthly fee. Between 2011 and 2017, Respondent MoviePass offered a variety of subscription plans at different price points, which were generally sold through a negative option in which consumers continued to pay a monthly fee for the service unless they affirmatively canceled their subscriptions.

9. In August 2017, Respondents re-launched the MoviePass service nationwide, offering consumers "unlimited" movie viewings at theaters for $9.95 per month, again sold as a negative option. Respondents expressly marketed the service (a) as offering "Unlimited movies for only $9.95/month"; (b) as providing access to "ANY MOVIE ANY THEATER ANY DAY," including "ALL MAJOR MOVIES" in "ALL MAJOR THEATERS"; and (c) as allowing consumers to "[e]njoy a new movie every day." The following marketing materials were representative of its advertisements during the period material to this complaint:

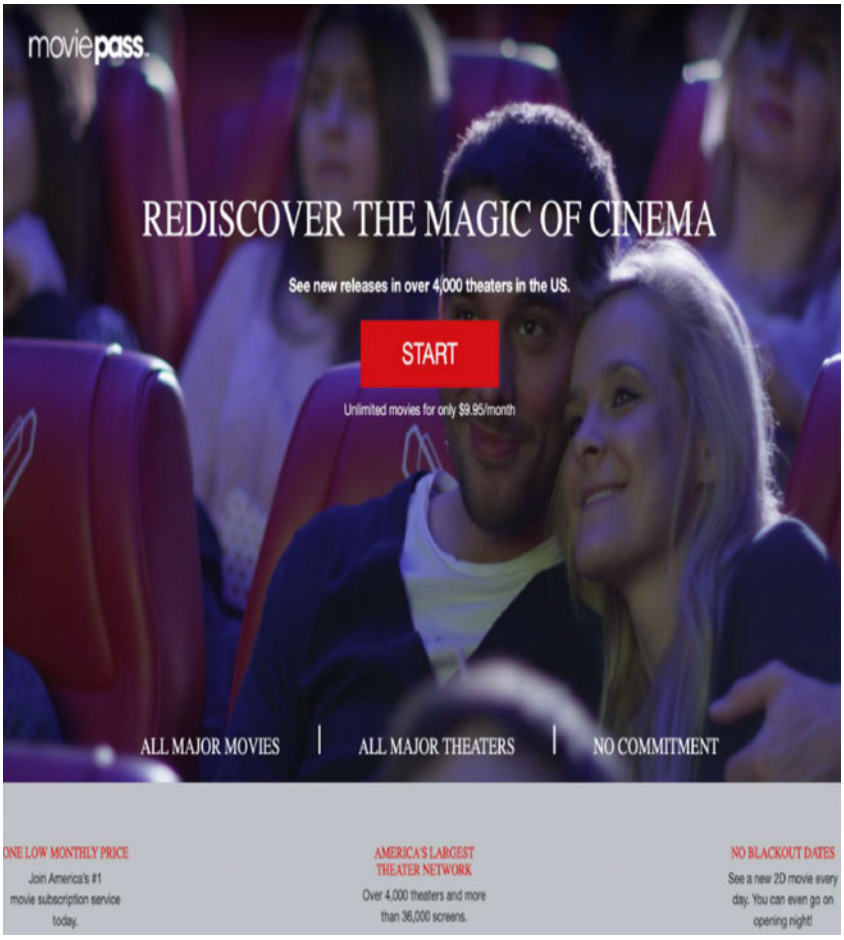

Figure 1 (image produced to the FTC by Respondent MoviePass on June 14, 2019).

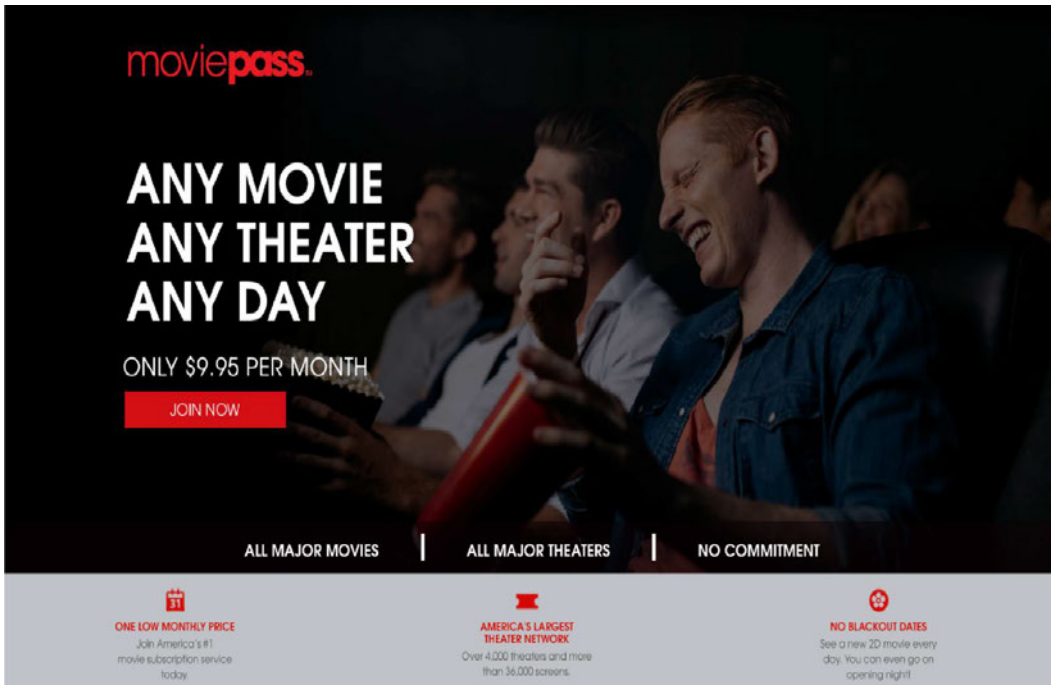

Figure 2 (image produced to the FTC by Respondent MoviePass on June 14, 2019).

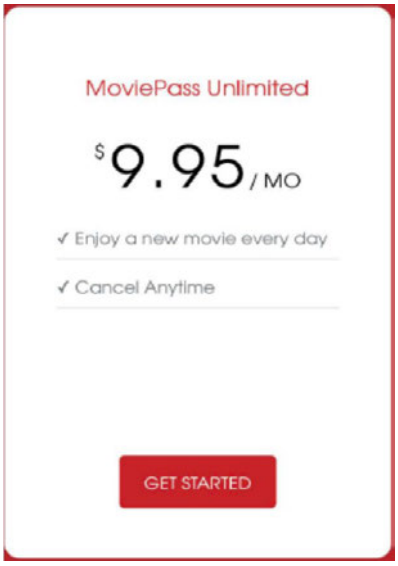

Figure 3 (image produced to the FTC by Respondent MoviePass on June 14, 2019).

10. Respondents had attracted approximately 3.2 million subscribers to MoviePass by early 2018. By this time, however, Corporate Respondents were already incurring financial losses due to the cost of the movie tickets subscribers acquired through the service.

a. In Respondent Helios's April 2018 Form 10-K filing, its auditors "expressed substantial doubt about [Respondent Helios's] ability to continue as a going concern."

b. In a May 2018 SEC filing, Respondent Helios provided a "Financial Update" in which it disclosed that it ran an average cash deficit of $21.7 million per month from September 30, 2017 to April 30, 2018.

RESPONDENTS DECEPTIVELY PREVENTED SUBSCRIBERS FROM USING MOVIEPASS AS ADVERTISED

11. In April 2018, Respondents devised and implemented "password disruption" and "ticket verification" programs in tandem to limit frequent MoviePass users' ability to view movies through the service as advertised.

12. Password Disruption. Under Respondents' password disruption program, Respondents invalidated the passwords of the 75,000 subscribers who used the service most frequently while claiming that "we have detected suspicious activity or potential fraud" on the affected subscribers' accounts.

13. This representation regarding purported "suspicious activity" caused one MoviePass executive to advise that it "**could insinuate there may have been a data breach**" (emphasis in original) and another to advise that "[i]t will go on [an online forum] and suspicions will arise … 'were they hacked?' 'Is our data really safe?'"

14. The password disruption program impeded subscribers' ability to view movies because MoviePass's password reset process often failed.

a. To reset their passwords, subscribers generally had to complete four steps: (i) enter their email addresses into the MoviePass app's "Reset Password" tool; (ii) wait for Respondent MoviePass to send an email with a password reset hyperlink; (iii) respond to the email by clicking on a hyperlink in the email; and (iv) fill out password reset information on a webpage accessed by the hyperlink.

b. Subscribers were often unable to reset their passwords because (i) the app would not accept their email address; (ii) the subscriber would never receive a password reset email; or (iii) the email's hyperlink would lead to a "Page Not Found" notification.

c. Indeed, when discussing the password disruption program, a MoviePass executive acknowledged that subscribers using a common smartphone operating system would encounter technical difficulty in resetting their passwords.

d. When subscribers attempted to contact MoviePass's customer service about their inability to reset their MoviePass passwords, Respondents often responded weeks later or not at all.

e. As a result of password reset failures and related poor customer service, subscribers who were required to reset their passwords were often unable to reset their passwords or to reset their passwords in a timely manner.

15. Both Lowe and Farnsworth knew of, ordered, or helped execute the password disruption program.

a. On April 11, 2018, an employee of Respondent Helios, writing from Farnsworth's personal email address and expressly "on behalf of Ted [Farnsworth]" to Lowe and others, proposed a notice that informed subscribers that their account passwords were required to be reset due to "suspicious activity or potential fraud."

b. Lowe circulated the proposed notice to MoviePass executives for comment and personally ordered subscribers' passwords to be disrupted in accordance with this plan. Lowe also personally chose the number of consumers who would be affected by the program.

16. Both Lowe and Farnsworth were aware of the deceptive nature of the password disruption program even at the time they were formulating it and understood its negative effect on consumers.

a. When Lowe and Farnsworth presented the disruption program to other executives of Respondent MoviePass, one executive warned that the password disruption program "would be targeting all of our heavy users" and that "**there is a high risk this would catch the FTC's attention (and State AG's attention)** and could reinvigorate their questioning of MoviePass, this time from a Consumer Protection standpoint." (Emphasis in original).

b. Another executive agreed, warning of "***FTC Fears:*** All [the other MoviePass executive's] notes about FTC and PR [public relations] fire are my main concerns as I think the PR backlash will flame the FTC stuff." (Emphasis in original).

c. In response to these concerns, Lowe responded, "Ok I get it. So let[']s try this with a small group. Let[']s say 2% of our highest volume users."

d. Respondents MoviePass and Lowe tracked the effect of password disruption on subscribers' use of the service. For example, Respondents MoviePass and Lowe found that only one-half of affected subscribers had successfully reset their passwords one week after they executed their plan.

17. Respondents' password disruption program prevented many subscribers who were using MoviePass in compliance with its terms of use from viewing movies with their MoviePass subscriptions.

18. Ticket Verification. Also in April 2018, Respondents imposed a ticket verification program to prevent certain subscribers from using the service.

19. The ticket verification program required subscribers to take and submit pictures of their physical movie ticket stubs for approval through the MoviePass app within a certain timeframe. Only tickets accepted by Respondent MoviePass's automated system qualified as properly submitted, and the program terms warned: (a) that subscribers whose pictures were not verified by the automated system would not be able to view future films until they uploaded a photo; and (b) that subscribers whose pictures were not verified by the automated system more than once would have their subscriptions canceled.

20. Respondents imposed this ticket verification requirement on the 20 percent of subscribers who used the MoviePass service most frequently while representing to these approximately 450,000 consumers that they had been "randomly selected" for the program and that it was intended to ensure compliance with MoviePass's terms of use.

21. The ticket verification program obstructed thousands of subscribers' ability to use MoviePass because: (a) the automated ticket verification program often did not function on certain common smartphone operating systems; (b) the program's software often failed to recognize pictures of the ticket stubs subscribers submitted; and (c) Respondents were unable to handle the volume of customer service complaints relating to the program, which left subscribers' complaints unresolved.

22. Both Lowe and Farnsworth knew of, ordered, or helped execute the ticket verification program.

a. Lowe was aware of the ticket verification program and personally chose the number of consumers who would be subject to the program.

b. Farnsworth was aware of the ticket verification program and received at least one report about the program's effect on consumers.

23. Lowe was aware that the ticket verification program was deceptive and understood its negative effect on consumers.

a. Respondents MoviePass and Lowe used the program to limit consumers' viewing of a major motion picture. When a MoviePass executive suggested that they delay an increase of ticket verification as "dry powder" to reduce ticket purchases for an upcoming major film release, Lowe responded, "Yes i [sic] agree to hold our powder for [the film]."

b. When Lowe was advised by a MoviePass executive that the ticket verification and password disruption programs would render Respondent MoviePass "not [] able to keep up in incoming [consumer complaint] volume this weekend," Lowe responded, "Yep we understand."

c. Respondents MoviePass and Lowe tracked the program's effect on subscribers and the anticipated reduction in usage the program would cause.

24. Respondents' ticket verification program prevented many subscribers who were using MoviePass in compliance with its terms of use from viewing movies with their MoviePass subscriptions.

25. Trip Wires. By approximately August 2018, Respondents devised another program to prevent frequent users from viewing one movie per day with MoviePass as Respondents had advertised: undisclosed financial thresholds that Respondents referred to as "trip wires."

26. To implement trip wires, Respondents placed subscribers into groups based upon how frequently they used MoviePass. Respondents assigned a dollar allotment to each group so that subscribers in the same group would collectively only be able to purchase a limited number of tickets using the MoviePass service.

27. Respondents typically imposed their trip wire financial thresholds on subscribers who viewed more than three movies per month using MoviePass—far fewer than the "one movie per day" limit that MoviePass represented when marketing MoviePass.

28. Subscribers were unaware that they had been placed in these groups or that they were subject to these financial trip wires: the practice was not disclosed in Respondents' advertising or terms of use, and MoviePass customer service did not tell affected subscribers who had lost access to MoviePass that they were subject to them.

29. Once a given group hit its "trip wire" threshold, Respondents denied access to the MoviePass service to all subscribers in that group. Subscribers affected by the trip wire would be unable to use the MoviePass service when they attempted to use it, often after having already traveled to a movie theater intending to use the service.

30. Both Lowe and Farnsworth knew of, ordered, or helped execute the trip wire program.

a. Lowe was aware of the trip wire program and personally set the trip wire thresholds.

b. Farnsworth was aware of the trip wire program and received at least one report about its implementation and effect on consumers.

31. Lowe was aware that trip wire program was deceptive and understood its negative effect on consumers.

a. On April 4, 2019, Lowe explained in an email that the "beauty of the cap [i.e. trip wire financial threshold]" was that "heavy users compete against other heavy users for tickets."

b. The following week, Lowe participated in correspondence regarding trip wire-related consumer complaints where a senior manager noted that "[w]e do have our hands tied as far as an explanation goes as we do not want to tell them they've consumed too much . . . These users are under the assumption that they're uncapped, so it's going to be tricky coming up with the right wording."

32. Respondents' trip wire program prevented many subscribers who were using MoviePass in compliance with its terms of use from viewing movies with their MoviePass subscriptions.

RESTORE ONLINE SHOPPERS' CONFIDENCE ACT

33. In 2010, Congress passed the Restore Online Shoppers' Confidence Act, 15 U.S.C. § 8401 *et seq.*, which became effective on December 29, 2010. Congress passed ROSCA because "[c]onsumer confidence is essential to the growth of online commerce. To continue its development as a marketplace, the Internet must provide consumers with clear, accurate information and give sellers an opportunity to fairly compete with one another for consumers' business." Section 2 of ROSCA, 15 U.S.C. § 8401.

34. Section 4 of ROSCA, 15 U.S.C. § 8403, generally prohibits charging consumers for goods or services sold in transactions effected on the Internet through a negative option feature, as that term is defined in the Commission's Telemarketing Sales Rule ("TSR"), 16 C.F.R. § 310.2(w), unless the seller (1) clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information, (2) obtains the consumer's express informed consent before making the charge, and (3) provides a simple mechanism to stop recurring charges. See 15 U.S.C.§ 8403.

35. The TSR defines a negative option feature as: "in an offer or agreement to sell or provide any goods or services, a provision under which the consumer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer." 16 C.F.R. § 310.2(w).

36. As described in Paragraphs 8 to 10, above, Respondents have advertised and sold subscriptions to the MoviePass service to consumers through a negative option feature as defined by the TSR. See 16 C.F.R. § 310.2(w).

37. Pursuant to Section 5 of ROSCA, 15 U.S.C. § 8404, a violation of ROSCA is a violation of a rule promulgated under Section 18 of the FTC Act, 15 U.S.C. § 57a.

VIOLATIONS OF THE FTC ACT

Count I – All Respondents
Misrepresenting MoviePass

38. In connection with the advertising, promotion, offering for sale, or sale of the MoviePass subscription service, Respondents have represented, directly or indirectly, expressly or by implication, that consumers who purchase a MoviePass subscription:

a. could use MoviePass to view one movie per day at their local movie theaters; and

b. could use MoviePass to view any movie, in any theater, at any time.

39. In numerous instances in which Respondents made these representations, consumers who purchased a MoviePass subscription:

a. could not use MoviePass to view one movie per day at their local movie theaters; and

b. could not use MoviePass to view any movie, in any theater, at any time.

Therefore, the representations set forth in Paragraph 38 are false or misleading.

VIOLATIONS OF ROSCA

Count II – All Respondents
Violations of ROSCA

40. In numerous instances, in connection with charging consumers for goods or services sold in transactions effected on the Internet through a negative option feature, as described in Paragraphs 11—32 above, Respondents have failed to:

a. clearly and conspicuously disclose all material terms of the transaction before obtaining the consumer's billing information; or

b. obtain the consumer's express informed consent before charging the consumer's credit card, debit card, bank account, or other financial account for the transaction.

41. Respondents' practices as set forth in Paragraph 40 are a violation of Section 4 of ROSCA, 15 U.S.C. § 8403, and are therefore a violation of a rule promulgated under Section 18 of the FTC Act, 15 U.S.C. § 57a, 15 U.S.C. § 8404(a), and therefore constitute an unfair or deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

RESPONDENTS' FAILURE TO TAKE REASONABLE MEASURES TO SECURE CONSUMERS' DATA

42. Respondent MoviePass collected significant amounts of personal information from consumers in connection with its subscriptions, including first name, last name, postal address, email address, birth date, gender, credit card number, CVV, expiration date, billing address, card type, geolocation information, user reviews, and movies attended.

43. In MoviePass's privacy policy, Respondent MoviePass made representations about its data security practices concerning personal information collected from consumers.

44. Respondent MoviePass represented, in relevant part, that it "takes information security very seriously" and "uses reasonable administrative technical, physical, and managerial measures to protect [consumers'] personal details from unauthorized access."

45. Respondent MoviePass further represented that it stored consumers' email addresses and payment information in "an encrypted form."

46. Lowe was responsible for Respondent MoviePass's consumer response and communication policies, practices, and procedures. These responsibilities include oversight of the representations Respondent MoviePass has made to consumers regarding data security.

47. Lowe was also responsible for the oversight of Respondent MoviePass's data security practices.

48. On August 20, 2019, media outlets reported that a security researcher had allegedly breached an exposed Respondent MoviePass database containing large amounts of consumers' personal information.

49. Respondent MoviePass confirmed the data breach on August 22, 2019 through a prepared statement, acknowledging "a security vulnerability that may have exposed subscriber records" and promising to "diligently [] investigate the scope of [the] incident and its potential impact on [MoviePass's] subscribers."

50. Following an investigation into the breach, Respondent MoviePass found that certain personal information of consumers had been exposed between April 25, 2019, and August 20, 2019.

51. According to Respondent MoviePass's analysis, the breach exposed a server containing unencrypted personal information. The unencrypted information contained approximately 28,191 consumers' financial information—i.e., the name on the credit card, the credit card number, the expiration date of credit card, the billing address, and the type of card—and other personal information, including first name, last name, postal address, email address, birth date, gender, geolocation, user reviews, and movies attended.

52. Respondent MoviePass's analysis also indicated that the exposed server was accessed several times from countries where the company does not operate or otherwise have any relationships.

53. This breach was made possible by the failure of Respondents MoviePass and Lowe to take reasonable steps to protect consumers' personal information stored on its network from unauthorized access. In fact, Respondents MoviePass and Lowe engaged in a number of practices that failed to provide reasonable security for consumers' personal information stored on its network. Among other things, Respondents MoviePass and Lowe:

a. Stored consumers' personal information, including financial information and email addresses in clear text;

b. Failed to assess the risks to the personal information stored on its network, such as by conducting periodic risk assessments or performing vulnerability and penetration testing of the network;

c. Failed to maintain and manage security controls that protect and restrict access to consumers' personal information. For example, Respondent MoviePass disabled its firewall and loaded consumers' personal information onto a server in April 2019 in a manner that left the information accessible to any parties with an internet connection;

d. Failed to provide adequate security training to its employees; and

e. Failed to implement safeguards to detect anomalous activity and/or cybersecurity events, such as an adequate intrusion prevention or detection system to alert of potentially unauthorized access to Respondent MoviePass's network or servers.

VIOLATIONS OF THE FTC ACT

Count III – Respondents MoviePass, Helios, and Lowe
Deceptive Failure to Take Reasonable Measures to Protect Consumer Data

54. As described in Paragraphs 43—45, Respondents MoviePass, Helios, and Lowe have represented, directly or indirectly, expressly or by implication, that they used reasonable administrative, technical, physical, and managerial measures to protect consumers' personal information from unauthorized access.

55. In fact, as set forth in Paragraphs 48—53, Respondents MoviePass, Helios, and Lowe have failed to use reasonable administrative, technical, physical, and managerial measures to protect consumers' personal data from unauthorized access. Therefore, the representations set forth in Paragraph 54 are false or misleading.

VIOLATIONS OF SECTION 5 AND ROSCA

56. The acts and practices of Respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act and Section 4 of the Restore Online Shoppers' Confidence Act.

By the Commission, Commissioner Phillips dissenting.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts andpractices 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 violations 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 statedin 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 shouldissue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in furtherconformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondents are:

   a. Respondent MoviePass, Inc. is a Delaware corporation with its principal place of business at 350 Fifth Avenue, Suite 5330, New York, New York 10118. Respondent MoviePass is a subsidiary of Helios and Matheson Analytics, Inc., which acquired a controlling interest in August 2017 and more than 90 percent of the company by April 2018.

   b. Respondent Helios and Matheson Analytics, Inc. is a Delaware corporation with its principal place of business also at 350 Fifth Avenue, Suite 5330, New York, New York 10118.

   c. Respondent Mitchell Lowe is the Chief Executive Officer of Respondent MoviePass. Individually or in concert with others, he controlled or had the authority to control, or participated in the acts and practices of Respondent MoviePass, including those relating to its advertising, marketing, public relations, data security, customer service, and the acts and practices alleged in this complaint. At all times material to this complaint, his principal office or place of business was the same as that of Respondents MoviePass and Helios.

   d. Respondent Theodore Farnsworth was the Chief Executive Officer of Helios until September 2019. Individually or in concert with others, he controlled or had the authority to control, or participated in the acts and practices of Respondents MoviePass and Helios, including those relating to Respondent MoviePass's advertising, marketing, public relations, customer service, and the acts and practices alleged in this complaint. At all times material to this complaint, his principal office or place of business was the same as that of Respondents MoviePass and Helios.

2. On January 28, 2020, Respondents MoviePass, Inc. and Helios and Matheson Analytics, Inc. filed voluntary petitions for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. 701 *et seq.*, in the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court"). *See In re MoviePass, Inc.*, Case No.

20-10244-smb (Bankr. S.D.N.Y. Jan. 28, 2020); *In re Helios and Matheson Analytics, Inc.*, Case No. 20-10242-smb (Bankr. S.D.N.Y. Jan. 28, 2020) ("Bankruptcy Cases"). Alan Nisselson of the firm Windels, Marx, Lane & Mittendorf, LLP was appointed as the trustee ("Bankruptcy Trustee").

3. If the Bankruptcy Cases are pending as of the date of entry of this Order, then this action against Respondents MoviePass, Inc. and Helios and Matheson Analytics, Inc., including the entry of judgment and enforcement of a judgment other than a money judgment, is not stayed by 11 U.S.C. § 362(a)(1), (2), (3), or (6) because it is an action brought by the Commission to enforce its police and regulatory power as a governmental unit pursuant to 11 U.S.C. § 362(b)(4) and thus falls within an exemption to the automatic stay.

4. The Bankruptcy Trustee is not a Respondent or a party to this Order and is acting solely in his fiduciary capacity as Chapter 7 trustee in the Bankruptcy Cases to bind Respondents MoviePass, Inc. and Helios and Matheson Analytics, Inc. to this Consent Agreement. The Bankruptcy Trustee's obligations arise, if at all, only if the Bankruptcy Trustee obtains authorization from the Bankruptcy Court to operate the business of such entity pursuant to 11 U.S.C. § 721, or abandons property of the estate of such entity pursuant to 11 U.S.C. § 554, before the Bankruptcy Case is closed. In the event that any obligations arise hereunder, the Bankruptcy Trustee shall have no further obligations under this Order after the Bankruptcy Case is closed, including with respect to any property the Bankruptcy Trustee abandons to effectuate the closing of any such Bankruptcy Case.

5. Notwithstanding the above, no obligations under this Consent Agreement arose by virtue of the Bankruptcy Trustee's limited operation of the MovieFone business pursuant to that certain Order of the Bankruptcy Court entered on February 26, 2020, which authorized the Bankruptcy Trustee, effective as of January 28, 2020, to continue the operation of the MovieFone business for a limited period until March 31, 2020, pursuant to 11 U.S.C. § 721.

6. The Bankruptcy Trustee has obtained approval from the Bankruptcy Court to enter into this Order and take any and all actions necessary to implement the terms and conditions of this Order applicable to Respondents MoviePass, Inc. and Helios and Matheson Analytics, Inc.

7. 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. "Covered Business" means (1) Corporate Respondents; (2) any business that Corporate Respondents control, directly or indirectly; and (3) any business that Respondent Lowe controls, directly or indirectly, that collects or maintains consumers' Personal Information.

B. "Covered Incident" means any instance in which any U.S. federal, state, or local law or regulation requires Respondents to notify any U.S. federal, state, or local government entity that information collected or received, directly or indirectly, by Respondents from or about an individual consumer was, or is reasonably believed to have been, accessed or acquired without authorization.

C. "Respondents" means all of the Individual Respondents and the Corporate Respondents, individually, collectively, or in any combination.

1. "Corporate Respondents" means MoviePass, Inc., Helios and Matheson Analytics, Inc., and their successors and assigns, *provided that*, for the purposes of Sections II-X of this Order, each of MoviePass, Inc. and Helios and Matheson Analytics, Inc., including their bankruptcy estates, are excluded from the definition of "Respondents" and "Corporate Respondents" for the period from the date of entry of this Order (at which time obligations under this Order arise) until the date the Bankruptcy Case for each such entity is closed, unless the Bankruptcy Trustee obtains authorization from the Bankruptcy Court to operate the business of such entity pursuant to 11 U.S.C. § 721 or abandons property of the estate of such entity pursuant to 11 U.S.C. § 554 before the Bankruptcy Case is closed, in which case Sections II-X of this Order shall apply to such entity as of the date such an event occurs.

2. "Individual Respondents" means Mitchell Lowe and Theodore Farnsworth.

D. "Personal Information" means individually identifiable information from or about an individual consumer, including:

1. First and last name.

2. Home or other physical address, including street name and name of city or town, or other information about the location of the individual, including but not limited to fine or coarse location or GPS coordinates;

3. Email address;

4. Telephone number;

5. Date of birth;

6. Social Security number;

7. Other government-issued identification numbers, such as a driver's license number, military identification number, passport number, or other personal identification number;

8. Financial institution account number;

9. Credit or debit card information; or

10. Authentication credentials, such as a username and password.

I. PROHIBITION AGAINST MISREPRESENTATIONS

IT IS ORDERED that Respondents, 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 advertising, promotion, offering for sale, or sale of any product or service, are permanently restrained and enjoined from misrepresenting or assisting others in misrepresenting, expressly or by implication:

A. That the service will allow consumers to view one movie per day at their local movie theaters;

B. That the service will allow consumers to view any movie, in any theater, at any time;

C. The total costs to purchase, receive, or use, and the quantity of, any good or service that is the subject of the sales offer;

D. All material restrictions, limitations, or conditions to purchase, receive, or use the product or service that is subject of the sales offer;

E. That Respondents will take reasonable administrative technical, physical, or managerial measures to protect consumers' Personal Information from unauthorized access;

F. The extent to which Respondents otherwise protect the privacy, security, availability, confidentiality, or integrity of Personal Information; or

G. Any material fact.

II. MANDATED INFORMATION SECURITY PROGRAM

IT IS FURTHER ORDERED that each Covered Business shall not transfer, sell, share, collect, maintain, or store Personal Information unless it establishes and implements, and thereafter maintains, a comprehensive information security program ("Information Security Program") that protects the security, confidentiality, and integrity of Personal Information. To satisfy this requirement, each Covered Business must, at a minimum:

A. Document in writing the content, implementation, and maintenance of the Information Security Program;

B. Provide the written program and any evaluations thereof or updates thereto to its board of directors or equivalent governing body or, if no such board or equivalent governing body exists, to a senior officer responsible for its Information Security Program at least once every twelve (12) months and promptly (not to exceed thirty (30 days) after a Covered Incident;

C. Designate a qualified employee or employees to coordinate, oversee, and be responsible for the Information Security Program;

D. Assess and document, at least once every twelve (12) months and promptly (not to exceed thirty (30 days) following a Covered Incident, internal and external risks to the security, confidentiality, or integrity of Personal Information that could result in the (1) unauthorized collection, maintenance, use, or disclosure of, or provision of access to, Personal Information; or the (2) misuse, loss, theft, alteration, destruction, or other compromise of such information;

E. Design, implement, maintain, and document safeguards each Covered Business identifies that control for the internal and external risks to the security, confidentiality, or integrity of Personal Information identified in response to sub-Provision II.D. Each safeguard must be based on the volume and sensitivity of the Personal Information that is at risk, and the likelihood that the risk could be realized and result in the (1) unauthorized collection, maintenance, use, or disclosure of, or provision of access to, Personal Information; or the (2) misuse, loss, theft, alteration, destruction, or other compromise of such information. Such safeguards must also include:

1. Training of all its employees, at least once every twelve (12) months, on how to safeguard Personal Information;

2. Technical measures to monitor of all of its networks and all systems and assets within those networks to identify data security events, including unauthorized attempts to exfiltrate Personal Information from those networks; and

3. Data access controls for all databases storing Personal Information, including by, at a minimum, (a) restricting inbound connections to approved IP addresses, (b) requiring authentication to access them, and (c) limiting employee access to what is needed to perform that employee's job function;

F. Assess, at least once every twelve (12) months and promptly (not to exceed thirty (30) days) following a Covered Incident, the sufficiency of any safeguards in place to address the internal and external risks to the security, confidentiality, or integrity of Personal Information, and modify the Information Security Program based on the results;

G. Test and monitor the effectiveness of the safeguards at least once every twelve (12) months and promptly (not to exceed thirty (30) days) following a Covered Incident, and modify the Information Security Program based on the results. Such testing and monitoring must include vulnerability testing of each of the Covered Business's networks once every four months and promptly (not to exceed thirty (30) days) after a Covered Incident, and penetration testing of each of the Covered Business's networks at least once every twelve (12) months and promptly (not to exceed thirty (30) days) after a Covered Incident;

H. Select and retain service providers capable of safeguarding Personal Information they access through or receive from each Covered Business, and contractually require service providers to implement and maintain safeguards sufficient to address the internal and external risks to the security, confidentiality, or integrity of Personal Information; and

I. Evaluate and adjust the Information Security Program in light of any changes to its operations or business arrangements, a Covered Incident, new or more efficient technological or operational methods to control for the risks identified in Provision III.D of this Order, or any other circumstances that any such Covered Business knows or has reason to know may have an impact on the effectiveness of the Information Security Program or any of its individual safeguards. At a minimum, each Covered Business must evaluate the Information Security Program at least once every twelve (12) months and modify the Information Security Program based on the results.

III. INFORMATION SECURITY ASSESSMENTS BY A THIRD PARTY

IT IS FURTHER ORDERED that, in connection with compliance with Provision II.B of this Order titled Mandated Information Security Program, Respondents must obtain initial and biennial assessments ("Assessments"):

A. The Assessments must be obtained from a qualified, objective, independent third party professional ("Assessor"), who: (1) uses procedures and standards generally accepted in the profession; (2) conducts an independent review of the Information Security Program; (3) retains all documents relevant to each Assessment for five years after completion of such Assessment, and (4) will provide such documents to the Commission within ten (10) days of receipt of a written request from a representative of the Commission. No documents may be withheld on the basis of a claim of confidentiality, proprietary or trade secrets, work product protection, attorney client privilege, statutory exemption, or any similar claim.

B. For each Assessment, any such Respondent must provide the Associate Director for Enforcement for the Bureau of Consumer Protection at the Federal Trade Commission with the name, affiliation, and qualifications of the proposed Assessor, whom the Associate Director shall have the authority to approve in her or his sole discretion.

C. 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 two-year period thereafter for twenty (20) years after issuance of the Order for the biennial Assessments.

D. Each Assessment must, for the entire assessment period: (1) determine whether such Covered Business has implemented and maintained the Information Security Program required by Provision II of this Order, titled Mandated Information Security Program; (2) assess the effectiveness of such Covered Business's implementation and maintenance of sub-Provisions II.A—I; (3) identify any gaps or weaknesses in, or instances of material noncompliance with, the Information Security Program; (4) address the status of gaps or weaknesses in, or instances of material non-compliance with, the Information Security Program that were identified in any prior Assessment required by this Order; and (5) identify specific evidence (including, but not limited to, documents reviewed, sampling and testing performed, and interviews conducted) examined to make such determinations, assessments, and identifications, and explain why the evidence that the Assessor examined is (a) appropriate for assessing an enterprise of the Covered Business's size, complexity, and risk profile; and (b) sufficient to justify the Assessor's findings. No finding of any Assessment shall rely primarily on assertions or attestations by such Covered Business's management. The Assessment must be signed by the Assessor, state that the Assessor conducted an independent review of the Information Security Program and did not rely primarily on assertions or

attestations by such Covered Business's management, and state the number of hours that each member of the assessment team worked on the Assessment. To the extent that such Covered Business revises, updates, or adds one or more safeguards required under Provision II of this Order during an Assessment period, the Assessment must assess the effectiveness of the revised, updated, or added safeguard(s) for the time period in which it was in effect, and provide a separate statement detailing the basis for each revised, updated, or additional safeguard.

E. Each Assessment must be completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Unless otherwise directed by a Commission representative in writing, such Respondent must submit the initial Assessment to the Commission within ten (10) days after the Assessment has been completed via email to DEbrief@ftc.gov or 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 MoviePass, Inc., FTC File No. 1923000." All subsequent biennial Assessments must be retained by Respondents until the order is terminated and provided to the Associate Director for Enforcement within ten days of request.

IV. COOPERATION WITH THIRD-PARTY INFORMATION SECURITY ASSESSOR

IT IS FURTHER ORDERED that each Covered Business, whether acting directly or indirectly, in connection with any Assessment required by Provision III of this Order titled Information Security Assessments by a Third Party, must:

A. Provide or otherwise make available to the Assessor all information and material in its possession, custody, or control that is relevant to the Assessment for which there is no reasonable claim of privilege;

B. Provide or otherwise make available to the Assessor information about its network(s) and all of its IT assets so that the Assessor can determine the scope of the Assessment, and visibility to those portions of the network(s) and IT assets deemed in scope; and

C. Disclose all material facts to the Assessor, and not misrepresent in any manner, expressly or by implication, any fact material to the Assessor's: (1) determination of whether each Covered Business subject to Provisions II and III of this Order has implemented and maintained the Information Security Program required by Provision II of this Order, titled Mandated Information Security Program; (2) assessment of the effectiveness of the implementation and maintenance of sub-Provisions II.A—I; or (3) identification of any gaps or weaknesses in, or instances of material non-compliance with, the Information Security Program.

V. COVERED INCIDENT REPORTS

IT IS FURTHER ORDERED that Respondents, for any Covered Business, within thirty (30) days after discovery of a Covered Incident must submit a report to the Commission. The report must include, to the extent possible:

A. The date, estimated date, or estimated date range when the Covered Incident occurred;

B. A description of the facts relating to the Covered Incident, including the causes of the Covered Incident, if known;

C. A description of each type of information that triggered the notification obligation to the U.S. federal, state, or local government entity;

D. The number of consumers whose information triggered the notification obligation to the U.S. federal, state, or local government entity;

E. The acts that the Covered Business has taken to date to remediate the Covered Incident and protect Personal Information from further exposure or access, and protect affected individuals from identity theft or other harm that may result from the Covered Incident; and

F. A representative copy of any materially different notice sent by the Covered Business to consumers or to any U.S. federal, state, or local government entity. 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 MoviePass, Inc., et al.*, FTC File No. 1923000."

VI. ANNUAL CERTIFICATION

IT IS FURTHER ORDERED that each Covered Business must:

A. One year after the issuance date of this Order, and each year thereafter, provide the Commission with a certification from a senior corporate manager, or if no such senior corporate manager exists, a senior officer, of each Covered Business responsible for such Covered Business's Information Security Program that: (1) the Covered Business has established, implemented, and maintained the requirements of this Order; (2) the Covered Business is not aware of any material non-compliance that has not been (a) corrected or (b) disclosed to the Commission; and (3) includes a brief description of all Covered Incidents during the certified period. The certification must be based on the personal knowledge of the senior corporate

manager, senior officer, or subject matter experts upon whom the senior corporate manager or senior officer reasonably relies in making the certification.

B. Unless otherwise directed by a Commission representative in writing, submit all annual certifications to the Commission pursuant to this Order via email to DEbrief@ftc.gov or 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 *MoviePass, Inc., et al*., FTC File No. 1923000."

VII. ACKNOWLEDGMENTS OF THE ORDER

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

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

B. For 20 years after the issuance date of this Order, each Individual Respondent for any business that such Respondent, individually or collectively with any other Respondents, is the majority owner or controls directly or indirectly, and each Corporate 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 Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

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

VIII. COMPLIANCE REPORTS AND NOTICES

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

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

1. Each Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of that Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Respondent (which Individual Respondents must describe if they know or should know due to their own involvement); (d) describe in detail whether and how that Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

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

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

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

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

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: *In re MoviePass, Inc., et al.*, FTC File No. 1923000.

IX. 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. Specifically, each Corporate Respondent, in connection with any conduct related to the subject matter of the Order, and each Individual Respondent for any business that such Respondent, individually or collectively with any other Respondents, is a majority owner or controls directly or indirectly, must create and retain the following records:

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

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

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

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

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

X. 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).

XI. ORDER EFFECTIVE DATES

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

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

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

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

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 Phillips dissenting.

CONCURRING STATEMENT OF COMMISSIONER CHRISTINE S. WILSON

I support the complaint and consent in this matter challenging the respondents' marketing of its movie subscription product. Specifically, the respondents offered subscribers "unlimited movies" but deployed a variety of tactics to prevent consumers from enjoying unlimited benefits, as recounted in the complaint, rendering the representations deceptive. I also concur with the inclusion of a count challenging violations of the Restore Online Shoppers' Confidence Act, 15 U.S.C. § 8403 (ROSCA). The conduct alleged in this case, in my view, violates the plain language of the statute.

Section 8403 of ROSCA states that:

> It shall be unlawful for any person to charge or attempt to charge any consumer for any goods or services sold in a transaction effected on the Internet through a negative option feature (as defined in the Federal Trade Commission's Telemarketing Sales Rule in part 310 of title 16, Code of Federal Regulations), unless the person—
>
> (1) provides text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information;
>
> (2) obtains a consumer's express informed consent before charging the consumer's credit card, debit card, bank account, or other financial account for products or services through such transaction; and
>
> (3) provides simple mechanisms for a consumer to stop recurring charges from being placed on the consumer's credit card, debit card, bank account, or other financial account.

The TSR defines "negative option feature" as "an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or service or to cancel the agreement is interpreted by the seller as acceptance of the offer." 16 C.F.R. §310.2(w).

MoviePass Unlimited was a month-to-month arrangement that consumers could cancel at any time. The FTC for decades has interpreted these types of recurring agreements as negative option plans. Each month, the consumer's failure to cancel implies consent to be charged for an additional month. In other words, the seller obtains consent for the recurring charge using a negative option.

The "unlimited" aspect of the MoviePass subscription constituted a material term of the pass that the company marketed and sold. Notably, as alleged in the complaint, MoviePass highlighted this term as a primary selling point – touting "MoviePass Unlimited" and stating "Enjoy a new movie every day." MoviePass did not disclose that it would prevent consumers from actually viewing one movie per day or that it would implement ticket verification procedures to frustrate consumers' attempts to use their passes, as described in the Commission's complaint. In essence, MoviePass throttled subscribers' movie consumption. The terms or limits to the purportedly unlimited subscription that were employed to achieve this throttling effect almost certainly would be considered material to consumers' decisions to purchase the subscription.

ROSCA Section 8403 plainly states that for goods or services sold through a negative option feature, the seller must "clearly and conspicuously disclose all material terms of the transaction." The respondents here did not disclose all material terms. Therefore, these facts, as alleged, in my view support a violation of ROSCA.

I am mindful that this settlement marks the first time the Commission has alleged a violation of ROSCA where the undisclosed material terms do not relate specifically to the negative option feature but instead to the underlying good or service marketed through that feature. But I believe that the facts of this case fall well within the bounds of the conduct that Congress contemplated challenging when promulgating the statute. In fact, the conduct described in the complaint fits neatly within the plain language of the statue.

Given the inaugural use of ROSCA for this purpose, it is appropriate that the Commission is foregoing civil penalties. Businesses need predictability about the manner in which laws will be enforced and should be afforded the ability to contest new uses of authority. This case will serve as notice to the market, and future violations of this type may well warrant civil penalties.

The Supreme Court's recent decision in *AMG*[1] has eliminated the FTC's ability to seek equitable monetary relief under Section 13(b) of the FTC Act to compensate consumers. The temptation to test the limits of our remaining sources of authority is likely to be strong. On numerous occasions, I have expressed concern about novel interpretations of our authority that

[1] AMG v. FTC, slip op No. 19-508 (Apr. 22, 2021), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.

exceed the boundaries of underlying statutes and corresponding Congressional intent.[2] And I will scrutinize carefully any future attempts to expand ROSCA, or any other authority entrusted to the Commission, beyond the plain language. Here, however, I am satisfied that the challenged conduct falls well within the four corners of the statute and therefore conclude that, under the facts alleged, including a ROSCA count is not an overreach.

DISSENTING STATEMENT OF COMMISSIONER NOAH JOSHUA PHILLIPS

The Commission's decision in this case to plead a novel theory of liability under the Restore Online Shoppers' Confidence Act of 2010 ("ROSCA") accomplishes nothing for consumers and reduces clarity for businesses seeking to follow the law. I respectfully dissent.

Congress enacted ROSCA to protect consumers from aggressive sales tactics on the Internet. In so doing, it expressed particular concern about the practice of reputable online retailers sharing their customers' information with third party sellers ("post-transaction third party sellers"), who in turn "used aggressive, misleading sales tactics" to charge millions of unwitting American consumers for goods and services.[1] Consumers didn't know what they were being charged for and had no way to stop recurring charges. Congress found that these sales tactics undermined consumer confidence in the Internet and harmed the American economy.[2]

The crux of the statutory regime set forth in ROSCA is to require disclosures in two particular circumstances. The first deals specifically with post-transaction third party sellers that, unbeknownst to consumers, receive consumers' financial information and charge them for goods or services, making it impossible for consumers to figure out what they were being charged for or

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[2] Statement of Commissioner Christine S. Wilson Concurring in Part, Dissenting in Part, Notice of Proposed Rulemaking related to Made in USA Claims (June 22, 2020) (expressing concern that the proposed rule exceeds the scope of authority Congress granted the FTC), https://www.ftc.gov/system/files/documents/public_statements/1577099/p074204musawilsonstatementrev.pdf; Separate Statement of Commissioner Christine S. Wilson Concurring in Part, Dissenting in Part, *FTC v. Avant, LLC* (Apr. 15, 2019) (dissenting with respect to the maiden use of the Telemarketing Sales Rule (TSR) provision related to novel payments (specifically remotely created checks) in a non-fraud case), https://www.ftc.gov/system/files/documents/public_statements/1514073/avant_inc_1623090_separate_statement_of_christine_s_wilson_4-15-19.pdf. In the *Avant* matter, the Commission sought to impose liability under the TSR against a legitimate company, selling legitimate products, in circumstances not contemplated when the Rule was promulgated to address fraudulent businesses abusing these types of payments. *Id.*

[1] 15 U.S.C. § 8401(4).
[2] 15 U.S.C. § 8401(3).

how to stop it.[3] Accordingly, under Section 8402, these post-transaction third party sellers cannot charge or attempt to charge a consumer's financial account for any good or service sold in an Internet transaction unless, before obtaining the consumer's billing information, they clearly and conspicuously disclose all material terms of the transaction. The statute defines these terms to include: a description of the goods or services being offered; the fact that such seller is not affiliated with the initial merchant; and the cost of such goods or services.[4] The post-transaction third party seller must also obtain express informed consent from the consumer. That scenario is not at issue here.

The second circumstance is when *any* seller uses a negative option feature, one of the aggressive tactics that Congress found third-party sellers employed. Here ROSCA also requires specific upfront disclosures. Under Section 8403, before charging a consumer for goods or services sold through a negative option feature,[5] the seller must: (i) clearly and conspicuously disclose "all material terms of the transaction" before obtaining the consumer's billing information; (ii) obtain express informed consent from the consumer before charging the consumer's financial account; and (iii) provide a simple mechanism for the consumer to stop the recurring charges.[6] Section 8403 does not define which terms must be disclosed, or make clear whether the disclosure obligation applies to the negative option feature or that feature as well as the underlying product.

In selling its services to consumers, MoviePass used a negative option feature. Consumers interacted directly with MoviePass and were aware that they were purchasing a service from MoviePass and were agreeing to recurring charges. The complaint does not allege that MoviePass failed to provide a simple mechanism to cancel the recurring charge or that any ROSCA violation took place for the majority of its consumers.

Liability here is instead predicated on the fact that, when it became apparent its business model was not working because some customers were going to too many movies, MoviePass began throttling high-volume users of its service and potentially reducing their ability to screen movies on a truly "unlimited" basis and failed to disclose this to new consumers. This is deception, and it violates Section 5 of the FTC Act. But the complaint also fashions MoviePass's failure to disclose affirmatively that it would throttle certain high-volume users of its service as a failure to clearly and conspicuously disclose all material terms of the transaction before obtaining the consumer's billing information under ROSCA.[7]

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[3] As set forth in ROSCA's Findings and Declaration of Policy section, in exchange for "bounties" and other payments, hundreds of reputable online retailers and websites shared their customers' billing information, including credit card and debit card numbers, with third party sellers through a process known as "data pass". 15 U.S.C. § 8401. This practice is not at issue here.

[4] 15 U.S.C. § 8402(a).

[5] ROSCA incorporates the definition of negative option feature from the Telemarketing Sales Rule, 16 C.F.R. § 310.2(w): Negative option feature means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

[6] 15 U.S.C. § 8403.

[7] Likewise, this means that MoviePass did not obtain express informed consent.

The novelty here is that, for the first time, the Commission is treating a deception about the characteristics of the underlying product—not the negative option feature—as a violation of ROSCA. To date, all the complaints filed by the Commission that allege ROSCA violations in the negative option context with a first party seller have involved defendants hiding a negative option feature, not obtaining express informed consent before charging the consumer, or failing to provide a simple mechanism for cancelling the recurring charge.[8] Instead of examining whether consumers understood the negative option feature, had given consent to that, or were able to cancel in a simple way, this complaint instead looks to the characteristics of the product that MoviePass sold to its some of its consumers.

The Commission is thus announcing that it may seek civil penalties against all businesses that online negative option features where the Commission determines that there has been any material deception, whether relating to the negative option feature or a characteristic of the underlying product. I have several concerns with this approach.

First, pleading this new theory accomplishes nothing here. One benefit of establishing liability for rule violations is to obtain a penalty. But the corporate respondents are in bankruptcy and the individual respondents are settling these allegations in a no-money order. The relief we obtain today is no different than if we proceeded without a ROSCA count. Including a ROSCA count does nothing for consumers in terms of monetary or injunctive relief. That makes our announcement of sweeping new liability and introduction of a lack of clarity to the market about required disclosures, discussed below, ill-advised.

Second, while not facially-implausible, the statutory interpretation pushed by the Commission in this case is far from obvious. Section 8403 concerns "negative option marketing" and speaks specifically to, *inter alia*, "goods or services sold in a transaction effected on the Internet through a negative option feature". The negative option is the aggressive tactic that Congress was concerned about, and the statutory requirements of disclosure of terms, consent to collection of financial information, and simple cancellation protect specifically against its abuse. But there is nothing in the statute—and little, for that matter, in the legislative history—to suggest congressional intent to regulate disclosures about the products or services being sold, as opposed to disclosures about the negative option.

Section 8402, concerning third-party post-transaction sellers, provides an important contrast. There, Congress specifically delineated the terms that sellers were obligated to disclose, including defining "material terms" to include "a description of the goods or services". Section 8403, addressing negative options, does not include that language. (So the Commission reads the words into the statute.) A heightened requirement for post-transaction third party sellers makes

[8] For example, in *FTC v. Triangle Media Corporation*, consumers were offered a free trial but were charged as much as $98.71 for the trial shipment, and also were enrolled in a negative-option continuity plan without their consent. Defendants also used deceptive order confirmation pages to trick consumers into ordering additional products, for which the defendants similarly charged consumers full price and enrolled them in negative-option plans. The defendants then made it difficult to cancel the continuity plan, stop or avoid the recurring charges, or obtain a refund. *FTC v. Triangle Media Corp.,* No. 18cv1388-MMA (NLS), 2018 WL 4051701 (S.D. Cal. Aug. 24, 2018).

sense. Where the consumer is not aware of the transaction at all, disclosures about the product are essential. But where the consumer is aware they are buying the product—but not the negative option that will continue charging them over time—the justification for compelling disclosure about the product is less clear.[9] What is more, because Congress specifies certain material terms in Section 8402 but not Section 8403, the scope of the obligation the Commission adopts—regarding "*all* material terms", whatever a majority of FTC Commissioners might deem those to be—would impose fewer disclosure obligations on post-transaction third party sellers than on businesses that use negative options. There is simply no justification for that.

Third, the Commission fails to announce today precisely what it believes are the "material terms", reducing clarity for businesses about their disclosure obligations. ROSCA creates affirmative disclosure obligations, but we have given no guidance to businesses about what to disclose.[10] Instead, the Commission now declares—in a settlement with two bankrupt companies and two individuals, none of whom will pay anything—that failing to disclose a product characteristic that the Commission later deems material exposes a business to substantial civil penalties. At the very least, before putting this new theory into action, the Commission should issue guidance to companies as to their disclosure obligations.

The Commission's decision dramatically to re-interpret ROSCA and expand liability comes just weeks after the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*, which held that equitable monetary relief is not available under Section 13(b) of the FTC Act.[11] I believe Congress should amend the statute. But I do not agree that our loss of authority under one statute somehow creates authority elsewhere. While equitable relief is not intended to be penal, my colleagues have touted the triggering of rule penalties as an alternative because they deprive the defendant of money.[12] But even to the extent one takes the view that a rule violation occurred here, and leaving aside the lack of clarity the Commission today creates, the reader should keep in mind that the respondents are not paying any money here at all.

I therefore dissent.

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[9] Other than in specific congressionally-delineated contexts, the FTC does not have civil penalty authority in the first instance for deception in the sale of products or services.

[10] In fact, the Commission did not even raise this issue in its recent rulemaking proposal concerning negative options. *See* Rules Concerning the Use of Prenotification Negative Option Plans, Advance Notice of Proposed Rulemaking and Request for Public Comment, 84 Fed. Reg. 52393, Oct. 2, 2019.

[11] *See AMG Capital Mgmt., LLC v. FTC*, No. 19-508, 593 U.S. ___, slip op. (Apr. 22, 2021), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.

[12] *See, e.g., The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers*, *Hearing on H.R. 2668 Before the Subcomm. on Consumer Prot. and Com. of the H. Comm. on Energy and Com.*, 117th Cong. 3 (2021) (statement of Rebecca Kelly Slaughter, Acting Chairwoman, Fed. Trade Comm'n).

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 proposed consent order ("Proposed Order") from MoviePass, Inc., a corporation, Helios and Matheson Analytics, Inc. ("Helios"), a corporation, Mitchell Lowe, individually and as an officer of MoviePass, Inc., and Theodore Farnsworth, individually and as an officer of Helios ("Respondents"). The Proposed Order has been placed on the public record for 30 days to receive comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's Proposed Order.

This matter involves Respondents' advertising, promotion and sale of the movie-viewing subscription service "MoviePass," which offered consumers access to one movie per day at their local movie theaters for a monthly subscription price. The FTC complaint challenges two aspects of Respondents' marketing of MoviePass:

First, the complaint alleges that Respondents' offer of one movie per day was deceptive due to several measures Respondents took to prevent consumers from using the service as promised—measures that included invalidating certain consumers' passwords, adding a difficult and defective ticket verification procedure to view movies, and placing undisclosed usage caps on frequent users.

The complaint alleges that this conduct violated two laws the FTC enforces. First, the FTC alleges the conduct to be a "deceptive act[] or practice[]" that violates Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a). The conduct described above was deceptive because Respondents engaged in it to prevent consumers from using MoviePass once per day as advertised. Second, the FTC alleges that Respondents violated the Restore Online Shoppers' Confidence Act ("ROSCA"), 15 U.S.C. § 8403, through the same conduct by failing to disclose the steps that they took to prevent consumers from using MoviePass once per day. This failure violated ROSCA in two ways—by failing to disclose all material terms of the transaction as required by 15 U.S.C. § 8403(1) and by failing to secure consumers' express informed consent to the transaction before charging their financial accounts as required by 15 U.S.C. § 8403(2).

In addition to the deceptive marketing of MoviePass's "one movie per day" service, the complaint further alleges that Respondents MoviePass, Inc., Helios, and Lowe misrepresented the data security measures they took to protect consumers' personal information against unauthorized access. The complaint alleges that Respondents' actions constitute unfair or deceptive acts or practices and the making of false advertisements, in violation of Section 5(a) of the FTC Act.

The Proposed Order is designed to prevent Respondents from engaging in similar acts or practices in the future. It includes injunctive relief to address these alleged violations and to prohibit similar and related conduct:

Part I prohibits Respondents from future misrepresentations similar to those at issue in the complaint by prohibiting them from misrepresenting that:

- A service will allow consumers to view one movie per day at their local theaters;

- A service will allow consumers to view any movie, in any theater, at any time; and

- Respondents will take reasonable administrative, technical, physical, or managerial measures to protect consumers' personal information from unauthorized access.

Part I also features ancillary relief relating to the challenged conduct by prohibiting misrepresentations relating to (1) the total costs to purchase, receive, or use, and the quantity of, any good or service, (2) any material restrictions, limitations, or conditions to purchase, receive, or use the product or service, (3) the extent to which Respondents otherwise protect the privacy, security, availability, confidentiality, or integrity of consumers' personal information, and (4) any other material fact.

Parts II—VI provide ancillary relief relating to the data security practices of MoviePass, Inc., Helios, and Lowe. The provisions thus only apply to businesses these three respondents operate.

- Part II requires a comprehensive information security program for any enterprise that collects consumers' personal information, requiring among other things:

  ▪ That the information security program contain safeguards that are based on the volume and sensitivity of the personal information at risk;

  ▪ That testing and monitoring of the safeguards are conducted regularly but no less often than once a year; and

  ▪ That the information security program be documented, evaluated, and adjusted in light of any changes to business operations or new technological advancements.

- Parts III and IV respectively require the three respondents (1) to obtain an initial and then biennial third-party information security assessments and (2) to cooperate with the third parties conducting the assessments.

- Part V requires the three respondents to report to the Commission any event involving consumers' personal information that constitutes a reportable event to any U.S. federal, state, or local government authority.

- Part VI mandates that the three respondents submit an annual certification regarding their compliance with the Proposed Order's data security requirements.

Parts VII through XI are reporting and compliance provisions. Part VII mandates that all Respondents acknowledge receipt of the Proposed Order and, for 20 years, distribute the Proposed Order to certain employees and agents and secure acknowledgments from recipients of the Proposed Order. Part VIII requires that Respondents submit compliance reports to the FTC one year after the order's issuance and submit additional reports when certain events occur. Part IX requires that, for 20 years, Respondents create certain records and retain them for at least 5 years. Part X provides for the FTC's continued compliance monitoring of Respondents' activity during the Proposed Order's effective dates. Part XI is a provision "sunsetting" the Proposed Order after 20 years, with certain exceptions. Respondents MoviePass, Inc. and Helios are exempt from Sections II—X of the Proposed Order until their bankruptcy cases are closed, and these bankruptcies led the FTC to not seek a monetary judgment in this matter.

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

Complaint

IN THE MATTER OF

TRAFFIC JAM EVENTS, LLC.
AND
DAVID J. JEANSONNE II

COMPLAINT AND FINAL ORDER IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 144 OF THE TRUTH IN LENDING ACT

Docket No. 9395; File No. X200041
Complaint, August 7, 2020 – Decision, October 25, 2021

This order addresses Traffic Jam Events, LLC.'s advertisements for the sale of motor vehicles on behalf of auto dealerships. The complaint alleges that Traffic Jam Events, LLC. deceptively represented that consumers are receiving COVID-19 stimulus relief from the federal government and that consumers have won a prize which can be collected by visiting a particular motor vehicle dealership where no prize was available. The complaint also alleges that Respondent failed to disclose or failed to disclose clearly and conspicuously the terms for close-end credit transactions. Under the order Respondent is prohibited from advertising, marketing, promoting, selling, or leasing automobiles and prohibits misrepresentation in any future marketing that violates the FTC or Truth in Lending Acts.

Participants

For the *Commission*: *Michael Tankersley* and *Sanya Shahrasbi*

For the *Respondents*: *L. Etienne Balart [Jones Walker LLP]*

COMPLAINT

The Federal Trade Commission, having reason to believe that Traffic Jam Events, LLC, a limited liability company, and David J. Jeansonne II, individually and as an officer of Traffic Jam Events, LLC (collectively, "Respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Traffic Jam Events, LLC ("Traffic Jam Events") is a Louisiana limited liability company with its principal place of business at 2232 Idaho Avenue, Kenner, LA 70062.

2. Respondent David J. Jeansonne II, is the owner, managing member, and president of Traffic Jam Events, LLC. Individually or in concert with others, he controlled, had the authority to control, or participated in the acts and practices of Traffic Jam Events, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Traffic Jam Events.

3. Respondents have advertised, marketed, promoted, or offered for sale or lease, and sold or leased motor vehicles for or on behalf of auto dealerships nationwide. Respondents create advertising, offer direct mail marketing services, and staff tent sales events to automotive dealerships.

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

5. Respondents have disseminated or caused to be disseminated deceptive advertisements and promotional materials, including advertisements purporting to provide COVID-19 stimulus relief to consumers.

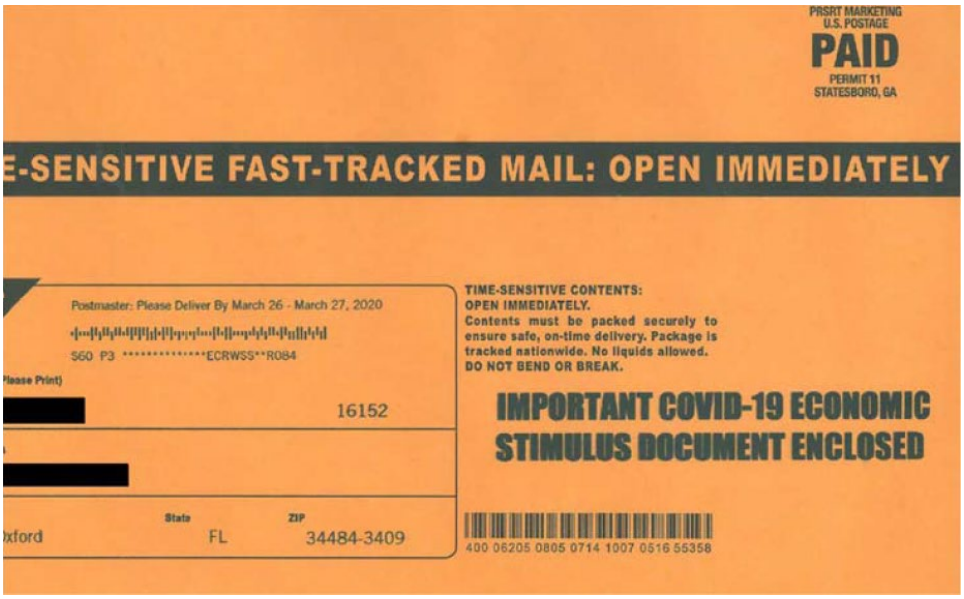
6. Beginning in or around March 2020, Respondents' advertisements sought to lure consumers to dealerships under the guise that valuable government relief related to COVID-19 was available at designated locations for a short period of time.

7. The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), P.L. 116-136, was enacted on March 27, 2020 to provide immediate assistance to individuals, families, and businesses affected by the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. The CARES Act provides a $1,200 stimulus payment to individuals and a $2,400 payment for married couples, with an additional $500 payment per qualifying child. Relief begins phasing out when incomes exceed $75,000 for individual filers and $150,000 for joint filers.

8. In addition to the monetary relief, the CARES Act provides deferrals on payments for federally-backed mortgages and federal student loans. While it does not provide relief relating to auto loans or auto-related financing, some coronavirus relief proposals have considered such relief.

9. Respondents' deceptive advertisements include an advertisement used for a Florida auto sales event. The advertising materials contain the following statements and depictions:

a. "TIME-SENSITIVE" mailer purporting to contain "IMPORTANT COVID-19 ECONOMIC STIMULUS DOCUMENTS."

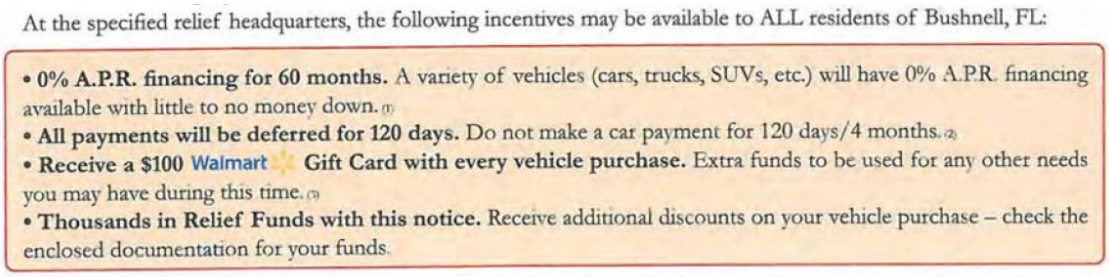


(Exhibit A, Florida mailer envelope).

b. The notice contained in the mailer states at the top in bold: "URGENT: COVID19 ECONOMIC AUTOMOTIVE STIMULUS PROGRAM RELIEF FUNDS AVAILABLE • ALL PAYMENTS DEFERRED FOR 120 DAYS." The notice header also includes a barcode with a notice number that claims to relate to "COVID-19 STIMULUS (INDIVIDUAL)" and a watermark depicting a likeness of the Great Seal of the United States.

(Exhibit B, COVID-19 Stimulus notice containing Great Seal in mailer)

c. Below the header information, the notice claims in bold that "[a] special COVID19 Economic Automotive Stimulus Program with relief funds and other incentives will be held at 5925 SW 20th St., Bushnell, FL 33513." A highlighted box touts specific relief similar to the CARES Act relief, including thousands in relief funds and payment deferrals.

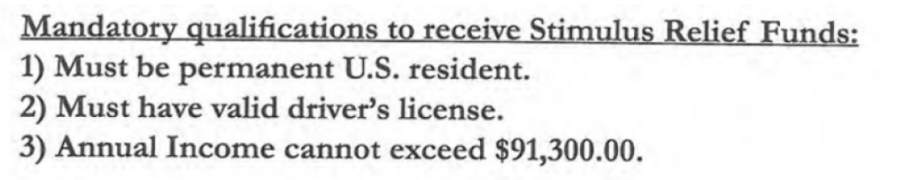


At the specified relief headquarters, the following incentives may be available to ALL residents of Bushnell, FL:

- **0% A.P.R. financing for 60 months.** A variety of vehicles (cars, trucks, SUVs, etc.) will have 0% A.P.R. financing available with little to no money down.(1)
- **All payments will be deferred for 120 days.** Do not make a car payment for 120 days/4 months.(2)
- **Receive a $100 Walmart Gift Card with every vehicle purchase.** Extra funds to be used for any other needs you may have during this time.(3)
- **Thousands in Relief Funds with this notice.** Receive additional discounts on your vehicle purchase – check the enclosed documentation for your funds.

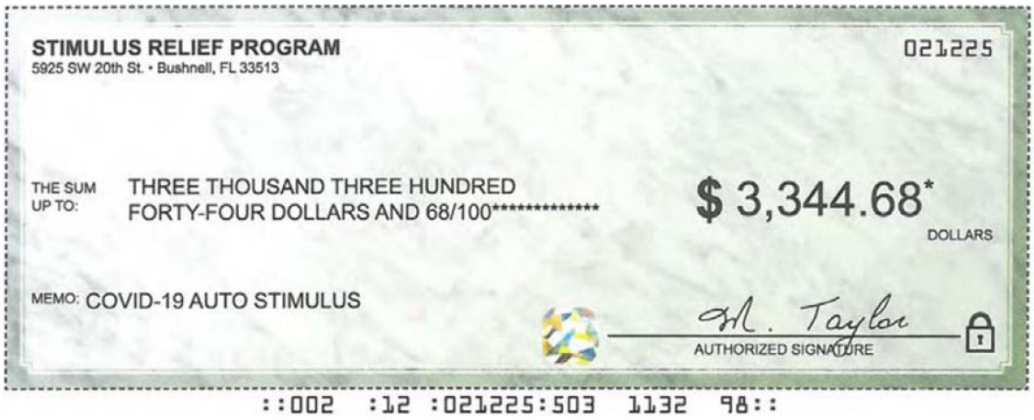
d. The notice repeatedly describes the location as "relief headquarters," "your designated temporary 10-day site," and "designated local headquarters." In particular, the notice represents that consumers "must claim these stimulus incentives at your designated temporary 10-day site: 5925 SW 20th St., Bushnell, FL 33513."

e. The notice additionally purports to describe "Mandatory qualifications to receive Stimulus Relief Funds:"



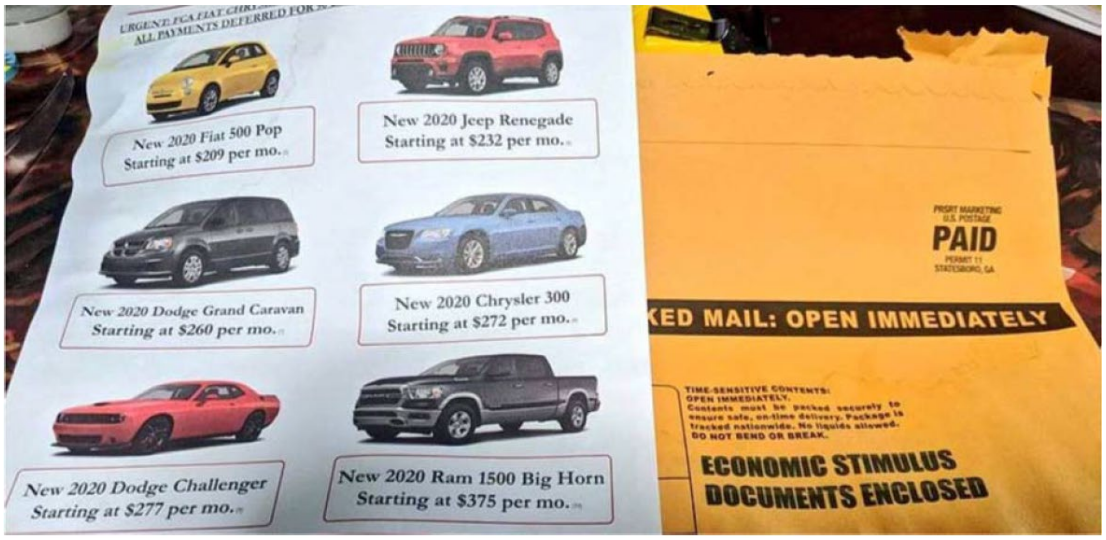
Mandatory qualifications to receive Stimulus Relief Funds:
1) Must be permanent U.S. resident.
2) Must have valid driver's license.
3) Annual Income cannot exceed $91,300.00.

f. Respondents also have included a supposed check issued by "Stimulus Relief Program" with the memo field stating "COVID-19 AUTO STIMULUS" and a space to endorse the check on the back.



(Exhibit C, copy of the purported check contained in mailer)

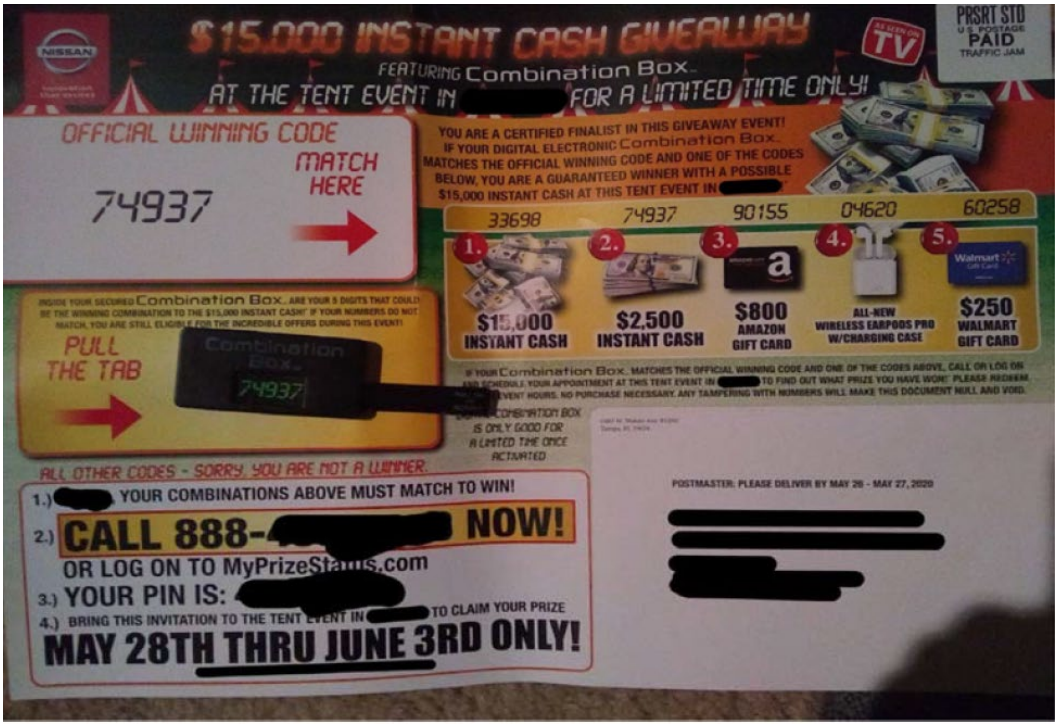
10. Respondents disseminated a similar "TIME-SENSITIVE" mailer purporting to contain "IMPORTANT COVID-19 ECONOMIC STIMULUS DOCUMENTS" to entice consumers to a Chrysler Dodge dealership in Dothan, Alabama (Exhibit D).



11. Respondents proposed additional advertising campaigns to at least one dealership touting "STIMULUS RELIEF FUNDS AND GIVEAWAYS." The advertisements represented that "THIS STIMULUS MONEY IS BEING ALLOCATED TO THE AUTOMOTIVE INDUSTRY SO THAT YOU, THE PUBLIC CAN BUY A VEHICLE AT NEVER BEFORE SEEN PRICES." The proposed advertisements repeatedly described "STIMULUS RELIEF HEADQUARTERS" (Exhibit E).

12. Respondents have also disseminated or have caused to be disseminated advertisements and promotional materials claiming that recipients have won prizes to lure individuals and families to auto sales events. For example, as part of an auto sales events from May 28 through June 3, 2020, Respondents disseminated or caused to be disseminated a promotion that lists an "OFFICIAL WINNING CODE," indicates that the prize for that code is "$2,500 INSTANT CASH," and invites consumers to pull a tab to see if the code in their "Combination Box" is the same code. The promotion represents, "If your digital electronic combination box matches the official winning code and one of the codes below, you are a guaranteed winner. . . ."

a. Below is the promotion, with the tab pulled, indicating that the Combination Box code is the WINNING CODE:



(Exhibit F, prize advertisement (redacted by consumer))

b. On the reverse side, in fine print at the bottom of the advertisement, the seventh line states, contrary to the claim that the consumer with a matching code is a "guaranteed winner" of "$2,500 INSTANT CASH," that consumers must visit the dealership to see if they have won a prize, and that they only have 1/52000 odds of winning $2,500 cash even if their Combination Box contained the winning code.

13. Respondents have been subject to state law enforcement actions for deceptive advertising. The Florida Attorney General sued Respondents on April 23, 2020 over the advertisement described in Paragraph 9. Previously, Indiana and Kansas brought actions against Respondent Traffic Jam Events alleging that Respondent's advertisements represented that consumers had won substantial prizes that could be claimed at auto sales events when, in fact, they had not, resulting in consent agreements. The Indiana agreement is signed by Respondent David Jeansonne II on behalf of Respondent Traffic Jam Events.

14. Respondents have also disseminated advertisements that fail to clearly and conspicuously disclose terms required by federal law. The COVID-19 notice for the Florida sales event described above and included as Exhibit B advertises various vehicles for sale, purportedly as part of the "COVID-19 Economic Stimulus Program" provided by "participating dealers in the area." The notice states particular terms, such as the down payment amount and monthly payment for the vehicles, without clearly and conspicuously disclosing other required terms, such as the repayment terms and annual percentage rate.

VIOLATIONS OF THE FTC ACT

Count I
Respondents' Deceptive Representations Regarding Government Relief

15. In connection with the advertising, marketing, promotion, or offering for sale, or sale of motor vehicles, Respondents have represented, directly or indirectly, expressly or by implication, that consumers are receiving official COVID-19 stimulus information; that consumers are receiving COVID-19 stimulus relief, including stimulus checks; and that Respondents are affiliated or otherwise associated with, or approved by, the government.

16. In fact, consumers are not receiving important COVID-19 stimulus information; consumers are not receiving COVID-19 stimulus relief, including stimulus checks and Respondents are not affiliated with, or approved by, the government. Therefore, the representations set forth in Paragraph 15 are false or misleading.

Count II
Respondents' Deceptive Representations Regarding Prize Winnings

17. In connection with the advertising, marketing, promotion, or offering for sale, or sale of motor vehicles, Respondents have represented, directly or indirectly, expressly or by implication, that consumers have won a specific prize that can be collected by visiting a particular dealership.

18. In fact, consumers have not won the specific prize. Therefore, the representations set forth in Paragraph 17 are false or misleading.

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

VIOLATIONS OF TILA AND REGULATION Z

20. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended, advertisements promoting closed-end credit transactions are required to make certain disclosures ("TILA additional terms") if they state any of several terms, such as the monthly payment ("TILA triggering terms").

21. Respondents' advertisements promote closed-end credit, including but not necessarily limited to those described in Paragraphs 9-10, and Respondent Traffic Jam Events is subject to the requirements of the TILA and Regulation Z.

Complaint

Count III

22. In numerous instances, Respondents' advertisements promoting closed-end credit, including, but not limited to, those described in Paragraphs 9-10, have included TILA triggering terms, but have failed to disclose, or failed to disclose clearly and conspicuously, TILA additional terms required by the TILA and Regulation Z, including one or more of the following:

a. The amount or percentage of the down payment;

b. The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment; and

c. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

23. Therefore, Respondents' acts or practices as set forth in Paragraph 22 violate Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

NOTICE

You are notified that on Tuesday, May 4, 2021, at 10:00 a.m., at the Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Room 532-H, Washington, DC 20580, an Administrative Law Judge of the Federal Trade Commission will hold a hearing on the charges set forth in this Complaint. At that time and place, you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this Complaint.

You are notified that you are afforded the opportunity to file with the Federal Trade Commission ("Commission") an answer to this Complaint on or before the 14th day after service of the Complaint upon you. An answer in which the allegations of the Complaint are contested must contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the Complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the Complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the Complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the Complaint and, together with the Complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer timely will be deemed to constitute a waiver of your right to appear and contest the allegations of the Complaint and will authorize the Commission, without further notice to you, to find the facts to be as alleged in the Complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge will hold an initial prehearing scheduling conference to be held not later than 10 days after the answer is filed by the last answering respondent in the Complaint. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532-H, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, but in any event no later than five days after the answer is filed by the last answering respondent. Rule 3.31(b) obligates counsel for each party, within five days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

Moreover, the Commission has reason to believe that, if the facts are found as alleged in the complaint, it may be necessary and appropriate for the Commission to seek relief to redress injury to consumers, or other persons, partnerships or corporations, in the form of restitution for past, present, and future consumers and such other types of relief as are set forth in Section 19(b) of the Federal Trade Commission Act. The Commission will determine whether to apply to a court for such relief based on the adjudicative proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that Respondents have violated or are violating Section 5 of the FTC Act, as amended, Section 144 of the TILA and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), 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. A prohibition on advertising and marketing concerning auto vehicles, government relief, or prizes, sweepstakes, and promotions.

2. A prohibition on misleading representations in connection with the advertising, marketing, promoting, or offering for sale of any product or services.

3. Relief requiring clear and conspicuous disclosures in connection with any advertisement for the extension of consumer credit, and relief in compliance with the Truth in Lending Act.

4. A requirement that Respondents must send appropriate notification of the order to any affected persons.

5. A requirement that, for a period of time, Respondents must send acknowledgments of the order to the Commission.

6. A requirement that, for a period of time, Traffic Jam Events and David J. Jeansonne must provide prior notice to the Commission of all new business activity.

7. A requirement to file periodic compliance reports with the Commission.

8. Requiring that Respondents' compliance with the order may be monitored for a term to be determined by the Commission.

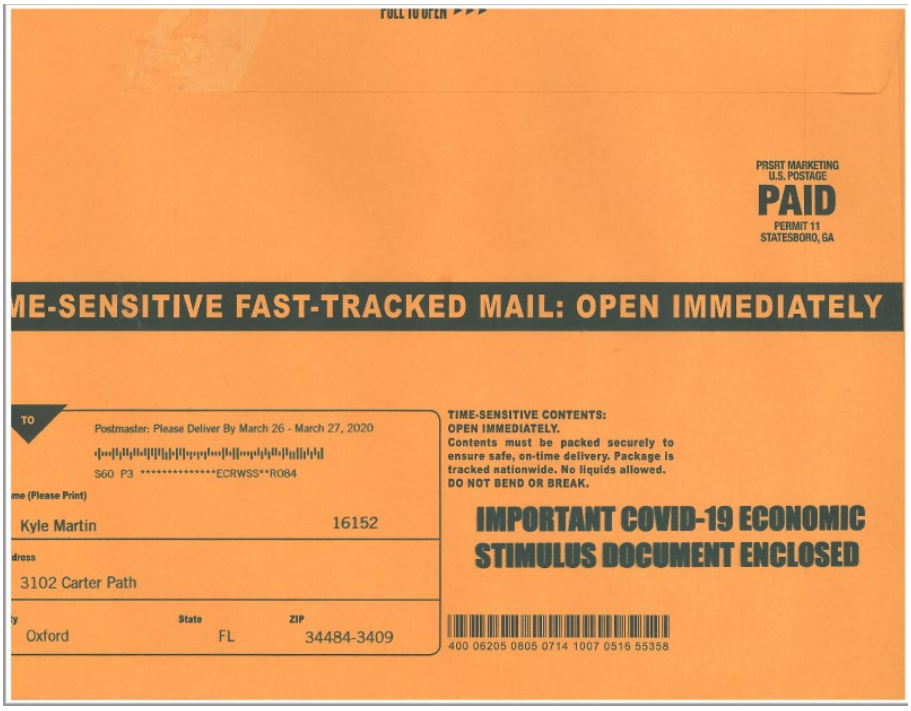
9. Any other relief appropriate to correct or remedy the effects of the Respondents' deceptive practices or of any or all of the conduct alleged in the complaint.

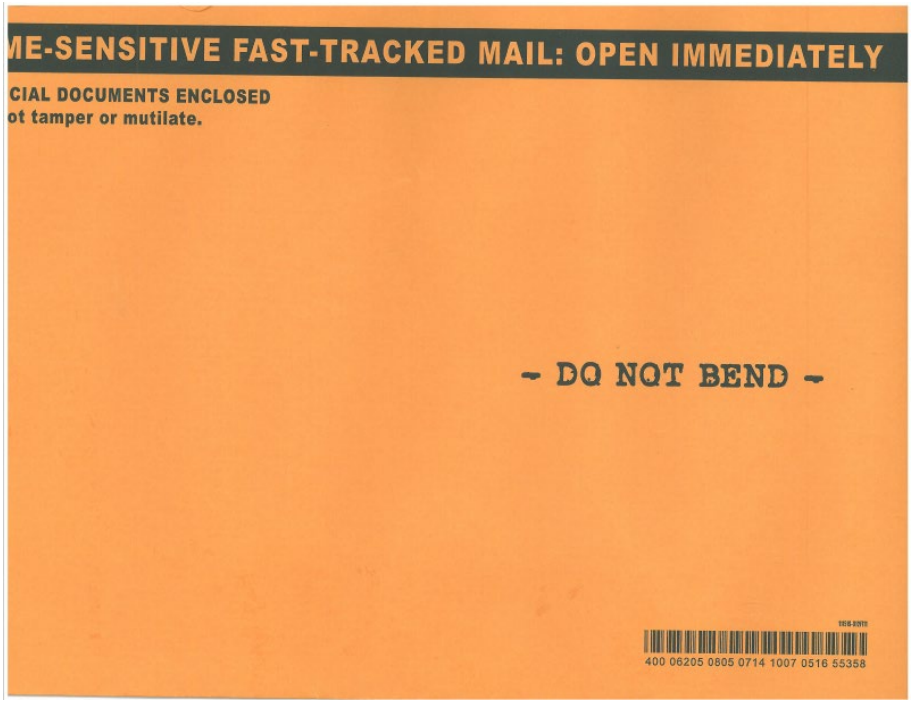
IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, DC, this 7th date of August, 2020.

By the Commission, Commissioner Slaughter not participating.

Complaint

EXHIBIT A





Complaint

EXHIBIT B

URGENT: COVID-19 ECONOMIC AUTOMOTIVE STIMULUS PROGRAM
RELIEF FUNDS AVAILABLE • ALL PAYMENTS DEFERRED FOR 120 DAYS

Eligible Dates:
March 27th thru
April 5th, 2020

COVID-19 STIMULUS (INDIVIDUAL)
NOTICE NO. F802-021225-096781

DATE: 03/25/20
NOTICE NO: F802-021225-096781
DESCRIPTION: COVID-19 STIMULUS (INDIVIDUAL)
URGENT NOTICE - READ IMMEDIATELY

Dear Florida residents,

A special COVID-19 Economic Automotive Stimulus Program with relief funds and other incentives will be held at 5925 SW 20th St., Bushnell, FL 33513, across the street from Walmart, March 27th thru April 5th, 2020. This program has been established to help local residents purchase automobiles with 120 days until first payment during these challenging times with special discounts, credit and finance opportunities to drastically reduce your out-of-pocket costs.

At the specified relief headquarters, the following incentives may be available to ALL residents of Bushnell, FL:

- **0% A.P.R. financing for 60 months.** A variety of vehicles (cars, trucks, SUVs, etc.) will have 0% A.P.R. financing available with little to no money down. (1)
- **All payments will be deferred for 120 days.** Do not make a car payment for 120 days/4 months. (2)
- **Receive a $100 Walmart Gift Card with every vehicle purchase.** Extra funds to be used for any other needs you may have during this time. (3)
- **Thousands in Relief Funds with this notice.** Receive additional discounts on your vehicle purchase – check the enclosed documentation for your funds.

You must claim these stimulus incentives at your designated temporary 10-day site: 5925 SW 20th St., Bushnell, FL 33513, across the street from Walmart. Bring this notice to collect all of these program benefits toward your vehicle purchase.

Please bring this notice to your designated local headquarters:

5925 SW 20th St.
Bushnell, FL 33513
Across the street from Walmart!

Eligible dates: March 27th thru April 5th, 2020
Monday–Saturday:
9:00am until all attendees have been assisted.
Sunday:
11:00am until all attendees have been assisted.

Look for the set-up tents and speak to an event representative upon your arrival.

MAP OF TEMPORARY 10-DAY RELIEF SITE:

URGENT: COVID-19 ECONOMIC AUTOMOTIVE STIMULUS PROGRAM
RELIEF FUNDS AVAILABLE • ALL PAYMENTS DEFERRED FOR 120 DAYS

Mandatory qualifications to receive Stimulus Relief Funds:
1) Must be permanent U.S. resident.
2) Must have valid driver's license.
3) Annual Income cannot exceed $91,300.00.

This COVID-19 Economic Automotive Stimulus Program will include hundreds of quality, clean cars, trucks, vans and SUVs from participating dealerships in the area. Bring this notice to the relief temporary 10-day site at 5925 SW 20th St., Bushnell, FL 33513, across the stree from Walmart and choose any of the available vehicles. Here are a couple examples of the more popular vehicles in-stock - with hundreds more available:

Mercedes-Benz M-Class	Nissan Versa
$0 down $116 per mo.(4)	$0 down $133 per mo.(5)

- **0% A.P.R. financing for 60 months.** A variety of vehicles (cars, trucks, SUVs, etc.) will have 0% A.P.R. financing available with little to no money down.(1)
- **All payments will be deferred for 120 days.** Do not make a car payment for 120 days/4 months.(2)
- **Receive a $100 Walmart Gift Card with every vehicle purchase.** Extra funds to be used for any other needs you may have during this time.(3)
- **Thousands in Relief Funds with this notice.** Receive additional discounts on your vehicle purchase – check the enclosed documentation for your funds.

Stimulus Temporary 10-Day Relief Site:
5925 SW 20th St. • Bushnell, FL 33513
Across the street from Walmart!

MAP OF TEMPORARY 10-DAY RELIEF SITE:

Eligible dates: March 27th thru April 5th, 2020
Monday–Saturday:
9:00am until all attendees have been assisted.
Sunday:
11:00am until all attendees have been assisted.
Look for the set-up tents and speak to an event representative upon your arrival.

DATE: 03/25/20
NOTICE NO: FB02-021225-096781
ACCOUNT TYPE: COVID-19 STIMULUS (INDIVIDUAL)

(1) 0% APR available on select models for up to 60 months financing subject to lender's approval with approved credit. (2) No payments for 120 days subject to lender's approval with approved credit. Interest accrues from date of purchase. (3) Receive one (1) $100 gift card to Walmart with any vehicle purchase during the event dates. (4) $0 down, plus tax, title and license/$116 per month example: 2009 Mercedes-Benz M-Class stk#TRA26442 sale price $7,399 72 months at 3.9% APR with approved credit. (5) $0 down, plus tax, title and license/$133 per month example: 2018 Nissan Versa stk#MAR89694 sale price $8,489 72 months at 3.9% APR with approved credit. New Wave Auto Sales employees and associates, mail house, associated sponsors or agencies, and their family members and members of same household are ineligible. Addressee must redeem original mail piece in person by close of business on April 5th, 2020. Vehicles are subject to prior sale. Void where prohibited by law. All offers end April 5th, 2020.

Complaint

EXHIBIT C

STIMULUS RELIEF PROGRAM 021225
5925 SW 20th St. • Bushnell, FL 33513

THE SUM UP TO: THREE THOUSAND THREE HUNDRED FORTY-FOUR DOLLARS AND 68/100********** **$ 3,344.68***
DOLLARS

MEMO: COVID-19 AUTO STIMULUS

M. Taylor
AUTHORIZED SIGNATURE

::002 :12 :021225:503 1132 98::

STIMULUS RELIEF PROGRAM 021225

Date	Type	Reference	Original Amt.	Balance Due	Payment
03/25/20	Stimulus Fund	BUSHN-021225	3,344.68	0.00	3,344.68

STIMULUS RELIEF PROGRAM week ending 04/05/2020 3,344.68
FOR RECIPIENT'S RECORDS

021225


ORIGINAL
DOCUMENT
ENDORSE HERE
DO NOT WRITE, STAMP OR SIGN BELOW THE LINE
RESERVED FOR FINANCIAL BANK USE
Void where prohibited, certificate has no cash value, non-negotiable certificate. This is not a check. Only valid if presented upon registration. Amount good toward select pre-owned vehicles. Cannot be used in conjunction with any other offers. Expires April 6th, 2020.

EXHIBIT D


ALL PAYMENTS DEFERRED FOR
New 2020 Fiat 500 Pop
Starting at $209 per mo.
New 2020 Jeep Renegade
Starting at $232 per mo.
New 2020 Dodge Grand Caravan
Starting at $260 per mo.
New 2020 Chrysler 300
Starting at $272 per mo.
New 2020 Dodge Challenger
Starting at $277 per mo.
New 2020 Ram 1500 Big Horn
Starting at $375 per mo.
PRSRT MARKETING
U.S. POSTAGE
PAID
PERMIT 11
STATESBORO, GA
KED MAIL: OPEN IMMEDIATELY
TIME-SENSITIVE CONTENTS:
OPEN IMMEDIATELY.
Contents must be packed securely to ensure safe, on-time delivery. Package is tracked nationwide. No liquids allowed.
DO NOT BEND OR BREAK.
ECONOMIC STIMULUS
DOCUMENTS ENCLOSED

Complaint

EXHIBIT E

Complaint


NEW WAVE AUTO SALES
STIMULUS RELIEF
AS SEEN ON TV
URGENT NEWS: STIMULUS RELIEF FUNDS AND GIVEAWAYS COMING TO PINELLAS PARK!
MASSIVE AUTOMOTIVE STIMULUS FUNDS AND SPECIAL DISCOUNTS WILL BE AVAILABLE AT NEW WAVE AUTO SALES! THIS STIMULUS MONEY IS BEING ALLOCATED TO THE AUTOMOTIVE INDUSTRY SO THAT YOU, THE PUBLIC CAN BUY A VEHICLE AT NEVER BEFORE SEEN PRICES!
DO NOT HESITATE TO BE AT THIS SITE!
TRADE-IN AND TRADE-UP WITH
$6,000 OVER KBB VALUE FOR ALL TRADE-INS NOW!*
KELLEY BLUE BOOK
JUST A COUPLE EXAMPLES OF THE MASSIVE STIMULUS RELIEF DISCOUNTS AT THIS EVENT!
$116 per mo. WITH $0 DOWN!*
MERCEDES-BENZ M-CLASS
$133 per mo. WITH $0 DOWN!*
NISSAN VERSA
HUNDREDS MORE IN STOCK WITH SPECIAL SAVINGS!
100% CREDIT APPROVAL IS OUR GOAL!
SLOW CREDIT, BAD CREDIT, BANKRUPTCY... LOCAL BANK REPS WILL BE ON-SITE!
STIMULUS RELIEF HEADQUARTERS:
NEW WAVE AUTO SALES
8000 PARK BLVD. N.
PINELLAS PARK, FL 33781
FLAT SCREEN TV GIVEAWAY
TO BE HELD SUNDAY, APRIL 26TH AT 3:00PM!*
CONGRATULATIONS TO JAKEB MCGINNIS, THE LATEST GRAND PRIZE WINNER!
STIMULUS RELIEF HEADQUARTERS:
8000 PARK BLVD. N. • PINELLAS PARK, FL 33781
MONDAY–SATURDAY: 9AM UNTIL THE LAST CUSTOMER IS SERVED
SUNDAY: 11AM UNTIL THE LAST CUSTOMER IS SERVED

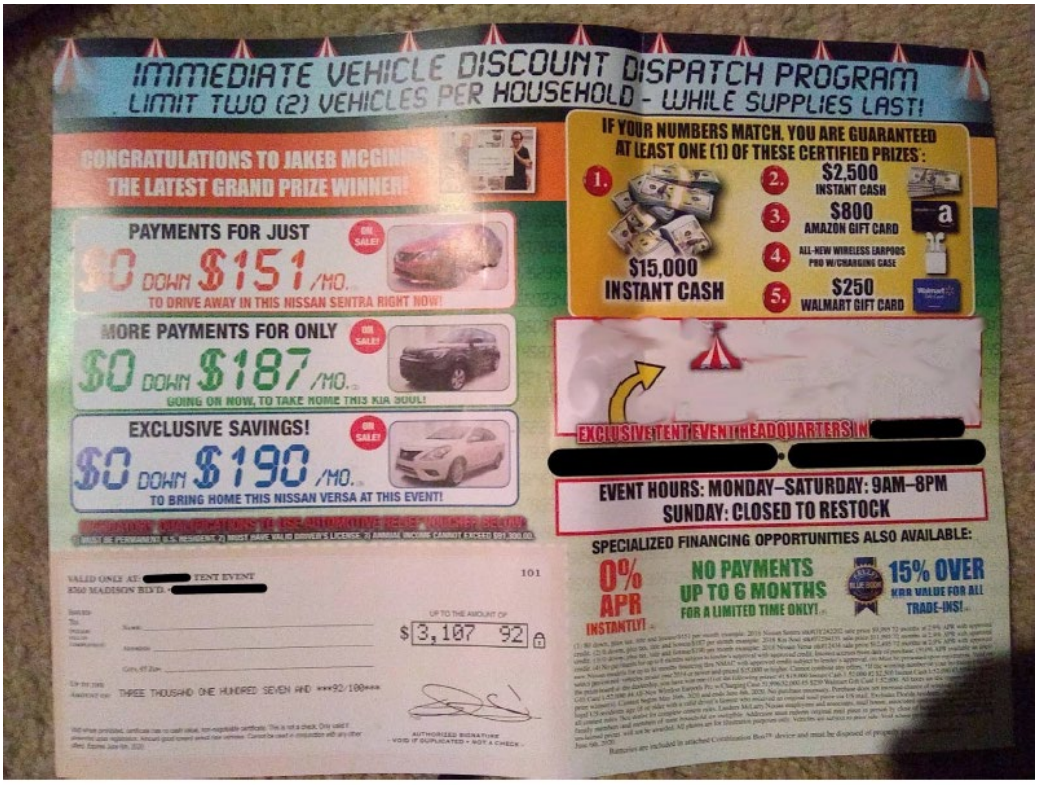
Complaint

<FIRSTNAME LASTNAME>


PINELLAS PARK STIMULUS RELIEF SITE
CONGRATULATIONS TO JAKEB MCGINNIS, THE LATEST GRAND PRIZE WINNER!
STIMULUS RELIEF HEADQUARTERS:
8000 PARK BLVD. N. • PINELLAS PARK, FL 33781
SPECIAL STIMULUS RELIEF SAVINGS AVAILABLE!
LIMIT TWO (2) VEHICLES PER HOUSEHOLD AT THIS EVENT!
MAKE NO PAYMENTS FOR 120 DAYS
ALL PAYMENTS DEFERRED!
BONUS 50" BIG SCREEN TV GIVEAWAY
TO BE HELD SUNDAY, APRIL 26TH AT 8:00PM
0% APR
AVAILABLE INSTANTLY!
WE ARE GOING TO GIVE YOU WHAT YOUR CAR IS ACTUALLY WORTH!
PAYMENTS FOR ONLY $116 PER MO. WITH $0 DOWN
TO TAKE HOME THIS MERCEDES-BENZ M-CLASS!
ON SALE!
OR PAY JUST $133 PER MO. WITH $0 DOWN
GOING ON NOW, TO BRING HOME THIS NISSAN VERSA!
ON SALE!
MANDATORY QUALIFICATIONS TO RECEIVE EARLY COVID-19 STIMULUS FUNDS BELOW:
1) MUST BE PERMANENT U.S. RESIDENT, 2) MUST HAVE VALID DRIVER'S LICENSE, 3) ANNUAL INCOME CANNOT EXCEED $91,300.00.
VALID ONLY AT: NEW WAVE AUTO SALES
8000 PARK BLVD. N. • PINELLAS PARK, FL 33781
101
ISSUED TO:
NAME:
ADDRESS:
CITY, ST ZIP:
$3,400.00 MAXIMUM PAYOUT
$ 3,344. 68
UP TO THE AMOUNT OF: THREE THOUSAND THREE HUNDRED FORTY-FOUR AND ***68/100***
MEMO: AUTO STIMULUS RELIEF
M. Taylor
AUTHORIZED SIGNATURE
- VOID IF DUPLICATED • NOT A CHECK -
STIMULUS RELIEF HEADQUARTERS:
NEW WAVE AUTO SALES
8000 PARK BLVD. N.
PINELLAS PARK, FL 33781
MON.–SAT: 9AM UNTIL THE LAST CUSTOMER IS SERVED • SUN: 11AM UNTIL THE LAST CUSTOMER IS SERVED

Complaint

EXHIBIT F



OPINION OF THE COMMISSION

By COMMISSIONER Christine S. Wilson, for the Commission.

Respondent Traffic Jam Events, LLC and its owner and president, Respondent David J. Jeansonne II (collectively, "Respondents"), conduct direct mail marketing on behalf of car dealerships. Compl. ¶¶ 2-3; Answer at 1 and ¶¶ 1-3.[1] The Complaint in this proceeding asserts that Respondents conducted two forms of deceptive marketing campaigns in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45 *et seq.* (prohibiting "unfair or deceptive act[s] or practice[s]"). Compl. ¶¶ 5-12, 15-19. Complaint Counsel allege that these campaigns took place in multiple states. *See, e.g.,* Compl. ¶¶ 9 (Florida), 10 (Alabama), PX4 Att. 2 (Texas). The Complaint also asserts that Respondents violated Section 144 of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1664, and the associated Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended, by advertising closed-end credit while failing properly to disclose certain required terms such as the amount or percentage of the down payment or the annual percentage rate. Compl. ¶¶ 14, 22-23. Complaint Counsel seek issuance of a cease and desist order pursuant to FTC Act § 5. Compl. at 9 (Notice of Contemplated Relief); Mot. at 35-38 and Proposed Order.

The parties conducted pretrial proceedings before the Chief Administrative Law Judge ("ALJ") during September 2020 – September 2021.[2] On August 14, 2021, Complaint Counsel moved for summary decision pursuant to Commission Rule 3.24, 16 C.F.R. § 3.24. Respondents timely opposed the Motion. As explained below, we have determined that summary decision should be granted.

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[1] We use the following abbreviations for documents in this Opinion:

Compl.	Complaint (Aug. 7, 2020)
Answer	Answer and Defense of Respondents Traffic Jam Events, LLC, and David J. Jeansonne II (Sept. 7, 2020)
Mot.	Complaint Counsel's Motion for Summary Decision (Aug. 14, 2021)
CC Fact Stmt.	Complaint Counsel's Statement of Material Facts As to Which There Is No Genuine Issue for Trial, appended to Mot. (Aug. 14, 2021)
PX	Complaint Counsel's exhibit to Mot.
Opp.	Respondent's Memorandum in Opposition to Complaint Counsel's Motion for Summary Decision (Sept. 7, 2021)
Reply	Reply in Support of Complaint Counsel's Motion for Summary Decision (Sept. 8, 2021)

[2] During the course of the pretrial proceedings, the ALJ granted motions to compel discovery on October 28, 2020 (Complaint Counsel's motion), December 16, 2020 (Complaint Counsel's motion), and July 15, 2021 (Respondents' motion); granted Complaint Counsel's Motions to Determine Sufficiency of Responses to Requests for Admission on August 11, 2021 and September 20, 2021; and sanctioned Respondents for failure to comply with his discovery orders on June 29, 2021 and August 9, 2021. At one point the Commission removed the case from adjudication, pausing it from December 28, 2020, through May 3, 2021, to allow for consideration of a proposed consent agreement that did not ultimately bear fruit. *See* Order Returning the Matter to Adjudication and Setting a New Evidentiary Hearing Date (May 3, 2021).

I. THE ALLEGATIONS OF THE PLEADINGS

Respondent Traffic Jam Events, LLC is a Louisiana limited liability company with its principal place of business in Kenner, Louisiana. Answer at 12 ¶ 1. Respondent Jeansonne is the owner, managing member, and president of Traffic Jam Events. *Id.* ¶ 2.

Respondents create advertising, offer direct mail marketing services, and staff tent sale events for automotive dealerships. *Id.* ¶ 3. Respondents have advertised, marketed, sold and offered for sale or lease, motor vehicles on behalf of auto dealerships nationwide. *Id.*

The Complaint alleges three types of unlawful conduct by Respondents. Count I alleges that, beginning in or around March 2020, Respondents disseminated deceptive advertisements designed to lure consumers to auto dealerships under the guise that government relief related to COVID-19 was available at designated locations for a short period of time. Compl. ¶¶ 5-6. Respondents' advertisements allegedly included an advertisement for a Florida auto sales event that purported to be "TIME-SENSITIVE" and to contain "IMPORTANT COVID-19 ECONOMIC STIMULUS DOCUMENTS." *Id.* ¶ 9. According to the Complaint, the mailers contained various other indicia to connote official government status, such as a barcode labeled "COVID-19 STIMULUS (INDIVIDUAL)" and containing a notice number, and a watermark containing the Great Seal of the United States. *Id.* The notice allegedly provided an address in Bushnell, Florida, which it described as a "relief headquarters" and "designated local headquarters," and further stated that the consumer "must claim these stimulus incentives at your designated temporary 10-day site." *Id.* In at least some instances, the Complaint alleges, Respondents included in their mailer a purported check issued by "Stimulus Relief Program" with "COVID-19 AUTO STIMULUS" in the memo line and a space for an endorsement on the back. *Id.* Respondents allegedly disseminated at least one other similar COVID-19 stimulus mailer to entice consumers to an auto dealership in Dothan, Alabama. Compl. ¶ 10.

Count II of the Complaint alleges that Respondents disseminated deceptive mailings claiming that recipients had won prizes in order to lure them to auto sales events. Compl. ¶ 12. For example, from May through June 2020, the Complaint alleges, Respondents disseminated a "$15,000 INSTANT CASH GIVEAWAY" mailer that invited consumers to match their listed "official winning code," a code in a "Combination Box," and a code next to the specific prize of $ 2,500. *Id.* The mailer allegedly states that the matching codes mean the consumer is a "guaranteed winner"; however, only on the reverse side in fine print, contrary to the claim that the consumer is a "guaranteed winner," does the mailer reveal that the consumer must visit the dealership to see if they have won a prize, and that they only have 1/52000 odds of winning $2,500 cash even if their Combination Box contains the winning code. *Id.*

Count III of the Complaint alleges that Respondents disseminated advertisements that violated TILA by failing clearly and conspicuously to disclose certain lending terms. Compl. ¶¶ 14, 20-23. For example, Respondents' COVID-19 mailer for the Florida sales event allegedly states particular terms for credit such as a down payment amount and monthly payment for vehicles, without clearly and conspicuously disclosing other required terms such as the repayment term and the annual percentage rate. *Id.* at 14.

Respondents' Answer admitted that the COVID-19 and the prize notification mailers were sent, Answer at 1-3, but denied that any mailings were deceptive or violated TILA. *Id.* at 2, 7, 11-12.

The Louisiana TRO Action: Several weeks before issuance of the Complaint in this proceeding, Complaint Counsel filed a civil action in the Eastern District of Louisiana seeking an injunction against the COVID-19 mailer pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). *FTC v. Traffic Jam Events, LLC, et al.,* Case No. 2:20-cv-01740 (E.D. La.) (filed Jun. 16, 2020). The court held a telephonic hearing on a motion for a temporary restraining order on June 25, 2020. The court declined to grant the preliminary relief for reasons inapplicable to this administrative proceeding. Specifically, the court found that Complaint Counsel had not shown that Respondents were (currently) "violating or [ ] about to violate" a provision of law enforced by the Commission, Order and Reasons (Jun. 26, 2020) at 7, a requirement for a § 13(b) injunction case in federal court. 15 U.S.C. § 53(b). But Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), governs the FTC's administrative actions, like this one. That section applies whenever the Commission has reason to believe that a person, partnership, or corporation "*has been* or is" using any unfair method of competition or unfair or deceptive act or practice, 15 U.S.C. § 45(b) (emphasis supplied), a standard met here. *See also AMG Capital Mgmt., LLC v. FTC,* 141 S. Ct. 1341, 1348 (2021) (purpose of § 13(b) is to stop seemingly unfair practices while the Commission determines their lawfulness in an administrative forum). The district court emphasized that the sole issue it decided was the Commission's entitlement to a temporary restraining order under § 13(b), which it deemed an "extraordinary remedy," Order and Reasons at 23, and it emphasized that it was "mak[ing] no finding regarding whether the FTC will succeed . . . in proving that Defendants have previously violated any provision of law enforced by the FTC."[1] *Id.* at 24. This latter determination, the court stated, "carries its own penalties." *Id.* Thus, we turn with fresh eyes to this case, which arises under our Section 5(b) relief authority encompassing past and current conduct.

II. STANDARD FOR SUMMARY DECISION

We review Complaint Counsel's motion for summary decision pursuant to Rule 3.24 of our Rules of Practice, 16 C.F.R. § 3.24. Our analysis is analogous to that applied to motions for summary judgment under Federal Rule of Civil Procedure 56. *See In re McWane, Inc. & Star Pipe Prods., Ltd.,* 2012 WL 4101793, at *5 (FTC Sept. 14, 2012); *In re Polygram Holding, Inc.,* 2002 WL 31433923, at *1 (FTC Feb. 26, 2002). "A party moving for summary decision must show that 'there is no genuine issue as to any material fact' and that it is 'entitled to judgment as a matter of law.'" *In re Benco Dental Supply Co.,* 2018 WL 6338485, at *2 (FTC Nov. 26, 2018) (quoting Commission Rule 3.24 and Fed. R. Civ. P. 56).

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)

[1] The court also made no findings about the prize mailings or the alleged TILA violations, which were not before it.

(internal quotations omitted). Commission Rule 3.24 provides that the movant must file a "separate and concise statement of the material facts as to which the moving party contends there is no genuine issue for trial." 16 C.F.R. § 3.24(a)(1). Provided the movant meets this initial 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); Carozza v. CVS Pharmacy, Inc., 992 F.3d 44, 56 (1st Cir. 2021). The non-movant must set forth these facts by filing its own, separate and concise counter-statement of facts. 16 C.F.R. § 3.24(a)(2).

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. *Benco Dental Supply Co.,* 2018 WL 6338485, at *3; *McWane, Inc.,* 2012 WL 4101793, at *5; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Where the "evidence [favoring the non-moving party] is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50. However, "[i]f reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment." *Impossible Elecs. Techniques, Inc. v. Wackenhut Protective Sys., Inc.,* 669 F.2d 1026, 1031 (5th Cir. 1982).

For the reasons stated below, we have determined to grant summary decision. As to Counts I and II, we find that the Respondents have failed to raise a genuine dispute of material fact regarding whether the challenged advertisements are deceptive, false, and the claims therein material to consumers. As to Count III, we find that Respondents have failed materially to dispute that Traffic Jam created and disseminated advertisements that failed to make the clear and conspicuous disclosures required by TILA. We further find Complaint Counsel have demonstrated, and Respondents have failed to raise a genuine dispute, that individual Respondent Jeansonne had authority and control over Respondent Traffic Jam Events and participated in its conduct regarding the pertinent advertisements, and we therefore find that summary decision is appropriate against both the individual and corporate Respondents for all three counts. Finally, we find that Complaint Counsel's proposed Order is appropriate and necessary to prevent further violations by the Respondents, and we therefore issue it.

III. FACTS ABOUT WHICH THERE IS NO GENUINE DISPUTE

Before we turn to summarizing the facts about which there is no triable dispute, we offer a note about our process. As required by Commission Rule 3.24, Complaint Counsel as the Movant identified the facts they claim are undisputed and supported those facts with record citations in a separate Statement of Material Facts. 16 C.F.R. § 3.24(a). Respondents do not make a serious attempt to controvert these facts. Respondents chose not to file a counter-statement of facts as required by the Rule. 16 C.F.R. § 3.24(a)(2). The statement should have identified "those material facts as to which [Respondents] contend[] there exists a genuine issue for trial." *Id.* The non-movant's statement of material facts is no mere procedural nicety, but goes to the heart of the non-movant's task on summary decision which is to demonstrate with evidence the need for a trial. *See Coseme-Rosado v. Serrano-Rodriguez,* 360 F.3d 42, 45-46 (1st Cir. 2004) (failure to submit counter-statement of facts, with citations to the record, justifies accepting the initial statement of facts as true). In any event, as explained herein, we have carefully considered each of the

arguments that Respondents raised in their Opposition memorandum, and we find these arguments are fully capable of resolution on summary decision.

Respondents raise several legal arguments. First, as to Counts I and II, they contest the Commission's authority to act, which they contend is limited by 5 U.S.C. § 45(n). Opp. at 4-7. They also challenge Complaint Counsel's showing of the materiality of the claims in their advertisements. *Id.* at 7-8. As to Count III, they challenge the applicability of TILA to advertisers such as Respondents. *Id.* at 12-13. Respondent Jeansonne denies responsibility for the acts and practices of Traffic Jam Events. *Id.* at 12. Finally, Respondents also challenge the Commission's authority to award the relief sought by Complaint Counsel. Opp. at 13-14.

Legal issues such as those raised by Respondents are appropriate for summary disposition. *See Cremona v. R.S. Bacon Veneer Co.,* 433 F.3d 617, 620 (8th Cir. 2006) (case that involves only questions of law is "particularly appropriate" for summary judgment); *see also* 10A Fed. Prac. & Proc. Civ. (Wright & Miller) (4th Ed.) § 2712 (summary judgment can dispose of actions that involve only a question of law.) Respondents' arguments regarding materiality, which involve the application of law to the undisputed contents of the advertisements, are equally appropriate for summary decision. Courts and the Commission regularly use the summary decision process to analyze the lawfulness of potentially deceptive advertisements. *See, e.g.*, *FTC v. Direct Marketing Concepts*, 569 F.Supp.2d 285, 300, 303 (D. Mass 2008), *aff'd,* 624 F.3d 1 (1st Cir. 2010) (analyzing the "net impression" of advertisement on summary judgment); *FTC v. Gill,* 71 F.Supp.2d 1030, 1043-44 (C.D. Cal. 1999) (same); *In re Jerk LLC,* 159 F.T.C. 885, 892-909 (2015) (analyzing deceptive advertising, including materiality, on summary decision), *aff'd in relevant part sub nom. Fanning v. FTC*, 821 F.3d 164 (1st Cir. 2016); *California Naturel,* 2016 WL 7228668, at *5-6 (Dec. 5, 2016) (conducting "facial analysis" of claims in advertising).

Based on our review of the Motion and the Opposition, with consideration of the uncontroverted facts, we find that Complaint Counsel have established the following beyond genuine dispute.

A. The Commission's Jurisdiction Over Respondents

Respondents create advertising, offer direct mail marketing services, and staff tent sale events for automotive dealerships. CC Fact Stmt. ¶ 5. Respondents' sales staff calls dealerships in different states to obtain new business, and Respondents have used email blasts to promote their products and services nationwide. *Id.* at ¶ 6.

Respondents' mailers have been disseminated to consumers throughout the United States. *Id.* at ¶ 7. Since at least July 2015, in the course of generating mailers to promote automotive sales events, Respondent Traffic Jam Events has employed the services of printers located in California and Florida. *Id.*

B. State Law Enforcement Actions Regarding Prize Mailings

In 2010, Respondent Traffic Jam Events entered into a consent order with the State of Kansas to resolve allegations that it had violated the Kansas Consumer Protection Act by disseminating mailings that implied consumers had the winning number for a grand prize drawing when they did not. CC Fact Stmt. ¶ 46. The order required payment of $25,000 and permanently enjoined Respondent from committing the acts or practices described in the complaint. *Id.* at ¶ 48.

In 2013, Respondent Traffic Jam Events entered another consent order with the State of Kansas that permanently enjoined Respondent from entering any consumer transactions in the State, due to asserted violations of the first order. *Id.* at ¶ 49. The order also required payment of $20,000. *Id.*

In February 2019, Respondent Traffic Jam Events entered into a consent order with the State of Indiana to resolve allegations that Respondent had contracted with automotive dealers to send mailings to thousands of Indiana consumers misrepresenting that they had won a specific prize. *Id.* at ¶¶ 51-52. The order prohibits deceptive prize promotions and is signed by Respondent Jeansonne. *Id.* at ¶ 52.

C. COVID-19 Stimulus Mailer

In March 2020, Respondents designed a direct mail advertising campaign based on COVID-19 government relief. CC Fact Stmt. ¶ 9. The material facts of the mailings are uncontested.

Respondent Jeansonne acknowledged in testimony the COVID-19 relief mailers as his "brainchild." *Id.* at ¶ 10. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law on March 27, 2020 to provide financial assistance to individuals, families, and businesses. *Id.* at ¶ 9. Around this time, Respondents sent an email blast to dealerships nationwide promoting a direct mail advertisement to consumers that would tout a COVID-19 stimulus relief mailer "on an official letter format." *Id.* at ¶ 11.

Respondents' COVID-19 stimulus relief mailer was distributed to approximately 35,000 consumers. *Id.* at ¶ 12. The mailer promoted an auto dealership, New Wave Auto Sales, also known as MK Automotive, in Bushnell, Florida. *Id.*

The mailers bore characteristics that were designed to associate them with a government program, including:

a. The mailers were sent in manila envelopes that stated "Official Documents Enclosed" "Do not tamper or mutilate" on one side and "IMPORTANT COVID-19 ECONOMIC STIMULUS DOCUMENT ENCLOSED" on the other. *Id.* Both sides of the envelopes contained bar codes and stated in bold font, "TIME-SENSITIVE FAST-TRACKED MAIL: OPEN IMMEDIATELY." *Id.*

b. The enclosed notice stated at the top in bold: "URGENT: COVID-19 ECONOMIC AUTOMOTIVE STIMULUS PROGRAM RELIEF FUNDS AVAILABLE • ALL PAYMENTS DEFERRED FOR 120 DAYS." *Id.*

c. The notice header also included a barcode with a notice number that claims relate to "COVID-19 STIMULUS (INDIVIDUAL)" and a watermark depicting the Great Seal of the United States. *Id.*

d. A box on the notice touted specific relief similar to the CARES Act, including thousands in relief funds and payment deferrals. *Id.* The notice repeatedly described the location as "relief headquarters," "your designated temporary 10-day site," and "designated local headquarters." *Id.*

e. The notice represented that consumers "must claim these stimulus incentives at your designated temporary 10-day site" and provided an address in Bushnell, FL. *Id.*

f. The notice also included a list of "Mandatory qualifications to receive Stimulus Relief Funds": 1) Must be permanent U.S. resident. 2) Must have a valid driver's license. 3) Annual Income cannot exceed $91,300. *Id.*

g. The mailer also included a mock check issued by "Stimulus Relief Program." *Id.* The check's memo field stated "COVID-19 AUTO STIMULUS" and included an "AUTHORIZED SIGNATURE" with a watermark of a lock; the back of the check included the statement "ORIGINAL DOCUMENT" and a space to endorse on the back with the instruction "DO NOT WRITE, STAMP OR SIGN BELOW THE LINE. RESERVED FOR FINANCIAL BANK USE." *Id.*

Images from the Bushnell, Florida mailer are attached to this Opinion as Appendix A.

Beginning on or around March 25, 2020, Respondent Traffic Jam Events disseminated or caused to be disseminated another COVID-19 mailer to 18,103 consumers in Alabama. CC Fact Stmt. ¶ 13. The mailer was used for a sales event for the dealership Dothan Chrysler Dodge Jeep Ram Fiat in Dothan, Alabama. *Id.* The mailers were sent in manila envelopes that state in bold font "ECONOMIC STIMULUS DOCUMENTS ENCLOSED" on one side and "TIME SENSITIVE FAST-TRACKED MAIL: OPEN IMMEDIATELY" on both sides *Id.*

D. The Prize Advertisements

Respondents do not dispute that Traffic Jam Events generated so-called "combination box" prize mailings to promote auto dealerships in at least six states. CC Fact Stmt. ¶¶ 17-18; *see also,* Opp. Ex. 4 (Lilley Dep.) 31:15-19 (referring to "combination box" mailer as a "saturation mailing"). The mailing for Landers McLarty Toyota in Madison, Alabama, attached to Respondents' Answer, provides an example. Answer, Ex. C. Images from the Landers McLarty

Toyota prize promotion are attached to this Opinion as Appendix B. The mailer states: "If your digital electronic combination box matches the official winning code and one of the codes below, you are a guaranteed winner with a possible $15,000 INSTANT CASH . . . ." Answer, Ex. C. Respondent Traffic Jam admits that the mailer was sent to residents in Alabama in May 2020. PX4 at Request for Admission 27. The practice of Respondent Traffic Jam was to design the mailers, obtain approval from the dealer, then direct a printing company to produce and mail the pieces. Opp. Ex. 4 (Lilley Dep.) 37:17-23; *see also* PX13, 19 (examples of printer records containing mailing instructions); PX 28, 29 (examples of postal statements); CC Fact Stmt. 30 (uncontested assertion of numerous ads disseminated by Respondents).

The Madison, Alabama advertisement lists an "OFFICIAL WINNING CODE" of 74937. CC Fact Stmt. ¶ 20. Below the OFFICIAL WINNING CODE is a Combination Box code. *Id.* The OFFICIAL WINNING CODE and the Combination Box code match. *Id.* In fact, the Combination Box code was always 74937 on all mailers and it always matched the official winning code. Opp. Ex. 4 (Lilley Dep.) 109:15-24. An arrow points rightward from the "Official winning code match here" to a selection of prizes. CC Fact Stmt. ¶ 21. Following that arrow, to the right of the "OFFICIAL WINNING CODE" and Combination Box code is a prize panel featuring five prizes with codes above each one. *Id.* The $2,500 INSTANT CASH prize lists the number 74937 and matches both the "OFFICIAL WINNING CODE" and the Combination Box code. *Id.* at ¶ 22.

The reverse side of the advertisement includes fine print in the bottom right corner. *Id.* at 23. The fine print disclaimer states: "If the winning number on your invitation matches the prize board at the dealership, you have won one (1) of the following prizes: #1 $15,000 Instant Cash 1:52,000 #2 $2,500 Instant Cash 1:52,000 #3 $800 Amazon Gift Card 1:52,000 #4 All-New Wireless Earpods Pro w/Charging Case 51,996:52,000 #5 $250 Walmart Gift Card 1:52,000." *Id.* at 24. The cost for the earpods depicted in these advertisements is around $6.00. *Id.* at 27.

The mailer lists a telephone number and website that consumers can use to verify their prize and schedule a time to come to the dealership. *Id.* at ¶ 28. Above that information is the consumer's first name, followed by "your combinations above must match to win!" Answer Ex. C. Consumers who call or go online are congratulated and told that they are indeed a winner and need to visit the dealership to claim their prize. PX14 (prize call script sample) ("Wow!!! My computer just verified that your code is a winner! To claim your prize, you must bring your invitation to Test Demo Dealership as shown on your invitation, during the sale dates and hours where your code will be verified and prize awarded."); PX15 (website screenshot).

In reality, the "official winning code" was not that at all: rather, to win, the consumer needed to match a different, unique number hidden within the ad to a different set of numbers on a prize board at the dealership. Opp. Ex. 4 (Lilley Dep.) at 59:15-18; PX2 (Jeansonne Dep.) 163:18-20. The unique number is hard to find because it is printed in fine print in inconspicuous locations. Even Respondent Jeansonne himself had trouble finding it: when asked if the ad stated that the prize board number was the number consumers had to match, he gravitated toward connecting the prominent combination code and "official winning code" numbers of 74937 with the matching number associated with the $2,500 prize: "It says right here, If your digital electronic combination box matches the official winning code and one of the codes below, you're a

guaranteed winner with a possible $15,000 instant cash. So you look at it, you have 74937. You have 74937; and then when you go in – I see where you're going, that it's above the 2,500 [dollars.]" CC Fact Stmt. 25. Jeansonne was asked if there was any disclaimer on the page, and replied, "No, I don't see that." PX2 (Jeansonne Dep.) at 165:1-4.

Respondents do not contest that Traffic Jam created and disseminated other prize mailers that were similar to the Madison, Alabama example. For example, one October 2020 "Match & Win" mailer entitled "$20,000 Instant Cash Giveaway" used pull-tabs in lieu of a combination box. Mot. at 22 and PX8. The mailer instructed the recipient to "PULL THE TABS TO SEE IF YOU'VE WON" and that "IF YOU HAVE A ROW OF MATCHING SYMBOLS, YOU ARE A GUARANTEED WINNER!*" The pull tabs showed matching 777s, which appeared on a prize panel next to $2,500 INSTANT CASH. *Id.* Another variation was the "$10,000 Pre-Loaded Instant Money Card Giveaway" disseminated in November 2020. PX9. Behind the scratch off was the number 74937, which corresponded with the winning number 74937 and matched the $2,500 INSTANT CASH prize. *Id.*

Consumers recorded numerous complaints with public websites, the Better Business Bureau, and law enforcement agencies regarding the mailers. CC Fact Stmt. ¶¶ 59-61, 63, 65-66. Consumers complained that they had been "scammed to come into [a dealership] with a promotion saying that I had won $1,500 instant cash." *Id.* at ¶ 59. A consumer who matched the three numbers with a valuable prize, checked by phone that they had won, and then was told that the bar code number determined their prize, commented that "this is misleading advertising and is just a bait to get you into [the] dealership." PX 1 Att. JI. As one consumer explained, "displaying your prizes right next to the codes always implies correlation. I drive for an hour to be told that, despite sitting right next to one another, those are not the prizes for those codes. The fine print did not convey that, either. Walked in for money, came out with bootlegged airpods." PX 1 Att. KW; *see also* PX 1 Atts. JJ, JU (customers explaining that the matching prize codes were withdrawn upon appearing at the dealer).

Facts suggest that Respondents understood that consumers would misperceive the mailers to mean that they had actually won. Former employee William Lilley describes many of the advertisements as "aggressive" prize panels. CC Fact Stmt. ¶ 31. By "aggressive," he means advertisements where "you get customers that, you know, sometimes perceive that they won a certain prize because of, you know, the way the prize is and the numbers are laid out." *Id.*

E. The Alleged TILA Violations

Visual inspection of Respondents' mailings shows that Respondents have regularly created advertisements to aid, promote, or assist closed-end credit transactions.[1] *See, e.g.,* Answer Ex. C (describing monthly payment amounts for credit offers); PX1 at Atts. G-BI, CI-JE. Such

[1] The advertisements were for "closed-end credit" because for auto loans, creditors do not make additional credit available as consumers repay their balances. 12 C.F.R. §§ 1026.2(a)(10), (20).

advertisements are thus subject to Section 144 of TILA, 15 U.S.C. § 1664 and its implementing regulation, Section 1026.24 of Regulation Z, 12 C.F.R. § 1026.24.

TILA and Regulation Z require advertisements for closed-end credit to disclose certain terms when "triggering terms" appear in the ad. Specifically, if an ad contains an amount or percentage of a down payment, the amount or number of installment payments, the amount of any finance charge, or the period of repayment, then the ad must also state additional terms such as the terms of repayment and the annual percentage rate ("APR"), using that term. 15 U.S.C. § 1664(d); 12 C.F.R. § 1026.24(d). These disclosures must be set forth "clearly and conspicuously." 12 C.F.R. § 1026.24(b).

Respondents' advertisements follow a pattern: monthly payment amounts appear prominently in colorful type, while other credit terms such as APR and number of monthly payments appear in a different part of the ad, in obscure, small type. CC Fact Stmt. ¶ 33.

In some advertisements, the monthly payment appears prominently on the first page and the number of payments and APR appear on a separate page, buried at the bottom, in minute type. *Id.* at ¶ 34.

In other advertisements, financing with 0% APR or a low APR appears in colorful, prominent type, in close proximity to images of vehicles and monthly payment amounts – but the fine print states that the APR for the vehicles pictured in the ad is substantially higher. *Id.* at ¶ 35.

In some instances, the advertisements state a monthly payment amount but do not disclose the down payment or the number of monthly payments. PX4, Request for Admission 24 Att. 24.

Respondent Traffic Jam Events admits creating these advertisements. Amended Response to Req. for Admission 31 (PX4 at 16). Both Traffic Jam Events and Respondent Jeansonne deny legal responsibility for the advertisements, arguing that the dealers are responsible. *Id.* [2]

F. Respondent Jeansonne's Participation in and Control of the Activities of Respondent Traffic Jam Events

As noted previously, Respondent Jeansonne is the owner, managing member, and president of Respondent Traffic Jam Events. Answer, ¶ 2. Jeansonne considered himself a "strategist" at the company whose duties were to "oversee all departments." PX 2 (Jeansonne Dep.) 20:12-13. He had a broad range of responsibilities, "dipping [his] foot in sales, dipping [his] foot in a mail piece, dipping [his] foot in operations, dipping [his] foot in adequate procedures." *Id.* at 20:21-25. Jeansonne exercised control over Traffic Jam Events' hiring and firing decisions. CC Fact Stmt. ¶ 39. He set payment amounts and approved payment methods for the mailing pieces. Id. at ¶ 40. It was protocol for direct mail advertisements, indeed for "anything that ever left the company," to

[2] At least some dealers, in turn, appear to blame Respondents. *See, e.g.,* PX16 (Better Business Bureau Dec.) attachment, dealer apologizing to a consumer for the "misunderstanding"; "[t]his event was handled by a third party vendor and they have stated the bar code is only there to validate the authenticity of the game piece in the event someone wins the large prizes." PX16 at 6.

"always" go past Jeansonne's email first. Opp. Ex. 4 (Lilley Dep.) at 103:20-108:3. Jeansonne does not contest these facts, nor his involvement in the specific mailings described below.

Jeansonne involved himself in the decision making for the advertising challenged here. He acknowledged that the COVID-19 stimulus relief mailers were his "brainchild" and that he "did the creation." CC Fact Stmt. ¶¶ 43, 41. Jeansonne explained to a dealer that "the catch phrase right now s [*sic*] Stimulus Relief Funds. People are somewhat running from COVID-19. . . . but everyone is running to Stimulus Relief Funds." *Id.* at ¶ 43. In a discussion with a dealer about how strongly to word the mailer, Jeansonne wrote, "Mike, this is what I do and the piece is legal. If we are going to start watering down the pieces it won't work." PX26.

Jeansonne provided input on one mailer, stating "I would like (Especially on the Pulltab piece) to see a little more emphasis on the obvious, there has been a lot of stimulus money allocated to the automotive industry to allow YOU the public to buy a vehicle at never before seen prices!! Do not hesitate to be at this site." CC Fact Stmt. ¶ 43. Jeansonne's employee responded to him saying, "updated pieces with more Stimulus verbiage," noting "[o]n the pull tab piece I added a lot more Stimulus relief stuff and included all the verbiage you sent over in the newspaper clipping on the back." *Id.* Moreover, Jeansonne testified that he made the decision to pay upfront for the development and dissemination of the mailers. PX17 at 44:13-14.

Regarding the prize mailers, Jeansonne exercised authority and control by settling state law enforcement actions. CC Fact Stmt. ¶ 42; PX2 (Jeansonne Dep.) 182:5-7. He was involved in communications with the printers and dealers about the telephone scripts, the success or failure of promotions, the type of glue-on pieces to use, the timing of mail drops, and other issues. CC Fact Stmt. ¶ 44; PX19-PX23.

IV. ANALYSIS

A. The Commission Has Jurisdiction Over the Challenged Advertising Activity

Under the FTC Act, the Commission has jurisdiction over persons, partnerships, and corporations using unfair or deceptive acts or practices "in or affecting commerce." 15 U.S.C. § 45(a). Traffic Jam describes itself as offering "industry-leading direct-response mail and staffed-event campaigns for dealerships across the U.S.A." CC Fact Stmt. ¶ 6. Respondents promoted their services by email blast to dealers across the country and disseminated the challenged mailings to tens of thousands of consumers. *Id.* ¶¶ 6, 12; Opp. at 3 (acknowledging dissemination of COVID-19 mailer to 35,000 consumers for a tent sale in Florida and 10,000 for a tent sale in Alabama). Respondents have utilized the services of printers in multiple states to produce mailings. CC Fact Stmt. ¶ 7. We find that we have jurisdiction over Respondents' allegedly deceptive advertising activities pursuant to Section 5 of the FTC Act.

We also have jurisdiction over Respondents' alleged TILA violations. Section 108(c) of TILA, 15 U.S.C. § 1607(c), authorizes the Commission to enforce compliance by any person with TILA's requirements, "irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act." For the purpose of our exercise

of enforcement authority, Section 108(c) deems a violation of any requirement imposed by TILA to be a violation of a requirement imposed by the FTC Act. *Id.* We thus have jurisdiction to address Respondents' alleged violations of TILA.

B. Respondents Have Violated Section 5 of the FTC Act As Alleged in Counts I and II

1. Legal Standard

"An advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances, and that representation or omission is material to a consumer's purchasing decision." *POM Wonderful LLC,* 2013 WL 268926, at *18 n.5 (FTC Jan. 16, 2013), *aff'd sub nom. POM Wonderful, LLC v. FTC,* 777 F.3d 478 (D.C. Cir. 2015); *see also, In re California Naturel, Inc.,* 2016 WL 7228668, at *5; *FTC Policy Statement on Deception,* 103 F.T.C. 174, 175 (1984) ("*Deception Statement*"), appended to *In re Cliffdale Assocs., Inc.,*103 F.T.C. 110 (1984). We thus utilize a three-part inquiry to evaluate whether, as a matter of law: (1) the advertising conveyed the claims alleged in the complaint; (2) the claim was false or misleading; and (3) the claim was material. *California Naturel,* 2016 WL 7228668, at *5; *FTC v. Direct Marketing Concepts, Inc.* 569 F. Supp. 2d at 297; *see also FTC v. Pantron I Corp.,* 33 F.3d 1088, 1095-6 (9th Cir. 1994).

Claims may be express or implied: express claims are those that directly state the representation at issue, while implied claims are any that are not express. *In re: Kraft, Inc.,* 114 F.T.C. 40, 120 (1991), *aff'd sub nom. Kraft, Inc. v. FTC,* 970 F.2d 311 (7th Cir. 1992). Absent an explicit representation, the Commission may determine whether the advertisement in question makes a representation by considering whether, from the point of view of a reasonable consumer-viewer, the "net impression" of the advertisement is to make such a representation. *In re Jerk LLC,* 159 F.T.C. at 891; *Direct Marketing Concepts,* 569 F. Supp.2d at 298; *Removatron Int'l Corp. v. FTC,* 884 F.2d 1489, 1497 (1st Cir. 1989) (looking to "common-sense net impression" of an advertisement). Extrinsic evidence is unnecessary if the claim is reasonably clear from the face of the advertisement. *POM Wonderful*, 2013 WL 268926, at *20-21. The analysis looks at the net impression created by the interaction of all of the different elements in the ad, rather than the impact of each or a few elements. *In re Thompson Med. Co.,* 104 FTC 648, 793 & n.17 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986).

Both express and implied claims may be deceptive. *Fedders Corp. v. FTC,* 529 F.2d 1398, 1402-03 (2nd Cir. 1976). "Deception may be accomplished by innuendo rather than by outright false statements." *FTC v. Wilcox,* 926 F. Supp. 1091, 1098 (S.D. Fla. 1995), quoting *Regina Corp. v. FTC,* 322 F.2d 765, 768 (3rd Cir. 1963); *FTC v. Capital Choice Consumer Credit, Inc.,* No. 02-21050 CIV, 2003 WL 25429612, at *4 (S.D. Fla. Jun. 2, 2003). Furthermore, false advertising can be based on deceptive visual representations. *Sterling Drug, Inc. v. FTC,* 741 F.2d 1146, 1152, 1154 (9th Cir. 1984).

Turning to the second element, the determination of whether a representation or omission is deceptive turns on whether it is likely to mislead, not whether it has caused actual deception.

Deception Statement at 176; *Thompson Med. Co., Inc. v. FTC,* 791 F.2d at 197; *Trans World Accounts, Inc. v. FTC,* 594 F.2d 212, 214 (9th Cir. 1979) ("[p]roof of actual deception is unnecessary to establish a violation of Section 5"). The question is whether the claim is likely to mislead a consumer acting reasonably under the circumstances. *Southwest Sunsites, Inc. v. FTC,* 785 F.2d 1431, 1436 (9th Cir. 1986); *FTC v. Wilcox,* 926 F. Supp. at 1098.

The third element is materiality. A representation is considered "material" if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *FTC v. Cyberspace.com LLC,* 453 F.3d 1196, 1201 (9th Cir. 2006) (quotation omitted); *see also Kraft, Inc. v. FTC,* 970 F.2d at 322; *In re Jerk LLC,* 159 FTC at 891. Express claims are presumed material, *see FTC v. Pantron I Corp.,* 33 F.3d at 1095-96, and consumer action based on express statements is presumptively reasonable. *See FTC v. Five-Star Auto Club, Inc.,* 97 F.Supp.2d 502, 528 (S.D.N.Y. 2000) (citations omitted). Where evidence exists that a seller intended to make an implied claim, the Commission will infer materiality. Deception Statement at 182. The Commission also presumes materiality where claims relate to central characteristics of the product or service such as its purpose, safety, efficacy, or cost. *Id; In re Thompson Med. Co.,* 104 F.T.C. at 816-17.

2. Count I: COVID-19 Stimulus Relief Mailer

Applying our three-part test, we find that Complaint Counsel have succeeded in demonstrating that the Respondents' COVID-19 stimulus relief mailers constituted deceptive advertising in violation of the FTC Act. Respondents disseminated the ads at or near the enactment of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), CC Fact Stmt. ¶ 9, at a time when many Americans may have expected a relief check based on widespread press coverage of the Act. Through a combination of express and implied claims, the mailers sought to convey that they originated from, or were affiliated with, a government stimulus program. The envelope stated, in bold letters, "IMPORTANT COVID-19 ECONOMIC STIMULUS DOCUMENTS ENCLOSED," and the enclosed notice stated "URGENT: COVID-19 ECONOMIC AUTOMOTIVE STIMULUS PROGRAM RELIEF FUNDS AVAILABLE · ALL PAYMENTS DEFERRED FOR 120 DAYS." CC Fact Stmt. ¶ 12. The notice header contained a barcode with the legend "COVID-19 STIMULUS (INDIVIDUAL)" and "URGENT NOTICE – READ IMMEDIATELY." Topping off the implied connection with an official stimulus program, the mailers included a watermark depicting the Great Seal of the United States and contained an ersatz check purported to be from the "Stimulus Relief Program" with "COVID-19 AUTO STIMULUS" in the memo line. *Id.* The mailing directed the recipient to appear at a "relief headquarters," the "designated local headquarters," or "your designated temporary 10-day site" in order to claim benefits. *Id.*

Looking at all the elements together, we find that the overall net impression is that the mailers originated from, or were associated with, a government stimulus program; that they provided official information regarding government stimulus benefits; and that they offered an opportunity for receiving COVID-19 stimulus relief, including an auto stimulus check. Respondents created and disseminated the mailer in the spring of 2020 when the news and public discourse in this country were consumed by discussion of the government stimulus package and

how it might mitigate the effects of the global coronavirus pandemic. Through a series of references to COVID-19 stimulus, relief, and benefits and by using indicia of official correspondence, Respondents exploited this climate and created an impression of government affiliation and relief.

As to the second element, we can readily dispense with the mailers' claim as false. Respondents are private actors who acknowledge that the U.S. government did not authorize or approve the stimulus mailer. PX4, Response to Request for Admission 26.

The third element is materiality. We find that representations designed to induce consumers to leave home and attend an automobile tent sale in the midst of a global pandemic, prompted by the understanding that they would receive a benefit from a government relief program designed to alleviate the effects of that pandemic, are "likely to affect the consumer's conduct" and are therefore material. *See* Deception Statement at 175; *Cyberspace.com,* 453 F.3d at 1201 (solicitations created the misleading impression that checks were a refund, when in reality they signed consumers up for services); *In re Jerk LLC,* 159 F.T.C. at 907-08 (representations about the source of content posted on a social media website were material to users).

Respondents' counter-arguments are unavailing.

a. Attributes of Purported Stimulus Check

Respondents argue that the mock stimulus check could not have deceived any consumer because it did not include the name of a financial institution; it contained disclaimers stating "no cash value" and "This is not a check"; and it showed no actual payee.[3] Opp. at 8. First, as to the disclaimers, Respondents appear to be referring to statements in tiny font on the back of the check. The check image proffered by Complaint Counsel bears no disclaimer. *Compare* CC Fact Stmt. ¶ 12(g) (front of check; no disclaimer); Compl. Ex. C (same); Answer at 9 (enlarged version of text, possibly from the back of the check, appears to show disclaimers described by Respondents).[4] Furthermore, courts have repeatedly held that fine print disclaimers may not overcome a clear net impression created by an ad. *See, e.g., FTC v. Grant Connect, LLC,* 827 F. Supp. 2d 1199, 1214, 1220 (D. Nev. 2011), *aff'd in part, rev'd in part on other grounds* 763 F.3d 1094 (9th Cir. 2014) (disclosures in fine print may not overcome an advertisement's deceptive net impression); *Cyberspace.com,* 453 F.3d at 1200-01 (fine print notices on reverse side of check did not overcome net impression that the check was a refund or rebate); *FTC v. QT, Inc.,* 448 F.Supp.2d 908, 924 (sprinkling of small-print disclaimers insufficient to overcome net impression of infomercial); *see also, FTC v. Brown & Williamson Tobacco Corp*., 778 F.2d 35, 43 (D.C. Cir. 1985) (disclaimer did not alter prominent claim); *Removatron Int'l Corp. v. FTC,* 884 F.2d at 1497 (disclaimers

[3] Respondents also argue that the checks did not have the amount "written out," Opp. at 8, but upon inspecting the sample check, we are persuaded that the amount is typed out similar to a government or commercial printed check.
[4] The exemplar of a *prize mailer* that Respondents attached to their Answer did contain a purported check stating on the front (in tiny print) "[t]his is not a check," but here we are dealing with the Covid-19 Stimulus Relief mailer, not the prize mailer. With regard to the prize mailers, Complaint Counsel based their theory of deception on the layout and representations of the game text, not on the presence of a purported check. Compare Answer Ex. C p.2 to Compl. Ex. C.

ineffective "unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression") (citation omitted). Respondents point to other check attributes that also fail to overcome the net impression. Specifically, the lack of a financial institution would be unremarkable on a federal government check, and the absence of a payee could have been addressed when the consumer appeared at the designated "relief headquarters" to claim the benefits.

In any event, Respondents' arguments regarding the check are a diversion. The question at issue is whether consumers acting reasonably would likely have regarded the challenged mailings as associated with a government stimulus program and as providing official information about an opportunity for receiving COVID-19 stimulus relief. Complaint Counsel assert that the purported check is one portion of the mailings that contributes to the overall net impression of the COVID-19 advertisement. The evidence is ample for that purpose. Complaint Counsel have demonstrated that the mailer as a whole – including but not limited to the manila envelope stating "IMPORTANT COVID-19 ECONOMIC STIMULUS DOCUMENT ENCLOSED," other quasi-official language, the Great Seal of the United States, the mock check with space to endorse, and the direction to attend a "relief headquarters" and a "designated temporary 10-day site" – was likely to mislead a consumer acting reasonably.

b. Absence of Actual Deception

As to both deceptiveness and materiality, Respondents rely heavily on what they claim is a lack of proof of actual deception. Misstating the legal standard, Respondents claim that "no reasonable consumer acting reasonably under the circumstances *was* misled or deceived." Opp. at 2 (emphasis supplied); *but see* Deception Statement, 103 FTC at 175 (advertisements "likely to mislead" are unlawful). In other variations of this argument, Respondents assert that any deception in enticing consumers to a car dealership is not material because it does not relate to the purchase or lease of an automobile, Opp. at 10; that very few consumers attended the sales, *id.* at 2-3; and that consumer complaints about "fake checks" show that consumers were not, in fact, deceived, *id.* at 8, 10-11.

Respondents appear to concede that approximately 40 people did attend the Florida and Alabama tent sales, Opp. at 10, and Complaint Counsel do, in fact, produce several customer complaints regarding Respondents' COVID-19 stimulus mailer and a press report alerting the public to the fake stimulus checks. CC Fact Stmt. ¶¶ 60, 62, 64. Complainants expressed frustration that the checks were not the stimulus payments they purported to be. This suggests that actual deception, although not necessary, did occur. But in any event, Respondents' arguments contradict the long-established law of deceptive advertising, that holds that Complaint Counsel need not show actual deception. *See* Section IV.b.1 above.

We are similarly unpersuaded by Respondents' additional argument that their mailings were designed to bring consumers to an auto sales site and are therefore distinct from any deception in the actual buyer-seller (or lessor-lessee) transaction for the car. Anticipating such arguments, the law defines a material misrepresentation as one that is "likely to affect a consumer's choice of *or conduct regarding* a product." Deception Statement, 103 F.T.C. at 182 (emphasis supplied);

see, e.g., *POM Wonderful LLC*, 2013 WL 268926, at *52; *Cyberspace.com,* 453 F.3d at 1201; *cf. In re Household Sewing Mach. Co.*, 76 F.T.C. 207, 239 (1969) (the problem with bait-and-switch is not that the consumer always takes the bait, but that it serves as an "opening gambit to get the salesman over the doorstep"). We are satisfied that a consumer's decision to attend an automobile sales event, during a global pandemic, constitutes relevant "conduct regarding a product" sufficient to establish materiality.

c. 15 U.S.C. § 45(n) Is Not a Barrier to Relief

Respondents devote significant space in their brief arguing that the Commission is without authority to act due to the provisions of 15 U.S.C. § 45(n). Opp. at 4-7. For cases brought under our unfairness authority, Section 45(n) requires that the act or practice "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." Contrary to Respondents' argument, that subsection simply does not apply in this deception case. Section 5 establishes deception and unfairness as two distinct grounds for Commission enforcement. *American Fin. Servs. Ass'n v. FTC,* 767 F.2d 957, 979 n.27 (D.C. Cir. 1985); *FTC v. Cantkier,* 767 F.Supp.2d 147, 153 (D.C. Dist. 2011). Congress passed the statute that became § 45(n) because it was concerned about the perceived breadth and undefined nature of the Commission's enforcement under its unfairness authority. *See FTC v. Wyndham Worldwide Corp.,* 799 F.3d 236, 243-44 (3d Cir. 2015) (discussing history of unfairness policy and § 45(n)); *American Fin. Servs. Ass'n. v. FTC,* 767 F.2d at 969 (describing history of 1980 policy statement later embodied in § 45(n)). It is therefore no accident that § 45(n) by its plain language restricts itself to unfairness cases only. The section affects neither the Commission's authority to bring an enforcement action against deception nor the elements of such a case. *Cantkier,* 767 F.Supp.2d at 153; *FTC v. Lights of America Inc.,* SACV 10-1333 JVS (MLGx), 2011 WL 13308569, at *5 (Apr. 29, 2011); *see CyberSpace.com LLC,* 453 F.3d at 1199 n.2. We therefore reject Respondents' claim that Complaint Counsel must demonstrate actual or likely substantial consumer injury.

3. Count II: Respondents' Deceptive Prize Advertisements

Complaint Counsel's uncontroverted facts establish that Respondents' prize advertisements violated Section 5. The advertisements stated that the consumer needed to match three unique numbers in order to win, then showed all three numbers as a match, with the third number appearing next to a valuable prize. The advertisements thus represented, and a consumer acting reasonably under the circumstances would understand, that he or she had won a specific, valuable prize. This impression would be confirmed when, as directed by the ad, the consumer called a telephone operator or visited a website that, in turn, would confirm that the consumer was a winner. Only upon appearing at the dealership would the consumer learn that he or she had not won the indicated prize, but, if anything, some other nominal door prize based on matching a fourth number with a "prize board." CC Fact Stmt. ¶¶ 24-27; Opp. Ex. 4 (Lilley Dep.) at 59:15-18; PX2 (Jeansonne Dep.) 163:18-20. As one consumer succinctly explained, this is "misleading advertis[ing] and is just a bait to get you into [the] dealership." PX 1 Att. JI.

Having found that the advertisements made false representations, we now turn to the final element, materiality. Telling consumers that they have won a valuable prize, such as $2,500 instant cash, in order to lure them to a car sale is doubtless material, as the information is important to consumers and capable of influencing their decision about how to proceed. *See, e.g.*, *Cyberspace.com,* 453 F.3d at 1201 (relying on Deception Statement, 103 F.T.C. at 182); *Kraft*, 970 F.2d at 322 (same). Several consumers complained that they had driven far out of their way to claim the prize that the ads represented they had won. *See, e.g.,* PX1 Atts. KW, KX, KY (loss of "time, money and frustration"). Indeed, the goal of these ads was to get consumers to appear at the dealership when they might not otherwise do so, potentially at substantial inconvenience, and at risk to their health, and the ads were therefore material. As the Supreme Court has stated, "[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising." Deception Statement, 103 F.T.C. at 182, *quoting Central Hudson Gas & Elec. Co. v. PSC,* 447 U.S. 557, 567 (1980).

Respondents make no attempt to controvert the facts that underpin Count II, and offer only a token defense on materiality. Respondents submit that the recipient of each mailer received at least one prize if they showed up at the dealer, and furthermore that there was at least one grand prize winner in each advertisement. Opp. at 11. Putting aside for the moment that Respondents' method appears to have been to represent to consumers that they won a valuable *second-place* prize such as $2,500 or $5,000 cash, *see, e.g.,* CC Fact Stmt. ¶ 21 and PX1 Atts. AH-AQ, the fact that consumers may have been offered an item of trivial value is not a defense to materiality. A promised cash payout of $2,500 would likely affect consumer behavior significantly more than would a $6 pair of earbuds. *See* PX1 Att. KW (consumer drove for an hour, "walked in for money, walked out with bootlegged airpods"); *see also, FTC v. Standard Education Soc'y,* 302 U.S. 112, 113-117 (1937) (finding it unlawful to deceive consumers into believing that a product was being given away); *accord Kalwajtys v. FTC,* 237 F.2d 654, 655-6 (7th Cir. 1956) (noting that consumers were told that they were members of a "selected" group of consumers receiving free products); *FTC v. Dayton Family Prods.,* 2016 WL 1047353, at *8, 10 (D. Nev., Mar 16, 2016) (holding that the fact that consumers received booklets on a chance to enter a sweepstakes and in some instances money orders for less than $2 did not change the misleading nature of the representations). In addition, the presence of at least one grand prize winner in no way mitigates the deception of the other consumers, who were told they had won a specific, valuable prize but, in fact, had not.

Finally, for the same reasons stated in regard to Count I above, we reject Respondents' arguments that mailings designed to lure consumers to an auto dealership do not affect consumer conduct with regard to a product and that 15 U.S.C. § 45(n) prevents us from acting in this deception case. We therefore grant summary decision on Count II.

C. Respondents Have Violated TILA as Alleged in Count III

Complaint Counsel demonstrated that Respondents created and disseminated many dozens if not hundreds of advertisements to "aid, promote, or assist" closed-end credit transactions, and that these ads violate TILA by failing properly to disclose required loan terms. Respondents' advertisements contained "triggering terms" in the form of monthly payment amounts next to the

image of a vehicle. *See, e.g.,* PX 1 Atts. F-BI, CI-JE. Rather than making the required "clear[] and conspicuous[]" disclosures of the additional required terms, such as the term of repayment and the annual percentage rate ("APR"), the ads disclosed this information, if at all, in small print in another part of the ad. Complaint Counsel's evidence of these ads stands uncontroverted, and we may evaluate as a matter of law whether the disclosures are conspicuous. *Burghy v. Dayton Racquet Club, Inc.,* 695 F. Supp.2d 689, 696 (S.D. Oh. 2010) (collecting cases). Under TILA, "conspicuous" means "obvious to the eye" or "plainly visible." *See Applebaum v. Nissan Motor Acceptance Corp.,* 226 F.3d 214, 220 (3rd Cir. 2000) (interpreting "clear and conspicuous" requirement in Consumer Leasing Act, embodied in TILA); *Gilberg v. Calif. Check Cashing Stores, LLC,* 913 F.3d 1169, 1176 (9th Cir. 2019) (conspicuous pursuant to TILA means "readily noticeable to the consumer"). Disclosures in tiny print, condensed text, or in difficult-to-find locations are not conspicuous under TILA. *See Barrer v. Chase Bank USA, N.A.,* 566 F.3d 883, 891-92 (9th Cir. 2009) (TILA disclosure buried in dense fine print five pages after related disclosure was not clear and conspicuous as a matter of law); *accord, Tucker v. New Rogers Pontiac, Inc.,* No. 03 C 862, 2003 WL 22078297, at *5 (N.D. Ill. Sept. 9, 2003) (rejecting claims that disclosures that appear in barely legible, smallest-sized font on the document are conspicuous).

Respondents do not contest the content of the ads, nor do they argue that the disclosures are clear and conspicuous. Instead, Respondents argue that TILA does not apply to them because they do not offer credit. Opp. at 12-13, citing 15 U.S.C. § 1602 (definition of "creditor"). This argument misses the mark. Complaint Counsel brought a claim under Section 144 of TILA, 15 U.S.C. § 1664, which facially applies to "any advertisement to aid, promote, or assist directly or indirectly" any consumer credit transaction other than an open end credit plan (emphasis supplied); *see also,* 12 C.F.R. § 1026.2 ("advertisement" defined as "a commercial message in any medium that promotes, directly or indirectly, a credit transaction").

There are, as Complaint Counsel acknowledges, some TILA duties that apply only to creditors. *See, e.g.,* 15 U.S.C. §§ 1638(a), 1669(a)(1), 1666a. The advertising obligations are not among them. 15 U.S.C. § 1664; *see also,* 12 C.F.R. § 1026.24(a) (2021) (applying Regulation Z to "an advertisement for credit"; no limitation to creditors); *compare* 12 C.F.R. § 1026.18 ("the creditor shall disclose the following information . . .") to 12 C.F.R. § 1026.24 ("If an advertisement states a rate of finance charge, it shall state the rate as an 'annual percentage rate' . . . ."). We note that the staff interpretation of Regulation Z, issued by the Federal Reserve, states, "Persons covered. All *persons* must comply with the advertising provisions in §§ 226.16 and 226.24,[5] not just those that meet the definition of creditor in 226.2(a)(17). Thus . . . others who are not themselves creditors must comply with the advertising provisions of the regulation if they advertise consumer credit transactions." 12 C.F.R. Part 226 Supp. I § 226.2(a)(2) ¶ 2 (emphasis in original). We find this to be a reasonable interpretation of the statutory text and we reach the same conclusion.

Respondents further point to language in Regulation Z stating that, "in general," it applies to those who extend credit. Opp. at 13. However, the use of the phrase "in general" implies that

[5] Due to a non-substantive re-numbering of Regulation Z effective December 30, 2011, these sections are now numbered 12 C.F.R. §§ 1026.16, 1026.24, and 1026(a)(17). *See* 76 Fed. Reg. 79767 (Dec. 22, 2011).

there are particular circumstances that differ. As discussed above, advertisements are just such an area, based on the statute's reference to "any advertisement" to aid, promote, etc., any extension of consumer credit. 15 U.S.C. § 1664(a) (emphasis supplied).

D. Respondent Jeansonne Is Individually Liable

Citing no legal authority and without controverting Complaint Counsel's facts, Respondents nonetheless assert that Complaint Counsel's showing of David J. Jeansonne II's individual liability falls short. Opp. at 12. After due consideration, we reject this argument.

An individual is liable for a business entity's deceptive acts or practices if the individual either had the authority to control or participated directly in the acts or practices at issue. *E.g.*, *FTC v. IAB Mktg. Assocs.*, 746 F.3d 1228, 1233 (11th Cir. 2014); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1204 (10th Cir. 2005); *FTC v. Amy Travel Servs., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989), *overruled in part on other grounds by AMG Capital Mgmt, LLC v. FTC,* 141 S. Ct. at 1348-49. Here, Complaint Counsel have demonstrated both. As the owner, managing member, and president of Respondent Traffic Jam Events, Mr. Jeansonne does not contest that he "overs[aw] all departments," exercising day-to-day control over hiring, firing, and other corporate affairs while simultaneously "dipping [his] foot in" operational matters such as sales, mailings, and what he called "adequate procedures." CC Fact Stmt. ¶¶ 38-40; PX2 at 20:13, 21-25.

Respondent Jeansonne also involved himself in the particular mailings disseminated by Traffic Jam Events. The uncontested testimony of his former employee established that nothing left Traffic Jam Events without going through Mr. Jeansonne's email inbox first. Opp. Ex. 4 (Lilley Dep.) at 103:20-108:3. Indeed, Mr. Jeansonne portrayed the COVID-19 stimulus mailers as has personal "brainchild," PX17 at 50:3-4, and he participated in their design. CC Fact Stmt. ¶ 43. He even explained to a dealer that those mailers should not be "water[ed] down" or they "won't work." *Id.* at ¶11; PX26. As to the prize mailers, Mr. Jeansonne similarly had input on their design, CC Fact Stmt. ¶ 44, and knowledge of their content as he settled multiple state enforcement actions alleging deceptive conduct related to these mailers. PX2 at 180:6-7, 19-21.

We find that Complaint Counsel have established Respondent Jeansonne's individual liability for Traffic Jam Events' deceptive acts and practices. We therefore find that summary decision is appropriate against both Respondents on all three counts.

V. RELIEF

The Commission has wide discretion in its choice of a remedy in addressing unlawful practices. *Jacob Siegel Co. v. FTC,* 327 U.S. 608, 611 (1946). A cease and desist order is appropriate if the Commission determines that the order is sufficiently clear and reasonably related to the unlawful practices at issue. *In re POM Wonderful*, 2013 WL 268926, at *62 (citing *Colgate-Palmolive Co.,* 380 U.S. 374, 392, 394-95 (1965)).

Where appropriate the Commission may order "fencing-in" relief, which refers to provisions that are "broader than the conduct that is declared unlawful." *Telebrands Corp. v. FTC*, 457 F.3d 354, 356 n.5 (4th Cir. 2006). *See FTC v. Nat'l Lead Co.,* 352 U.S. 419, 431 (1957) ("[T]hose caught violating the [FTC] Act must expect some fencing in.") Thus, in carrying out its function of preventing unlawful conduct, 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). The Commission has the power to forbid acts that are lawful, when necessary "to prevent a continuance of the unfair competitive practices that are found to exist." *FTC v. Nat'l Lead Co.,* 352 U.S. at 430.

When determining whether an order is reasonably related to the unlawful practices, the Commission considers three factors: "(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the Respondent has a history of prior violations." *Stouffer Foods Corp.* 118 F.T.C. 746, 811 (F.T.C. 1994); *see also, POM Wonderful,* 2013 WL 268926, at *62. "The reasonable relationship analysis operates on a sliding scale – any one factor's importance varies depending on the extent to which the others are found." *Telebrands,* 457 F.3d at 358. In applying the three-part analysis, the Commission considers the circumstances of the violation as a whole, and not merely the presence or absence of any one factor. *Kraft, Inc. v. FTC,* 970 F.2d at 327-28 (upholding the FTC's imposition of fencing-in relief, despite absence of prior violations by Kraft, in light of seriousness, deliberateness, and transferability of violations).

Here, Complaint Counsel's proposed Order prohibits three areas of conduct. Part I prohibits Respondents from engaging in businesses that involve advertising, marketing, promoting, distributing, offering for sale or lease, or selling or leasing motor vehicles. Part II prohibits Respondents from misrepresenting any material fact in connection with advertising, marketing, promoting, or offering for sale or lease any product or service, including but not limited to matters such as affiliation with or financial relief from the government, or prizes or sweepstakes. Part III, in its essence, prohibits Respondents from violating Section 144 of TILA or Regulation Z by stating the amount of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without also clearly and conspicuously disclosing all of the additional required terms.[6] Part III also forbids Respondents from representing a rate of finance charge without stating the term as an annual percentage rate or APR.

Applying the Commission's three-part test, we find first that the Respondents' violations were sufficiently serious and deliberate to warrant the requested relief. The COVID-19 stimulus mailers used deception to lure consumers to attend public sales events during a public health emergency, preying on their need for government assistance at a time when many individuals (including persons with health vulnerabilities) were attempting to avoid any unnecessary public events. As Mr. Jeansonne explained, "People are somewhat running from COVID-19 . . . but

[6] The additional required terms are: the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate ("APR"), including any potential increase of the APR post-transaction.

everyone is runing (sic) for and to Stimulus Relief Funds." PX6; CC Fact Stmt. ¶ 43. Respondents' email blast to dealers expressly touted the ads as using "an official letter format." CC Fact Stmt. ¶ 11. The mailers featured, not merely one or two, but numerous attributes seeking to create a perception of government affiliation (U.S. government watermark, purported check, direction to appear at "stimulus headquarters," manila envelope with bold "STIMULUS DOCUMENT ENCLOSED," etc.). Respondents justified these strong features on grounds that "[i]f we are going to start watering down the pieces it won't work." PX26. And as egregious as the mailers were, Mr. Jeansonne stated to a federal judge that the mailers were "so watered down" that in his view they were a "flop." PX17 (TRO Hear'g Transcript) at 44:12-13. All of this suggests the seriousness and deliberateness of the conduct that justifies the fencing-in relief.

The persistence with which Respondents pursued their prize mailing campaigns also is notable. Respondents persisted in the unlawful mailings despite entering consent orders with the States of Kansas in 2010 and 2013 for prize and credit violations (the latter order banning Respondents from doing business in the state), and with Indiana for the prize violations in 2019. PX1, Atts. LX – LZ, MA. The state actions, at a minimum, alerted Respondents' to the potential deception concerns raised by their advertising. Yet Respondent Jeansonne testified that he did not change his company's practices in other states because of the Kansas consent orders. PX2 at 181:25-182:7. Similarly, Mr. Jeansonne said he made no changes to Traffic Jam Events' mailers because of Indiana's law enforcement action, except to include language in the emails to dealers attempting to shift responsibility to them. *Id.* at 186:16-24; *see also* 185:2-3 ("[We] implement[ed] at the bottom of his email that it's up to you, Mr. Dealer. We're not responsible."). The determination to continue their advertising campaigns without modification despite the state actions reflects a deliberate choice to employ practices challenged by law enforcement as deceptive. Moreover, even without the enforcement actions, Respondents knew the prize ads were misleading some consumers because consumers complained directly to them: Mr. Jeansonne's former employee acknowledged receiving complaints from "customers that, you know, sometimes perceive that they won a certain prize because of, you know, the way the prize is and the numbers are laid out." PX3 at 70:23-71:1.

All three of the violations – the egregious COVID-19 mailers, the voluminous prize mailers, and the TILA violations numbering in the many dozens if not hundreds after Respondents had already encountered law enforcement in the Kansas order – support the need to ban the Respondents from the auto industry in this case. *See FTC v. Nat'l Lead Co.,* 352 U.S. at 430 (on appeal from a Commission order, "the Court is obliged not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices"); *cf. FTC v. Gill,* 265 F.3d at 957-58 (in federal court action, affirming a ban on engaging in the credit repair business due to systematic and repeated violations); *FTC v. Somenzi,* No. 16-cv-07101, 2017 WL 6049371, at *7-8 (C.D. Cal. Jul. 24, 2017) (default judgment including a lifetime ban on participating in or assisting others in engaging in prize promotion schemes, due to cognizable danger of recurrent violation); *FTC v. Inc21.com Corp.,* 745 F. Supp. 2d 975, 1009-10 (N.D. Cal. 2010) (ban on telephonic billing); *FTC v. Publ'g Clearing House, Inc.,* No. CV-S-94-623, 1995 WL 367901, at *4 (D. Nev. May 12, 1995) (ban on participating in any telephone premium promotion).

Applying the second part of the remedy analysis, we find that in the absence of complete relief, Respondents readily could transfer their deceptive practices to markets other than the sale or lease of motor vehicles. Bogus prize mailers could be used to tout any product that consumers typically buy in-person or through the mail. In a similar vein, fake promises of government largesse could lure customers to in-person sales for a variety of products, particularly where they are told they must present themselves at a "headquarters" during a limited time to claim what is due them. The ease of transferability, along with the elements described for factor one above, particularly supports Parts II and III of Complaint Counsel's proposed order (ban on deception in any industry; ban on TILA violations in any advertisement). The remedy seeks to "close all roads to the prohibited goal" of deceiving consumers. *FTC v. Ruberoid Co.,* 343 U.S. at 473.

Given the strength of our findings under the first two factors, we need not make a finding under the third – whether the Respondents have a history of prior violation; the first two factors alone are enough to support the relief sought by Complaint Counsel.[7] Here we know of three prior state challenges to Respondents' advertising activities, two in Kansas and one in Indiana. Although these actions were settled without liability findings, in *Telebrands*, we found that a pattern of narrow settlements, if ineffective in stopping unlawful conduct, could help establish the need for broader relief. [8] Federal courts similarly consider the "failure of prior enforcement efforts in . . . stopping unlawful activity" when considering how broad a remedy to impose.[9] Applying these standards, we believe the Respondents' committing multiple violations despite entering three consent orders involving similar conduct to the violations at issue here supports the imposition of broad fencing-in relief.

In sum, we find that Respondents have demonstrated a commitment to their pattern of conduct and a willingness to mislead in ways that are widely transferable. The Order's clear limitations on Respondents' conduct, including the ban on participation in the automotive industry, are appropriate and no broader than necessary to prevent recurrence of the violations.

VI. CONCLUSION

We have determined to grant Complaint Counsel's Motion for Summary Decision. Complaint Counsel have met their burden to demonstrate that Respondents violated Section 5 of the FTC Act as alleged in Counts I and II, and TILA as alleged in Count III. Respondents have failed to raise a genuine issue of material fact as to these claims, and their statutory defenses lack merit. Respondent Jeansonne is individually liable for the violations along with Respondent Traffic Jam Events. We conclude that Complaint Counsel are entitled to summary decision as to both Respondents as a matter of law. Finally, we enter the accompanying Final Order, in the form of Complaint Counsel's proposed Order as a necessary and appropriate measure to prevent further violations.

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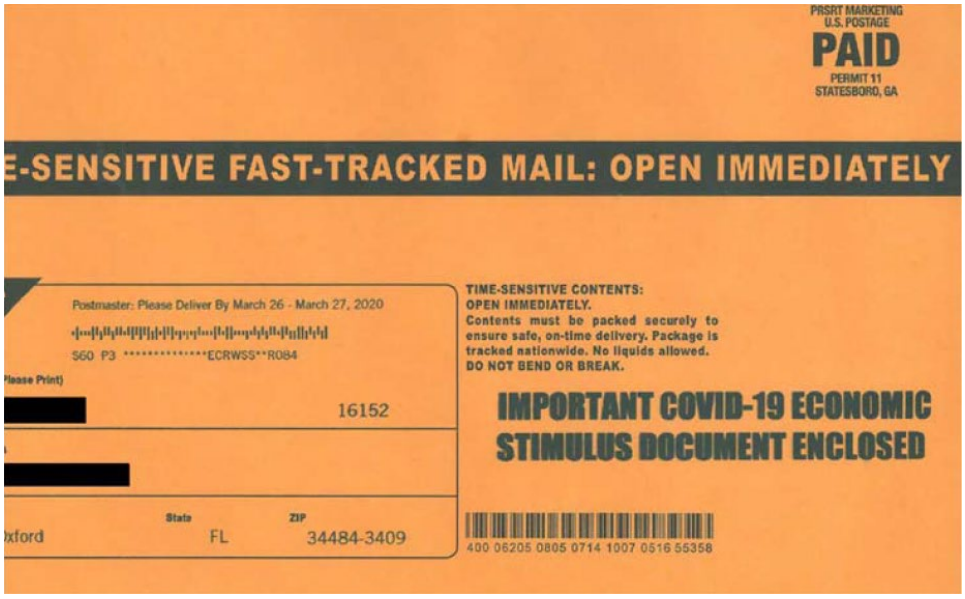
[7] *See Telebrands*, 457 F.3d at 362 (seriousness/deliberateness and transferability were sufficient to justify fencing-in relief); *Kraft, Inc. v. FTC,* 970 F.2d at 327-28 (approving application of fencing-in relief despite absence of prior violations, in light of seriousness, deliberateness, and transferability of violations).

[8] *Telebrands Corp.,* 140 F.T.C. 278, 340 (2005)

[9] *FTC v. Think Achievement Corp.,* 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000); *see also, FTC v. Wilcox,* 926 F. Supp. 1091, 1103 (S.D. Fla. 1995); *FTC v. Five-Star Auto Club, Inc.,* 97 F. Supp. 2d 502, 536-37 (S.D.N.Y. 2000).

APPENDIX A



URGENT: COVID-19 ECONOMIC AUTOMOTIVE STIMULUS PROGRAM
RELIEF FUNDS AVAILABLE • ALL PAYMENTS DEFERRED FOR 120 DAYS

Eligible Dates:
March 27th thru
April 5th, 2020

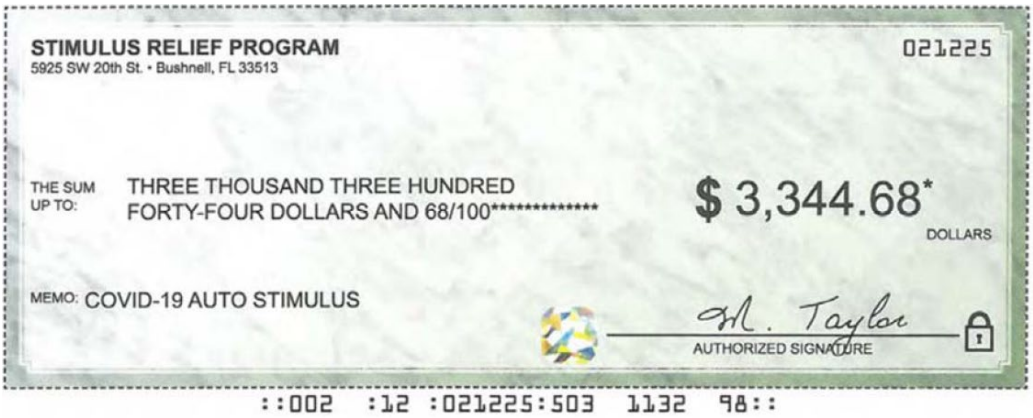
COVID-19 STIMULUS (INDIVIDUAL)
NOTICE NO. FB02-021225-096781

DATE: 03/25/20
NOTICE NO: FB02-021225-096781
ACCOUNT TYPE: COVID-19 STIMULUS (INDIVIDUAL)
DESCRIPTION: URGENT NOTICE - READ IMMEDIATELY

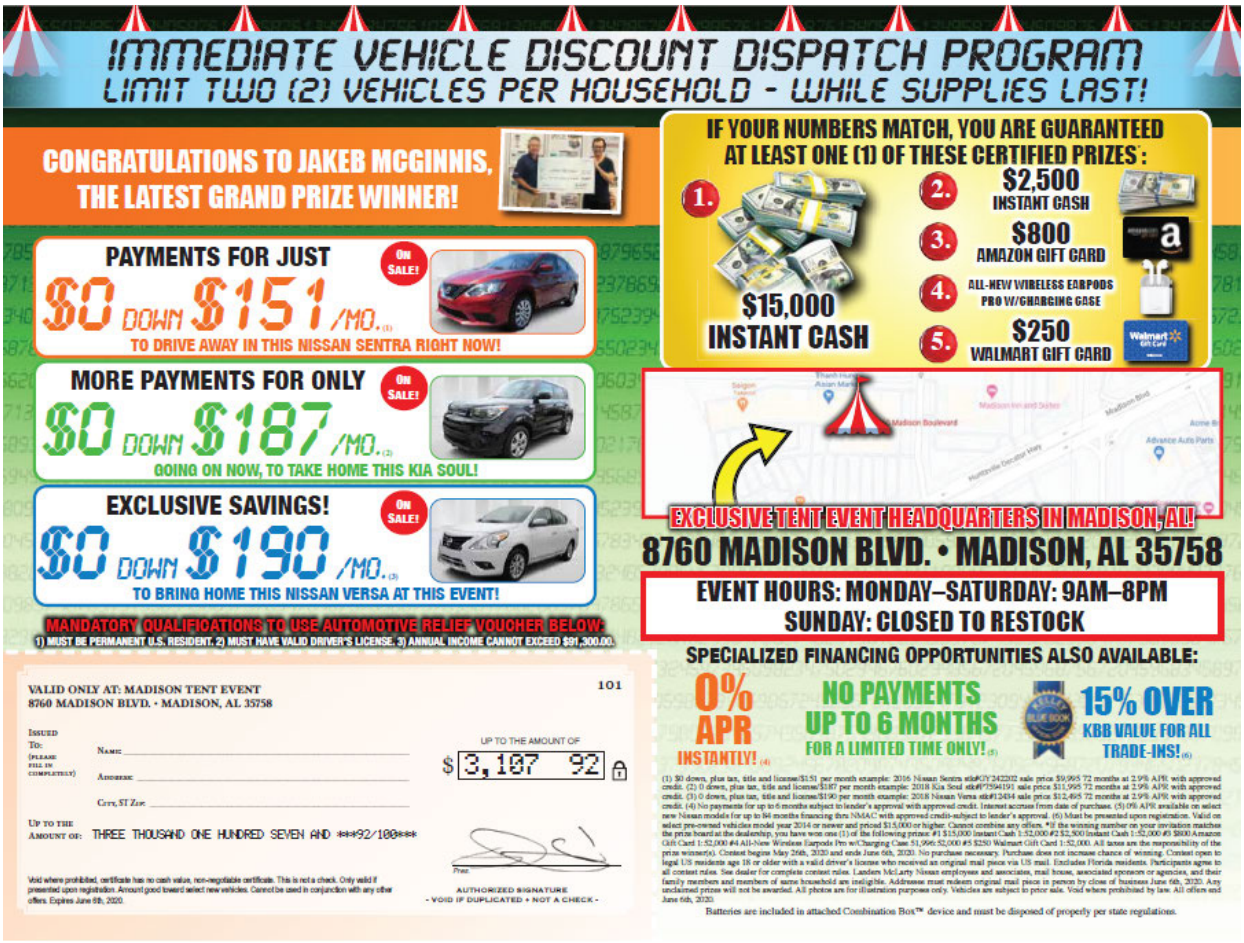
At the specified relief headquarters, the following incentives may be available to ALL residents of Bushnell, FL:

- **0% A.P.R. financing for 60 months.** A variety of vehicles (cars, trucks, SUVs, etc.) will have 0% A.P.R. financing available with little to no money down. (1)
- **All payments will be deferred for 120 days.** Do not make a car payment for 120 days/4 months. (2)
- **Receive a $100 Walmart Gift Card with every vehicle purchase.** Extra funds to be used for any other needs you may have during this time. (3)
- **Thousands in Relief Funds with this notice.** Receive additional discounts on your vehicle purchase – check the enclosed documentation for your funds.

Opinion of the Commission



APPENDIX B


IMMEDIATE VEHICLE DISCOUNT DISPATCH PROGRAM
LIMIT TWO (2) VEHICLES PER HOUSEHOLD - WHILE SUPPLIES LAST!
CONGRATULATIONS TO JAKEB MCGINNIS, THE LATEST GRAND PRIZE WINNER!
IF YOUR NUMBERS MATCH, YOU ARE GUARANTEED AT LEAST ONE (1) OF THESE CERTIFIED PRIZES:
1. $15,000 INSTANT CASH
2. $2,500 INSTANT CASH
3. $800 AMAZON GIFT CARD
4. ALL-NEW WIRELESS EARPODS PRO W/CHARGING CASE
5. $250 WALMART GIFT CARD
PAYMENTS FOR JUST $0 DOWN $151 /MO.(1)
ON SALE!
TO DRIVE AWAY IN THIS NISSAN SENTRA RIGHT NOW!
MORE PAYMENTS FOR ONLY $0 DOWN $187 /MO.(2)
ON SALE!
GOING ON NOW, TO TAKE HOME THIS KIA SOUL!
EXCLUSIVE SAVINGS! $0 DOWN $190 /MO.(3)
ON SALE!
TO BRING HOME THIS NISSAN VERSA AT THIS EVENT!
MANDATORY QUALIFICATIONS TO USE AUTOMOTIVE RELIEF VOUCHER BELOW:
1) MUST BE PERMANENT U.S. RESIDENT. 2) MUST HAVE VALID DRIVER'S LICENSE. 3) ANNUAL INCOME CANNOT EXCEED $91,300.00.
EXCLUSIVE TENT EVENT HEADQUARTERS IN MADISON, AL!
8760 MADISON BLVD. • MADISON, AL 35758
EVENT HOURS: MONDAY–SATURDAY: 9AM–8PM
SUNDAY: CLOSED TO RESTOCK
SPECIALIZED FINANCING OPPORTUNITIES ALSO AVAILABLE:
0% APR INSTANTLY! (4)
NO PAYMENTS UP TO 6 MONTHS FOR A LIMITED TIME ONLY! (5)
15% OVER KBB VALUE FOR ALL TRADE-INS! (6)
VALID ONLY AT: MADISON TENT EVENT
8760 MADISON BLVD. • MADISON, AL 35758
101
ISSUED TO: (PLEASE FILL IN COMPLETELY)
NAME:
ADDRESS:
CITY, ST ZIP:
UP TO THE AMOUNT OF
$ 3,107 92
UP TO THE AMOUNT OF: THREE THOUSAND ONE HUNDRED SEVEN AND ***92/100***
PAID
AUTHORIZED SIGNATURE
- VOID IF DUPLICATED • NOT A CHECK -
Void where prohibited, certificate has no cash value, non-negotiable certificate. This is not a check. Only valid if presented upon registration. Amount good toward select new vehicles. Cannot be used in conjunction with any other offers. Expires June 6th, 2020.
Batteries are included in attached Combination Box™ device and must be disposed of properly per state regulations.

FINAL ORDER

The Commission has heard this matter upon the Motion for Summary Decision filed by Complaint Counsel, and upon the briefs and responses filed in support thereof and in opposition thereto. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to grant Complaint Counsel's Motion for Summary Decision. Accordingly,

IT IS ORDERED that the following Order to cease and desist be, and it hereby is, entered:

ORDER

DEFINITIONS

For purposes of this Order, the following definitions 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 deliveredin a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

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

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

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

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

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

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

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

1. "Corporate Respondent" means Traffic Jam Events, LLC, a limited liability company, and its successors and assigns.

2. "Individual Respondent" means David J. Jeansonne II.

Provisions

I.

IT IS ORDERED that Respondents, whether acting directly or through an intermediary, must not participate in any business which involves, in whole or in part, advertising, marketing, promoting, distributing, offering for sale or lease, or selling or leasing motor vehicles.

II.

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 advertising, marketing, promoting, or offering for sale or lease, or selling or leasing, must not misrepresent, or assist others in misrepresenting, expressly or by implication, any material fact, including the following:

A. Financial assistance or relief from the government;

B. Any prize, sweepstakes, lottery, or giveaway;

C. Any affiliation, association with, endorsement, sponsorship, or approval by the government; and

D. The nature, value, or amount of any incentive and all material restrictions, limitations, or conditions applicable to the purchase, receipt, or use of any product or service.

III.

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 any advertisement for any extension of consumer credit, shall not:

A. State, expressly or by implication:

1. The amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing Clearly and Conspicuously all of the following terms:

a. The amount or percentage of the down payment;

b. The terms of repayment; and

c. The annual percentage rate, using the term "annual percentage rate" or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed; or

2. A rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term; or

B. Fail to comply with Regulation Z, 12 C.F.R. Part 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667, a copy of which is attached (TILA).

IV. Acknowledgments of the Order

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

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

B. Each Individual Respondent for any business that such Respondent, individually or collectively with any other Respondents, is the majority owner or controls directly or indirectly, and each Corporate 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; (3) all customers of Corporate Respondent; and (4) 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, that Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

V. Compliance Reports and Notices

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

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

1. Each Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (b) identify all of that Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the products and services offered, the means of advertising, marketing, and sales, and the involvement of any other Respondent (which Individual Respondent must describe if he knows or should know due to his own involvement); (d) describe in detail whether and how that Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

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

such business activity, including title, role, responsibilities, participation, authority, control, and any ownership.

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

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

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

C. Each Respondent must submit notice of the filing of any bankruptcy petition, insolvencyproceeding, 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 Traffic Jam Events, LLC*, FTC File No. X200041.

VI. 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. 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 directlyor indirectly, must create and retain the following records:

A. accounting records showing the revenues from all products 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 of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

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

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

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

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

VII. Compliance Monitoring

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

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

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

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

VIII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on October 25, 2041, 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.

Complaint

IN THE MATTER OF

BROADCOM, INCORPORATED

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

Docket No. C-4750; File No. 181 0205
Complaint, June 29, 2021 – Decision, November 4, 2021

This consent order addresses Broadcom, Inc.'s violation of the FTC Act through anticompetitive practices. The complaint alleges that Broadcom, Inc. engaged in anticompetitive and exclusionary acts to enhance or maintain its monopoly power and unreasonably restrain trade in relevant markets. Under the order the Respondent is prohibited from entering into certain types of exclusivity or loyalty agreements with its customers for the supply of semiconductor components and retaliating against customers for working with Broadcom competitors.

Participants

For the *Commission*: *Kathleen Clair, Joseph Baker, Michael Turner, Melissa Westman-Cherry, Patricia Jerjian, Stephanie Funk, Philip Kehl,* and *J. Wells Harrell*.

For the *Respondent*: *Daniel Wall* and *Josh Holian [Latham & Watkins]; Stephen Weissman [Gibson Dunn];* and *Maureen Ohlhausen [Baker Botts]*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Broadcom Inc. ("Broadcom"), a corporation, hereinafter sometimes referred to as "Respondent," has violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

I. NATURE OF THE CASE

1. Respondent Broadcom possesses monopoly power in markets for the sale of several semiconductor components (chips) used in connection with the delivery of subscription video and broadband internet service (as hereinafter defined, the "Monopolized Products"). The Monopolized Products are incorporated by Broadcom's customers into video set-top boxes and broadband internet access devices.

2. Broadcom also is a supplier in markets for the sale of other semiconductor components related to the Monopolized Products (as hereinafter defined, the "Related Products"). The Related Products are also incorporated by Broadcom's customers into video set-top boxes and broadband internet access devices.

3. Since 2016, Broadcom has entered and maintained agreements with customers that require customers to purchase, use, or bid Monopolized Products and Related Products from Broadcom on an exclusive or near-exclusive basis. Broadcom secured these restrictive contract terms in part by threatening to retaliate against "disloyal" customers in various ways, including by withholding needed Monopolized Products, by charging higher prices for needed Monopolized Products, or by withholding support for previously purchased Monopolized Products. Broadcom employed threats of retaliation against other customers to deter these customers from using products supplied by Broadcom's rivals. This conduct supplemented the foreclosure effect of its written agreements. Through these contracts and coercive tactics, Broadcom foreclosed rivals from a substantial share of the relevant product markets and harmed competition in these markets.

4. Broadcom entered such agreements and employed such coercive tactics as part of a deliberate strategy to hinder its competitors, to enhance or maintain its monopoly power in the markets for Monopolized Products, and to restrain competition in the markets for Related Products.

5. Broadcom's conduct harmed consumers, competition, and the competitive process, in violation of Section 5 of the FTC Act.

II. RESPONDENT

6. Respondent Broadcom Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the United States, with its principal place of business located at 1320 Ridder Park Drive, San Jose, CA 95131.

III. JURISDICTION

7. At all times relevant herein Broadcom has been, and Broadcom is now, a corporation, as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

8. Broadcom has engaged in and continues to engage in commerce and activities affecting commerce in the United States, as the term "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

IV. INDUSTRY BACKGROUND

9. Broadcom designs, develops, and sells semiconductor components, including Systems-on-a- Chip ("SOCs"), Wi-Fi chips, and front-end chips (described further below), for a wide range of computing and telecommunications applications, including for video set-top boxes ("STBs") that consumers use to access television and other video services, and broadband internet access devices such as modems and gateways ("Broadband Devices") used to access internet service (collectively, "Customer Devices""). Broadcom also provides essential ongoing engineering and software support services ("ESS Services") for devices containing its components.

10. The products at issue in this Complaint are components incorporated into Customer Devices that are purchased by providers of subscription video (e.g., television) or internet connectivity services ("Service Providers"). Service Providers use Customer Devices to provide their services to end consumers. Examples of major United States Service Providers include AT&T, Charter, Comcast, DISH, and Verizon.

11. An STB is a hardware device that converts external source signals into video content for a television, whether such video content is transmitted via traditional (e.g., cable, satellite, fiber-optic) or Internet Protocol ("IP") technologies.

a. A "Broadcast STB," also referred to as a "traditional" STB, is a Set Top Box that uses a broadcast interface to access subscription video services provided by a Service Provider, whether or not the Set Top Box also is capable of decoding IP signals to access video services.

b. A "Streaming STB" is a Set Top Box that decodes IP signals to access video services provided by a Service Provider or other third party and that does not contain a broadcast interface to access subscription video services provided by a Service Provider.

12. A Broadband Device is a hardware device, such as a modem, gateway, embedded multimedia terminal adapter, passive optical network terminal, or router, used by a consumer to connect electronic devices to broadband internet service furnished by a Service Provider via a cable, fiber optic, or digital subscriber line ("DSL") network.

13. Customer Devices are typically manufactured by one or more original equipment manufacturers ("OEMs") to the specifications of a Service Provider. Because OEMs and Service Providers both play important roles in the selection of components for use in Customer Devices, major OEMs and major Service Providers are both key customers for component suppliers like Broadcom.

14. In the tender and design process for a new STB or Broadband Device, a Service Provider typically issues a request for proposals ("RFP") to several OEMs, setting forth technical specifications. In some instances, a Service Provider may also specify by name required suppliers of key semiconductor components. The OEMs, working with component suppliers such as Broadcom, develop product designs and submit engineering and commercial proposals to the Service Provider.

15. When a Service Provider launches a device model, it provides the devices to its end-user customers. Once deployed on a Service Provider's network, Customer Devices remain in service for approximately five to ten years, with STBs typically remaining in service longer than Broadband Devices. While a device is deployed, Service Providers rely on the device's key component suppliers, including Broadcom, for ongoing ESS Services, including software support and maintenance, troubleshooting, bug fixes, software updates and upgrades, and testing.

V. RELEVANT PRODUCTS

16. This action concerns the following products, each comprising a type of component incorporated into Customer Devices (and each, a "Relevant Product"):

a. A Broadcast STB SOC is an integrated circuit that serves as the core component within, and directs functions and features of, a Broadcast STB;

b. A DSL Broadband SOC is an integrated circuit that serves as the core component within, and directs functions and features of, a Broadband Device that accesses internet service via a DSL network;

c. A Fiber Broadband SOC is an integrated circuit that serves as the core component within, and directs functions and features of, a Broadband Device that accesses internet service via a fiber optic network;

d. A Streaming STB SOC is an integrated circuit that serves as the core component within, and directs functions and features of, a Streaming STB;

e. A Cable Broadband SOC is an integrated circuit that serves as the core component within, and directs functions and features of, a Broadband Device that accesses internet service via a cable network;

f. A Wi-Fi Chip is an integrated circuit that enables an STB or Broadband Device to connect to a wireless network;

g. A Front-End Chip for an STB is an integrated circuit that converts incoming analog signals to digital signals to be read by the SOC in the STB; and

h. A Front-End Chip for a Broadband Device is an integrated circuit that converts incoming analog signals to digital signals to be read by the SOC in the Broadband Device.

VI. BROADCOM'S ANTICOMPETITIVE CONDUCT

17. Broadcom has long been the dominant supplier of Broadcast STB SOCs, DSL Broadband SOCs, and Fiber Broadband SOCs (the "Monopolized Products").

18. As early as 2016, Broadcom recognized that it faced competitive threats to its monopoly power as to the Monopolized Products from low-priced, nascent rivals. Broadcom understood that nascent rivals could, by working with key OEMs and Service Providers, become stronger, more effective competitors.

19. One competitive threat arose from efforts by leading Service Providers and OEMs to lessen their dependence on Broadcom and to foster competition in Customer Device component markets. Both Service Providers and OEMs sought component supplier diversity for multiple reasons, including to promote competitive pricing and to ensure continuity of supply. OEMs also sought supplier diversity to maximize their ability to meet the component supplier preferences of Service Provider customers.

20. To this end, leading Service Providers at times have asked OEMs to submit multiple responses to RFPs, with each response incorporating components from a different supplier, or have asked OEMs to design and bid a device using particular identified component suppliers. OEMs, in turn, have sought to comply with these requests from their customers.

21. At other times, leading Service Providers sought to provide opportunities for capable but less established suppliers to gain experience and scale by, for example, considering them for partial design awards involving relatively low-end versions of Relevant Products, including Monopolized Products. And in 2016, at least one major OEM actively sought to develop products using non-Broadcom suppliers for Monopolized Products.

22. An important factor affecting demand for Relevant Products is that customers are increasingly "cutting the cord" to traditional broadcast (e.g., cable or satellite) television and instead accessing video content via an internet connection, for example, through a Streaming STB that accesses content via the home's broadband modem. This has led to a decline in the use of Broadcast STBs (where Broadcom components are dominant) and to a relative increase in the commercial significance of Streaming STBs.

23. While demand for Broadcast STBs is declining, this decline has a "long tail." Even as many consumers cut the cord, there are many other consumers who will continue using Broadcast STBs for some time to come. Additionally, once deployed, a Broadcast STB remains in use for several years, with Service Providers continuing to rely on Broadcom to provide support for their installed base.

24. As described below, these shifting market dynamics presented Broadcom with an incentive and opportunity to maintain its monopoly power over Broadcast STB SOCs and to use that power to weaken rivals in the markets for Related Products, including components of streaming and cable broadband devices.

25. Broadcom recognized these threats and opportunities. It sought to maintain its monopoly positions by implementing a wide-ranging exclusivity program covering Monopolized Products. Broadcom also conditioned customers' access to Monopolized Products on commitments to purchase, use, or bid Related Products from Broadcom on an exclusive or near-exclusive basis. Through a series of long-term contracts entered with both OEMs and Service Providers, and through an accompanying campaign of threats and retaliation, Broadcom induced customers to purchase or use Broadcom's Relevant Products on an exclusive or near-exclusive basis. As a result, sales opportunities for Broadcom rivals were severely restricted.

OEM Agreements

26. Between 2016 and the present, Broadcom negotiated and entered into agreements with leading OEMs, pursuant to which the OEMs agreed, for contract and renewal terms spanning multiple years, to purchase, use, or bid Broadcom Relevant Products in STBs and Broadband Devices on an exclusive or near-exclusive basis.

27. Broadcom induced OEMs to enter these agreements by communicating that OEMs that broadly committed to Broadcom would be treated as favored or "strategic" partners. Customers that did not broadly commit to Broadcom would be mere "tactical" customers, facing higher prices and less favorable non-price terms and conditions than their rivals, including disadvantageous technology access, product allocation, delivery lead times, and bid support. In other words, OEMs that did not accept exclusivity, the "tactical" customers, would find themselves at a significant commercial disadvantage relative to other, competing OEMs that did agree to purchase exclusively from Broadcom.

28. In all, Broadcom entered exclusive or near-exclusive agreements with at least ten OEMs, which collectively are responsible for a majority of STB and Broadband Device sales worldwide, and even higher percentages of STB and Broadband Device sales in the United States.

29. These OEMs included the largest and most capable Customer Device OEMs, those with the largest market shares, the most extensive engineering and design capabilities, and the strongest reputations and relationships with downstream Service Provider customers.

Service Provider Agreements

30. In parallel with its pursuit of exclusive agreements with OEMs, in 2016 Broadcom also began seeking exclusivity and high share commitments from major Service Providers, first in the United States, and later around the world.

31. As a lever to extract these commitments, Broadcom threatened that if a Service Provider did not limit its purchases from Broadcom's rivals, Broadcom would implement large increases in the fees it charged for ESS Services on devices containing Broadcom Monopolized Products, including Broadcast STB SOCs, that were already deployed on the Service Providers' networks.

32. Charging substantial fees for ESS Services was a departure from Broadcom's prior practice and course of dealing with the Service Providers. Service Providers rely on Broadcom to provide these ESS Services, which are essential to the continued operation of STBs and Broadband Devices deployed on their networks. Service Providers cannot obtain ESS Services for Broadcom-based devices from anyone other than Broadcom, nor can they perform these services themselves.

33. This initiative resulted in a series of agreements with major Service Providers pursuant to which the Service Providers committed, for contract terms spanning multiple years, to use Broadcom Relevant Products on an exclusive or near-exclusive basis for their STBs and Broadband Devices.

34. These Service Provider agreements, including agreements with key U.S. Service Providers, have reinforced and exacerbated the effects of Broadcom's OEM agreements on competition, including foreclosing rivals from significant sales opportunities.

Monitoring and Enforcement

35. Broadcom actively monitored customers' compliance with its restrictive agreements, refusing to grant requested exceptions to exclusivity even where Broadcom was not cost competitive or did not have an appropriate solution for a given RFP.

36. Broadcom communicated to customers that disloyalty as to even a single bid involving a single Relevant Product could mean loss of strategic partner terms, that is, the favorable price, supply, and support terms to which customers were otherwise entitled under their agreements, across numerous product lines.

37. Broadcom induced OEM counterparties to withdraw bids they had made using a rival's Relevant Product under the threat that Broadcom otherwise would charge higher prices for other products, including Monopolized Products.

Threats and Retaliation

38. Broadcom supplemented its formal, written agreements with ad hoc retaliation and threats thereof against Service Providers and OEMs that used, or considered using, Relevant Products from Broadcom's rivals. Targets of these tactics included Service Providers and OEMs that had not entered into written exclusive agreements with Broadcom. Broadcom adopted a strategy of imposing selective price increases as punishment to deter customers from supporting its rivals.

39. For example, when a major Service Provider considered awarding a minority share of a design award to a new supplier rather than to Broadcom, Broadcom thwarted its rival by threatening increased prices on Broadcom's current business with the Service Provider, as well as increased prices for ESS Services. Thereafter, the Service Provider awarded the entirety of the design award to Broadcom.

40. In another example, when an OEM that did not yet have an exclusive agreement with Broadcom submitted a bid to a Service Provider using a non-Broadcom component, Broadcom responded by cutting off all supply and support to that OEM and announcing significantly increased prices. As a result, and in order to reverse these adverse actions, the OEM withdrew its bid for that Service Provider opportunity. Also as a result of these actions, it entered an exclusive agreement with Broadcom.

41. Broadcom also employed coercive tactics to prevent OEMs from submitting, or to induce them to withdraw, bids that presented a Service Provider with both a Broadcom and an alternative non-Broadcom option, even when the Service Provider specifically requested such alternative bids.

42. Broadcom's threats of retaliation were pervasive and effective, and customers learned to expect them. As one Broadcom employee noted, one only needed to inform a customer that a demand for exclusivity had "visibility" with Broadcom senior management, and the customer would foresee harmful retaliation.

VII. BROADCOM'S MONOPOLY AND MARKET POWER

43. Broadcom has exercised and continues to exercise monopoly and market power with respect to Broadcast STB SOCs, DSL Broadband SOCs, and Fiber Broadband SOCs.

44. Broadcom has been able to maintain prices for these Monopolized Products substantially above the competitive level. Broadcom has also been able to impose upon customers unusual and disfavored non-price terms and weaken competitors through its exclusive contracting practices.

45. Additionally, Broadcom has maintained high shares in the relevant markets for Monopolized Products, which have substantial barriers to entry.

46. There is a separate relevant market for each of the above Relevant Products.

47. Each of the above Relevant Products has distinct characteristics and uses, requires unique design and production capabilities, has distinct prices, and within the semiconductor industry is generally recognized as comprising a distinct market with distinct competitors and competitive conditions.

48. For each of the above Relevant Products, other products are not close enough substitutes to prevent a hypothetical monopolist of the Relevant Product from profitably sustaining a small but significant and non-transitory increase in price.

49. The relevant geographic markets are worldwide. Each supplier of Relevant Products generally ships the products worldwide, and there are no material geographic barriers to competition for sales of Relevant Products.

50. In early 2016, Broadcom's last remaining significant rival in the sale of Broadcast STB SOCs exited that market, leaving Broadcom as the sole remaining major supplier of Broadcast STB SOCs. The remaining suppliers of Broadcast STB SOCs have a significantly smaller market presence than Broadcom and focus on lower-end products. Broadcom has a recent track record of supplying all of the Broadcast STB SOC requirements of nearly all of the largest United States and European Service Providers. For the high-end Broadcast STBs that these Service Providers need, Broadcom is effectively the only supplier available.

51. In both the DSL and Fiber Broadband SOC markets, Broadcom describes itself as holding a "dominant #1" market share position. In each of these markets, Broadcom's market position dwarfs those of its rivals, which sell devices that target the low to middle tiers of these markets.

52. Broadcom is one of the few significant suppliers in each of the markets for Streaming STB SOCs, Cable Broadband SOCs, Wi-Fi Chips for STBs or Broadband Devices, Front-End Chips for STBs, and Front-End Chips for Broadband Devices (collectively, the "Related Products").

53. The markets for Relevant Products are concentrated and have significant barriers to entry and expansion. Such barriers include the need to invest significant time and to invest sunk costs in capital resources to (i) research, develop, and maintain current technological capabilities; (ii) develop and maintain business and engineering relationships with OEMs and Service Providers; and (iii) participate, together with OEMs, in resource intensive Service Provider tender and design processes, from initial information requests through formal proposals, selection, qualification, production, and testing. In addition to these and other structural barriers, Broadcom's anticompetitive practices as alleged herein have created further barriers to entry and expansion by limiting the number of OEM partners and the volume of sales available to would-be rivals.

VIII. COMPETITIVE EFFECTS

54. Broadcom's actions described above have foreclosed competitors from a substantial share of each of the relevant markets. This has harmed price and non-price competition and reduced innovation, as described below.

55. Broadcom's conduct has also reduced customer choice. Service Providers and OEMs wish to diversify their supply base and work with multiple component suppliers in order to increase price competition, enhance innovation, and ensure security of supply. Broadcom's conduct has substantially curtailed the ability of key Service Providers and OEMs to purchase and use Relevant Products supplied by Broadcom's rivals in a way that harmed competition.

56. Further, by requiring exclusivity and loyalty commitments for Monopolized Products and by conditioning the availability of, or sales or support terms for, Monopolized Products on exclusivity and loyalty commitments for other Relevant Products, Broadcom has weakened rivals. Winning a design award for a Relevant Product covered by such a commitment would in effect require a rival to compensate its customers for the penalties—increased prices and/or degraded terms—that Broadcom would impose on the customer as to other projects and for other covered products. Broadcom's actions thus thwarted the ability of rival suppliers of Relevant Products to compete with Broadcom on the merits, resulting in harm to customers.

57. Additionally, as Broadcom recognized, a major OEM or Service Provider could—if unencumbered by exclusivity or loyalty commitments to Broadcom—facilitate entry or expansion by a rival supplier of Relevant Products. But Broadcom's conduct foreclosed rivals from the many significant benefits of engagement with major Service Providers and OEMs, including

scale and engineering, business planning, relationship, and reputational benefits. Broadcom's conduct has also impeded rivals' product development efforts as it prevented or discouraged customers from engaging in development work with non-Broadcom suppliers. The loss of opportunities to work with key OEMs and Service Providers on important projects thus degraded rivals' ability to improve their capabilities, offer better products to customers, and position themselves to win business in the future. These opportunities are critical to ensure ongoing innovation and price and non-price competition.

58. Broadcom has further harmed innovation and impeded rivals from effectively competing on the merits because, as a result of Broadcom's conduct, Broadcom's rivals have diverted resources away from, divested from, and/or are considering exiting markets for Monopolized Products.

59. The acts and practices of Broadcom as alleged herein have had the purpose, capacity, tendency, and effect of maintaining Broadcom's monopoly power in the relevant markets for Monopolized Products and of restraining competition unreasonably in the relevant markets for all Relevant Products.

60. There are no legitimate procompetitive efficiencies that justify Broadcom's conduct or that outweigh the substantial anticompetitive effects thereof.

61. Any legitimate objectives of Broadcom's conduct as alleged herein could have been achieved through significantly less restrictive means.

IX. VIOLATION OF FTC ACT

62. The allegations in all of the paragraphs above are re-alleged and incorporated by reference as though fully set forth herein.

63. Broadcom has willfully engaged in anticompetitive and exclusionary acts and practices that enhance or maintain its monopoly power in the markets for Monopolized Products. Broadcom has entered a series of agreements that unreasonably restrain trade in markets for all Relevant Products. These acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on the twenty-ninth day of June, 2021, issues its complaint against Respondent.

By the Commission, Chair Khan not participating.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices by Respondent Broadcom Inc. 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 a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondent and the Bureau of Competition executed an Agreement Containing Consent Order ("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.

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. 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 makes the following jurisdictional findings,

1. Respondent Broadcom 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 1320 Ridder Park Drive, San Jose, California 95131.

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

ORDER

I. Definitions

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

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

B. "Antitrust Compliance Officer" means the person appointed or retained to supervise Respondent's antitrust compliance program described in Paragraph III.A. of this Order.

C. "Antitrust Laws" means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., the Sherman Act, 15 U.S.C. § 1 et seq., and the Clayton Act, 15 U.S.C. § 12 et seq.

D. "Broadband Device" means a hardware device, including a modem, gateway, embedded multimedia terminal adapter, passive optical network ("PON") terminal, or router, used by a consumer to connect one or more electronic devices to broadband internet service via a cable, fiber optic, or digital subscriber line network.

E. "Broadcast Set Top Box" means:

1. a Set Top Box that uses a broadcast interface (e.g., QAM, QPSK, 8PSK, DVB-T) to access subscription video services provided by a Service Provider, whether or not the Set Top Box is also capable of decoding Internet Protocol ("IP") signals to access video services, with the following exception: a Set Top Box that is capable of decoding IP signals and has a broadcast interface that decodes only terrestrial (such as DVB-T) signals is not a Broadcast Set Top Box; or

2. any Set Top Box identified in Appendix D.

For the avoidance of doubt, any Set Top Box that uses a broadcast interface other than a terrestrial interface is a Broadcast Set Top Box.

F. "Competitor" means a person other than Broadcom that manufactures (or has manufactured) any Product or sells any Product to Customers.

G. "Customer" means (i) a U.S. Service Provider, or (ii) an OEM.

H. "Customer Device" means a Set Top Box or Broadband Device for use by an end user to access subscription video or internet connectivity services from a Service Provider.

I. "Customer Device Category" means any group of Customer Devices that share one or more of the following characteristics: (i) type of Device (e.g., Set Top Box or Broadband Device), (ii) connectivity technology (e.g., cable, fiber optic, digital subscriber line (xDSL or copper), satellite), or (iii) a technological generation of Customer Devices (e.g., 4K or 8K video capability, DOCSIS 3.1 or 4.0, Wifi 5 (802.11ac), or Wifi 6 (802.11ax)).

J. "Customer Device Model" means a set of Customer Devices in which all individual units are identical and fully interchangeable and sold to only one Service Provider.

K. "Derivative" means a variation of a Customer Device Model that uses the same Product SOC die number and is part of the same single tender process (request for quotation, request for proposal, or similar solicitation) as the Customer Device Model but which may contain different components or functionalities requested by the Customer. For purpose of this definition, a Product SOC die number means a unique number assigned to the die for an SOC.

L. "DOCSIS" means Data Over Cable Service Interface Specifications.

M. "Executive and Sales and Marketing Staff" means the Chief Executive Officer, Chief Operating Officer, and Chief Financial Officer of Respondent (or their equivalent positions regardless of job title); the General Managers and Vice Presidents of Respondent (or their equivalent positions regardless of job title) whose duties relate to the marketing, promotion, or sale of any Product; and the employees of Respondent whose duties relate primarily to the marketing, promotion, or sale of any Product.

N. "Forecasted Requirements" means Respondent's good faith expectation, at the time a purchase requirement for a Customer is established, of a Customer's total Requirements from all suppliers, based on information reasonably available to Respondent, including any information provided by the Customer to Respondent.

O. "Grouping" means (i) a subset of a Product that is used in a Customer Device Category ("Product Subset") or (ii) a group of Product Subsets.

P. "Legacy Service Provider Contract" means a contract between Respondent and a U.S. Service Provider that includes the sale or Purchase of a Product and expires no later than February 28, 2022. For the avoidance of doubt, a contract with an initial term that expires no later than February 28, 2022, but allows for renewal, is a Legacy Service Provider Contract only for the period prior to February 28, 2022.

Q. "Majority Share Requirement" means an absolute or conditional requirement, whether formal or informal, with respect to a Product or Grouping, that a Customer, over the time period of the relevant requirement:

1. Purchase from Respondent more than 50% of the Customer's Requirements, whether in volume or dollars, or Purchase from Respondent a minimum volume of units Worldwide or for Customer Devices for end users in the United States if that minimum is more than 50% of applicable Forecasted Requirements for the Customer;

2. Purchase a dollar amount from Respondent Worldwide or for Customer Devices for end users in the United States if that will require the Customer to Purchase more than 50% of its applicable Forecasted Requirements from the Respondent; or

3. Refrain from Purchasing from a Competitor; refrain from researching, designing, developing, testing, manufacturing, producing, distributing, marketing, promoting, or selling a Customer Device that contains a Competitor's Product; limit the volume of a Competitor's Product that the Customer may Purchase, or limit the amount the Customer may spend Purchasing the Product or Grouping from a Competitor,

provided, however, a requirement that a Customer Purchase an amount of a Product or Grouping from the Respondent that is no more than 50% of Respondent's Forecasted Requirements for the Customer, without more, shall not qualify as conduct falling under this Paragraph I.Q.3.

R. "Non-Price Advantage" means an advantage that is not a Price Advantage, for example preferential Product Support Terms, lead-times, warranties, allocation, supply, delivery, or inventory levels, whether related to future or past sales by Respondent.

S. "OEM" means a person that designs or manufactures Customer Devices who is not a Service Provider.

T. "Past Award For Streaming SOCs" means an agreement, contract or contract term governing the Purchase of SOCs for Streaming Set Top Boxes (the "relevant SOCs") if the relevant SOCs are Purchased by:

1. A U.S. Service Provider that either (a) prior to the date this Order is issued, selects the relevant SOCs for use in a Customer Device Model, or (b) has a Legacy Service Provider Contract and, prior to the expiration of that contract, selects the relevant SOCs for use in a Customer Device Model; or

2. An OEM for use in a Customer Device Model for a U.S. Service Provider that either (a) prior to the date this Order is issued, selects the relevant SOCs for use in a Customer Device Model, or (b) has a Legacy Service Provider Contract and, prior to the expiration of that contract, selects the relevant SOCs for use in a Customer Device Model.

U. "Price Advantage" means a payment, discount, discounted price, or rebate.

V. "Primary Product" means a product identified on Appendix A of this Order.

W. "Primary Product Grouping" means a Grouping of Primary Products.

X. "Product" means a Primary Product or a Secondary Product.

Y. "Product Support Terms" means the terms upon which Respondent provides any service, assistance, information, or other product support to a Customer, including (i) design and bid support, including in responding to requests for information, proposals or quotations; (ii) engineering support, including in relation to early technology access and product development, testing, qualification, and interoperability; (iii) aftermarket engineering support services, including in relation to warranty support, bug fixes, and firmware or software upgrades or updates.

Z. "Purchase" or "Purchasing," means purchase, source, bid, specify, use, or take-or-pay for.

AA. "Retroactive Advantage" means a Price Advantage or Non-Price Advantage that is provided to a Customer based upon the Customer's purchases of a Product reaching a specified threshold (in units, revenues, share, or any other measure), but excluding any Price Advantage or Non-Price Advantage provided to the Customer only with respect to the Customer's purchases of a Product beyond such a specified threshold. By way of example, a discount of X% on all units if sales exceed Y units (including on the units sold up to and including Y) is a Retroactive Advantage, while a discount of X% on all units sold that are in excess of Y (but not on those units sold up to and including Y) is not a Retroactive Advantage.

BB. "Requirements" means a Customer's requirements of a Product or Grouping for use (a) Worldwide or (b) in Customer Devices for end users in the United States.

CC. "Retention Custodians" means Respondents' officers and employees serving in the positions listed on Nonpublic Appendix C.

DD. "Secondary Product" means a product identified on Appendix B of this Order.

EE. "Secondary Product Grouping" means a Grouping of Secondary Products.

FF. "Service Provider" means a provider of subscription video or internet connectivity services, such as a telecommunications network operator or a provider of cable service.

GG. "Set Top Box" means a hardware device that converts external source signals into video content for a television, whether such video content is transmitted via cable, satellite, or IP technologies.

HH. "SOC" means an integrated circuit that serves as the core component within, and directs functions and features of, a Customer Device.

II. "Streaming Set Top Box" means (i) a Set Top Box that is capable of decoding Internet Protocol ("IP") signals to access video services provided by a Service Provider or other third party and that does not contain a broadcast interface to access subscription video services provided by a Service Provider, or (ii) a Set Top Box that is capable of decoding IP signals and terrestrial (such as DVB-T) signals but not other broadcast signals.

JJ. "U.S. Service Provider" means a Service Provider that serves end users in the United States.

KK. "Worldwide" means the entire world excluding the People's Republic of China.

II. Majority Share Requirements

IT IS FURTHER ORDERED that in connection with the sale of a Product in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Respondent shall cease and desist from, directly or indirectly, or through any corporate or other device:

A. Entering into, maintaining, or enforcing an agreement, contract, understanding, term, condition, or policy that imposes upon a Customer or commits a Customer to a Majority Share Requirement for a Primary Product or Primary Product Grouping, including by:

1. Conditioning sale of a Primary Product on a Majority Share Requirement for such Primary Product;

2. Conditioning a Price Advantage or Non-Price Advantage for a Primary Product on a Majority Share Requirement for such Primary Product;

3. Conditioning a flat or lump sum payment of monies (or any other item of pecuniary value) on the Customer implementing a Majority Share Requirement for a Primary Product or Primary Product Grouping; or

4. Providing a Retroactive Advantage for a Customer's Purchases of a Primary Product,

Provided, and for the avoidance of doubt, the fact that a Customer Purchases from Respondent more than 50% of the Customer's Requirements for a Primary Product or Primary Product Grouping Worldwide or for use in Customer Devices for end users in the United States does not, without more, establish a violation of this Paragraph II.A.,

Provided, further, and for the avoidance of doubt, the fact that a Customer classifies or refers to Respondent as an "authorized" or "preferred" provider (or a similar term), where such classification or reference does not impose upon the Customer or commit the Customer to a Majority Share Requirement for a Primary Product or Primary Product Grouping, does not, without more, establish a violation of this Paragraph II.A.,

Provided, further, and for the avoidance of doubt, tiered, volume-based discounts or rebates that are not Retroactive Advantages, are not, without more, prohibited by this Paragraph II.A.,

Provided, further, it is not a violation of this Paragraph II.A. for Respondent to achieve, continue, maintain, or enter into a Majority Share Requirement in a bid as part of a single tender process (that is, a single request for proposal, request for quotation, or similar solicitation) so long as (i) the Majority Share Requirement applies only to a Primary Product or Primary Product Grouping for use in a single Customer Device Model or a single Customer Device Model and Derivatives thereof, (ii) Respondent does not bid for more business than a Customer has asked Respondent to bid for within the tender process, and (iii) Respondent does not seek to impose a Majority Share Requirement on a larger volume of Primary Products or Primary Product Groupings than the Customer seeks to award to Respondent within the tender process,

Provided, further, it is not a violation of this Paragraph II.A. for Respondent and a Customer to agree to a Majority Share Requirement for a model of a Primary Product ("the EOL model") so long as (i) Respondent's ordinary-course roadmaps and planning documents reflect that the model is reaching the end of its ordinary-course lifecycle and that Respondent plans to discontinue the EOL model in the ordinary course; (ii) Respondent has sent written notice to Customers who use the EOL model informing them that the EOL model is reaching the end of its ordinary-course lifecycle and stating the date on which Respondent plans to discontinue the model ("discontinuation date"); (iii) the Customer requests that Respondent continue producing the model after the discontinuation date; and (iv) the Majority Share Requirement that Respondent and the Customer agree to (a) begins on or after the discontinuation date, (b) is limited to the EOL model, and (c) is no broader than reasonably necessary to justify Respondent producing the EOL model after the discontinuation date for the period that the Customer requests that Respondent continue to produce the EOL model, and

Finally, for the avoidance of doubt, Paragraph II.A. does not prohibit Respondent from seeking to sell to a Customer a volume of Products that in total amounts to more than 50% of the Customer's Requirements for a Primary Product or a Primary Product Grouping so long as the Respondent seeks to sell the relevant Products in a manner that does not violate this Paragraph II.A.

B. Engaging in the following with respect to a Customer:

1. Conditioning the sale of a Primary Product, or any Price Advantage or Non-Price Advantage for a Primary Product, on a Majority Share Requirement for a different Primary Product, a Secondary Product, a Primary Product Grouping or a Secondary Product Grouping; or

2. Breaching or threatening to breach a Past Award For Streaming SOCs for the purpose, in whole or in meaningful part, of inducing or coercing the Customer to enter into a new Majority Share Requirement for any SOCs for Streaming Set Top Boxes, including breaching or threatening to breach Product Support Terms of a Past Award For Streaming SOCs.

C. Engaging in the following with respect to a Customer:

1. Threatening to, or taking any action to:

a. terminate, suspend, or delay the sale or delivery of a Primary Product, or

b. withdraw or modify a Price Advantage or Non-Price Advantage for a Primary Product;

2. Offering or providing less favorable Price Advantages or Non-Price Advantages for a Primary Product than Respondent would have otherwise proposed or provided; or

3. Refusing to deal or threatening to refuse to deal with the Customer on terms and conditions generally available to other Customers for a Primary Product;

For the reason, in whole or meaningful part, that (i) the Customer does not agree to a Majority Share Requirement that violates this Order, (ii) the Customer does not acquiesce in Respondent achieving, continuing, or maintaining a Majority Share Requirement that violates this Order; or (iii) Respondent seeks to retaliate against the Customer because the Customer has engaged in, or considered engaging in, the research, design, development, testing, manufacture, production, distribution, Purchase, marketing, promotion, or sale of any Customer Device that uses a Product that is or will be manufactured or supplied by a Competitor (collectively "Prohibited Reasons");

For the avoidance of doubt, it is not a violation of this Paragraph II.C. for Respondent to take an action, including one of the following actions, if taken for independent, verifiable business reasons unrelated to one or more Prohibited Reasons:

a. enforcing the terms of an agreement with a Customer that do not otherwise violate this order, for example, terms requiring prompt payment;

b. offering a Customer terms and conditions that Respondent offers to other, similarly situated Customers (or offering a Customer terms and conditions different from those that Respondent offers to other Customers that are not similarly situated to the Customer);

c. implementing or offering a volume-based discount or rebate that is not a Retroactive Advantage; or

d. making product allocations among Customers when Respondent does not have the practical ability to supply a Product to all Customers in the quantities and on the timeframes they have requested.

D. Notwithstanding any other provision of this Order, it shall not be a violation of this Order for Respondent to enforce a Majority Share Requirement in a Legacy Service Provider Contract until the earlier of termination of the contract or February 28, 2022, if:

1. Within 5 days of issuance of this Order, Respondent notifies each Customer with a Legacy Service Provider Contract of the Customer's right to terminate its Legacy Service Provider Contract, without penalty or charge under the terms of such contract, by providing a copy of this Order and Exhibit C to such Customer; and

2. The Customer does not terminate such Legacy Service Provider Contract by providing Respondent with 10 days' written notice of the intent to terminate the contract. The right to terminate shall expire 60 days after the date on which Respondent provides the notice pursuant to Paragraph II.D.1. above.

III. Compliance Program

IT IS FURTHER ORDERED that:

A. Respondent shall design, maintain, and operate an antitrust compliance program to ensure compliance with this Order and the Antitrust Laws, and as part of such program shall:

1. No later than 30 days from the date this Order is issued, appoint or retain an Antitrust Compliance Officer to supervise Respondent's antitrust compliance program (Respondent may replace the Antitrust Compliance Officer with another person at any time);

2. Upon issuance of this Order, provide in-person or online training concerning Respondent's obligations under this Order and an overview of the Antitrust Laws as they apply to Respondent's activities to Respondent's Executive and Sales and Marketing Staff:

    a. No later than 30 days after this Order is issued,

    b. No later than 30 days after an employee first becomes Executive and Sales and Marketing Staff, and

    c. At least annually;

    Provided, however, that if at the time the Order is issued Respondent has in place a program for training employees with regard to its Commitments with the European Commission in Case AT.40608, then Respondent can provide its first annual training under this Order so as to coincide with the training regarding its Commitments, and thereafter provide training on an annual basis from the date of such training.

3. Maintain policies and procedures for:

    a. Executive and Sales and Marketing Staff to ask questions about, and report violations of, this Order and the Antitrust Laws confidentially and without fear of retaliation of any kind,

    b. Disciplining Executive and Sales and Marketing Staff for failure to comply with this Order and the Antitrust Laws, and

    c. The retention of documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph III., including records showing that Executive and Sales and Marketing Staff have received all trainings required under this Order during the preceding two years.

B. Respondent shall:

1. Deliver a letter in the form of Exhibit A and a copy of this Order to each Customer that has a current contract for a Product with Respondent within 10 days of the date this Order is issued (except for Customers with a Legacy Service Provider Contract to whom Respondent has provided notice pursuant to Paragraph II.D. of this Order);

2. Deliver a letter in the form of Exhibit B to each OEM that bids to supply or supplies Customer Devices to a U.S. Service Provider and each U.S. Service Provider, to whom Respondent did not deliver either a letter pursuant to Paragraph III.B.1. or notice pursuant to Paragraph II.D. of this Order, no later than 10 days after the Customer completes Respondent's onboarding process that, inter alia, validates that the Customer is authorized to purchase Products from Respondent; and

3. Permit any Customer to whom Respondent is required to provide a letter under Paragraph III.B.2. and who wishes to terminate an agreement with Broadcom because the Customer believes it violates this Order, to terminate such agreement via written notice and without penalty or charge, if the Customer delivers the written notice no later than 60 days after Broadcom delivers to the Customer the letter required under Paragraph III.B.2.

IV. Compliance Reports

IT IS FURTHER ORDERED that Respondent shall file verified written reports ("Compliance Report") in accordance with the following:

A. Respondent shall submit an interim Compliance Report 60 days after the date this Order is issued and an annual Compliance Report one year after the date this Order is issued and annually for the next nine years on the anniversary of that date; and additional Compliance Reports as the Commission or its staff may request.

B. Each Compliance Report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent is in compliance with the Order. Conclusory statements that Respondent has complied with its obligations under the Order are insufficient. Respondent shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance:

1. The name, title, business address, e-mail address, and business telephone number of the Antitrust Compliance Officer;

2. A list of all persons who received the notice required by Paragraph III.B.1. or III.B.2. of this Order, together with proof of service of the notice; and

3. A copy of each agreement or other document that contains or reflects a Majority Share Requirement for (a) a Primary Product or (b) a Secondary Product sold to a Customer that also purchases a Primary Product.

C. For a period of 5 years after filing a Compliance Report, Respondent shall retain the following documents that are within the custody or control of Respondent's Retention Custodians and contain relevant information concerning whether or not Respondent is fulfilling or has fulfilled its obligations under this Order: written communications with any third party identified in the Compliance Report, and non-privileged internal memoranda and reports. Respondent shall provide copies of these documents to Commission staff upon request.

D. Respondent shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent 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; provided, however, that Respondent need only file electronic copies of the 60-day report required by Paragraph IV.A. of this Order.

V. Change in Respondent

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

A. The dissolution of Broadcom Inc.;

B. The acquisition, merger, or consolidation of Broadcom Inc.; or

C. Any other change in Respondent, including assignment and the creation, sale, or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VI. Access

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 10 business days' notice to Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of 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 Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative of the Commission and at the expense of Respondent; and

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

VII. Term

IT IS FURTHER ORDERED that this Order shall terminate 10 years from the date it is issued.

By the Commission.

APPENDIX A

Primary Products

Product	**Description**
SOCs for DSL Broadband Devices	An integrated circuit that serves as the core component within, and directs functions and features of, a Broadband Device that accesses internet service via a digital subscriber line (DSL) network.
SOCs for Fiber Broadband Devices	An integrated circuit that serves as the core component within, and directs functions and features of, a Broadband Device that accesses internet service via a fiber optic network.
SOCs for Broadcast Set Top Boxes	An integrated circuit that serves as the core component within, and directs functions and features of, a Broadcast Set Top Box.

APPENDIX B

Secondary Products

Product	Description
SOCs for Cable Broadband Devices	An integrated circuit that serves as the core component within, and directs functions and features of, a Broadband Device that accesses internet service via a cable (DOCSIS) network.
Front End Chips for Set Top Boxes or Broadband Devices	An integrated circuit that converts incoming analog signals to digital signals to be read by the SOC in a Set Top Box or Broadband Device.
WiFi Chips for Set Top Boxes or Broadband Devices	An integrated circuit that enables Set Top Boxes or Broadband Devices to connect to wireless networks.
SOCs for Streaming Set Top Boxes	An integrated circuit that serves as the core component within, and directs functions and features of, a Streaming Set Top Box.

NONPUBLIC APPENDIX C

Retention Custodians

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

APPENDIX D

Broadcast Set Top Boxes

The following Set Top Box models are included within the definition of "Broadcast Set Top Box":

1. Dish Joey 3,
2. Dish Joey 4,
3. DirecTV C61,
4. DirecTV C61K,
5. Comcast Xi3,
6. Verizon IPC1100, and
7. Verizon IPC4100.

EXHIBIT A

Letter to Customers

[Broadcom letterhead]

[Name and address of Customer]

Dear [name of Customer]:

Broadcom is required to send you this notice by the FTC's Decision and Order in In re Broadcom *Inc.,* C-xxxx. The Decision and Order reflects a settlement without litigation between the FTC and Broadcom and does not constitute an admission by Broadcom that it has violated the law or that any of the facts alleged by the FTC regarding Broadcom's conduct are true. Attached is a copy of the Order. You also may read and download a copy of the Order from the FTC's website at [web link to case on FTC website]. Broadcom's obligations under the Order are set out in Paragraph II. of the Order. Capitalized terms used in the Order are defined in Paragraph I. of the Order. All capitalized terms in this letter refer to terms defined in the Order. **Please read the Order carefully. If anything in this letter conflicts with the terms in the Order, the terms in the Order apply**.

Generally, the Order prohibits Broadcom from requiring you to purchase from Broadcom more than 50% of your requirements for certain components used in certain Set Top Boxes and Broadband Devices, subject to the exceptions set forth in the Order. For the term of the Order, this prohibition applies to your existing agreements with Broadcom and to any new agreements you

enter with Broadcom. The Order also prohibits Broadcom from conditioning the sale of certain components to you (or price or non-price advantages for those components) on you purchasing more than 50% of your requirements for certain other components from Broadcom, subject to the limitations in the Decision and Order. Finally, the Order prohibits Broadcom from retaliating against customers for using an alternative source of any relevant component.

If you have concerns in the future about whether Broadcom is complying with its obligations under the Order, you may contact us, the FTC, or both. You may contact Broadcom through the [sales] staff with whom you do business, or contact our corporate offices directly by phoning or e-mailing [name] at [phone number and e-mail address]. You may contact the FTC by phoning or e-mailing [name] at [phone number and e-mail address].

Sincerely,

[name and title]

EXHIBIT B

Letter to New Customers

[Broadcom letterhead]

[Name and address of Customer]

Dear [name of Customer]:

Broadcom is required to send you this notice by the FTC's Decision and Order in *In re Broadcom Inc.,* C-xxxx. The Decision and Order reflects a settlement without litigation between the FTC and Broadcom and does not constitute an admission by Broadcom that it has violated the law or that any of the facts alleged by the FTC regarding Broadcom's conduct are true. You may read and download a copy of the Order from the FTC's website at [web link to case on FTC website]. Broadcom's obligations under the Order are set out in Paragraph II. of the Order. Capitalized terms used in the Order are defined in Paragraph I. of the Order. All capitalized terms in this letter refer to terms defined in the Order. **Please read the Order carefully. If anything in this letter conflicts with the terms in the Order, the terms in the Order apply.**

Generally, the Order prohibits Broadcom from requiring you to purchase from Broadcom more than 50% of your requirements for certain components used in certain Set Top Boxes and Broadband Devices, subject to the exceptions set forth in the Order. The Order also prohibits Broadcom from conditioning the sale of certain components to you (or price or non-price

advantages for those components) on you purchasing more than 50% of your requirements for certain other components from Broadcom, subject to the limitations in the Decision and Order. Finally, the Order prohibits Broadcom from retaliating against customers for using an alternative source of any relevant component. These prohibitions apply for the term of the Order to agreements you enter with Broadcom for the covered products, either now or going forward.

You are receiving this letter because Broadcom considers you a new customer for the covered products. If you believe the terms of your customer agreement with Broadcom do not comply with the Order, **you have the right within 60 days of your receipt of this letter to terminate that agreement without penalty or charge.** In addition, if you have concerns in the future about whether Broadcom is complying with its obligations under the Order, you may contact us, the FTC, or both. You may contact Broadcom through the **[sales]** staff with whom you do business, or contact our corporate offices directly by phoning or e-mailing **[name]** at **[phone number and e-mail address]**. You may contact the FTC by phoning or e-mailing **[name]** at **[phone number and e-mail address]**.

Sincerely,

[name and title]

EXHIBIT C

Letter to Customers with Legacy Service Provider Contracts

[Broadcom letterhead]

[Name and address of Customer]

Dear [name of Customer]:

Broadcom is required to send you this notice by the FTC's Decision and Order in *In re Broadcom Inc.,* C-xxxx. The Decision and Order reflects a settlement without litigation between the FTC and Broadcom and does not constitute an admission by Broadcom that it has violated the law or that any of the facts alleged by the FTC regarding Broadcom's conduct are true. Attached is a copy of the Order. You also may read and download a copy of the Order from the FTC's website at [web link to case on FTC website]. Broadcom's obligations under the Order are set out in Paragraph II. of the Order. Capitalized terms used in the Order are defined in Paragraph I. of the Order. All

capitalized terms in this letter refer to terms defined in the Order. **Please read the Order carefully. If anything in this letter conflicts with the terms in the Order, the terms in the Order apply.**

Generally, the Order prohibits Broadcom from requiring you to purchase from Broadcom more than 50% of your requirements for certain components used in certain Set Top Boxes and Broadband Devices, subject to the exceptions set forth in the Order. For the term of the Order, this prohibition applies to your existing agreements with Broadcom, except as described below, and to any new agreements you enter with Broadcom. The Order also prohibits Broadcom from conditioning the sale of certain components to you (or price or non-price advantages for those components) on you purchasing more than 50% of your requirements for certain other components from Broadcom, subject to the limitations in the Decision and Order. Finally, the Order prohibits Broadcom from retaliating against customers for using an alternative source of any relevant component.

You have the right to terminate your current agreement with Broadcom without penalty by providing Broadcom at least 10 days' notice in writing. Your right to terminate shall expire 60 days after the date on which you receive this letter. If you do not terminate your current agreement, any Majority Share Requirement in the agreement will remain in effect through the remaining term (or, where applicable, initial term) of the agreement, or until February 28, 2022, whichever is earlier, at which time Broadcom is required to cease enforcing any terms of the agreement that are prohibited by the Order.

If you have concerns in the future about whether Broadcom is complying with its obligations under the Order, you may contact us, the FTC, or both. You may contact Broadcom through the **[sales]** staff with whom you do business, or contact our corporate offices directly by phoning or e-mailing **[name]** at **[phone number and e-mail address]**. You may contact the FTC by phoning or e-mailing **[name]** at **[phone number and e-mail address]**.

Sincerely,

[name and title]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission has accepted, subject to final approval, a consent agreement with Broadcom Incorporated. Broadcom designs, develops, and sells semiconductor components for a wide range of computing and telecommunications applications, including for set-top boxes ("STBs") and broadband devices such as modems. (STBs and broadband devices are sometimes collectively referred to as customer premises equipment or "CPE" or "CPE devices.")

As further described below, the consent agreement contains a proposed order addressing allegations in the proposed complaint that (1) with regard to certain components used in CPE devices, Broadcom unlawfully maintained a monopoly and unreasonably restrained trade through exclusive dealing and related conduct, and (2) with regard to certain other components used in CPE devices, Broadcom unreasonably restrained trade through cross-product conditioning, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

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

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint, the consent agreement, or the proposed order, or to modify their terms in any way. The consent agreement is for settlement purposes only and does not constitute an admission by Broadcom that the law has been violated as alleged in the complaint or that the facts alleged in the complaint, other than jurisdictional facts are true.

II. The Complaint

The complaint makes the following allegations.

A. Background

Consumers use STBs and broadband devices in their homes to access television and internet services. Service providers such as telecommunications and cable companies supply their customers with the CPE devices needed to access television and internet services.

Analysis to Aid Public Comment

Broadcom makes semiconductor components that are used in CPE devices. These include a "system on a chip" or "SOC," which is the core component directing the functions and features of a CPE device; a "front-end" chip, which converts incoming analog signals to digital signals to be read by the SOC; and a "Wi-Fi" chip, which enables a device to connect to a wireless network. Original equipment manufacturers ("OEMs") incorporate these components in STBs and broadband devices, which they typically build to service-provider specifications and sell to service providers.

Broadcom has long been the dominant supplier of (i) SOCs for traditional "broadcast" STBs,[1] (ii) SOCs for DSL broadband devices, and (iii) SOCs for fiber broadband devices (the "Monopolized Products"). In addition, Broadcom is one of few significant suppliers of (iv) Wi-Fi chips for CPE devices, (v) front-end chips for CPE devices, (vi) SOCs for "streaming" STBs, and (vii) SOCs for cable broadband devices (collectively, the "Related Products," and together with the Monopolized Products, the "Relevant Products").[2] Broadcom also provides essential ongoing engineering and software support services for devices containing its components. The markets for Monopolized Products and Related Products are concentrated and have significant barriers to entry and expansion.

As early as 2016, Broadcom recognized that it faces competitive threats to its monopoly power in Monopolized Products from low-priced, nascent rivals. Broadcom understood that nascent rivals could, by working with key OEMs and service providers, become stronger, more effective competitors. Leading service providers and OEMs were seeking to lessen their dependence on Broadcom and to foster competition in CPE component markets. These customers sought component-supplier diversity for multiple reasons, including to promote competitive pricing and to ensure continuity of supply. Another factor threatening Broadcom's monopoly power was the ongoing "cord-cutting" trend, whereby consumers were beginning to move away from traditional "broadcast" (*e.g.* cable or satellite) television service and instead to access television and other video content via a "streaming" internet connection. This trend threatened Broadcom because its market position was stronger in "broadcast" STB SOCs (where it has monopoly power) than in "streaming" STB SOCs.

These market conditions presented Broadcom with the incentive and opportunity to engage in anticompetitive conduct aimed at maintaining its monopoly power in markets for Monopolized Products and to use that power to weaken rivals and harm competition in markets for Related Products.

[1] "Broadcast" STBs, sometimes referred to as "traditional" STBs, access television signals over a broadcast interface (*e.g.*, cable, satellite, or fiber), as distinct from "streaming" STBs, which access only streaming "internet protocol" (IP) signals, often over an internet connection.

[2] The proposed order refers to Monopolized Products and Related Products as "Primary Products" and "Secondary Products," respectively.

B. Broadcom's Anticompetitive Conduct

Broadcom acted to maintain its monopoly positions and unreasonably restrain competition by implementing a wide-ranging exclusivity program in which it conditioned customers' access to Monopolized Products and support services for these products on commitments to source Relevant Products from Broadcom on an exclusive or near-exclusive basis. Broadcom implemented this exclusivity program through a series of long-term contracts entered with both OEMs and service providers, and through an accompanying campaign of ad hoc threats and retaliation. As a result, sales opportunities for Broadcom's rivals were severely restricted.

Between 2016 and the present, Broadcom negotiated and entered agreements with lead OEMs pursuant to which the OEMs agreed, for contract and renewal terms spanning multiple years, to purchase, use, or bid Broadcom's Relevant Products in STBs and broadband devices on an exclusive or near-exclusive basis. In all, Broadcom entered exclusive or near-exclusive agreements with at least ten OEMs which collectively are responsible for a majority of STB and broadband device sales worldwide and even higher percentages of STB and broadband device sales in the United States. These OEMs included the largest and most capable CPE OEMs – those with the largest market shares, the most extensive engineering and design capabilities, and the strongest reputations and relationships with downstream service provider customers.

Broadcom also negotiated and entered a series of agreements with major service providers pursuant to which the service providers committed, for contract terms spanning multiple years, to use Broadcom's Relevant Products on an exclusive or near-exclusive basis for their STBs and broadband devices. As with the OEMs targeted by Broadcom, these were among the largest, most advanced, and most innovative service providers in the world 0 those that were best positioned, absent their agreements with Broadcom, to enable Broadcom's nascent competitors.

In the course of securing and policing these long-term agreements, and also of obtaining exclusive or near-exclusive business from customers with which it did not enter formal long-term agreements, Broadcom routinely employed coercive leveraging tactics grounded in its monopoly power and spanning across product categories. For example, Broadcom communicated to OEM customers that disloyalty for even a single bid involving a single Relevant Product could mean loss of favorable price and non-price terms across numerous product lines, including Monopolized Products unrelated to that specific bid. And it communicated to service providers that is a service provider did not limit its purchases from Broadcom's rivals, Broadcom would implement large increases in the fees it charged for support services on devices containing Broadcom Monopolized Products that were already deployed on the service providers' networks.

C. Competitive Impact of Broadcom's Conduct

Broadcom's exclusivity program weakened competitors by foreclosing them from substantial portions of the markets for Relevant Products. It raised its rivals' costs by forcing rivals competing for a design award to be prepared to compensate customers for the penalties – increased prices and/or degraded terms – that Broadcom threatened to impose on the customer as to other designs and other covered products.

Broadcom's conduct deprived rivals of opportunities to work with key OEMs and service providers, thereby degrading rivals' ability to obtain scale and commercial validation, improve their engineering capabilities, offer better products to customers, and position themselves to win business in the future. As a result, rivals diverted resources away from, divested from, and/or considered exiting markets for Monopolized Products.

By foreclosing rivals from substantial sales opportunities other than through competition on the merits, Broadcom has maintained its monopoly in the markets for Monopolized Products and has unreasonably restrained competition in the markets for all Relevant Products, in each case harming price and non-price competition, reducing innovation, and reducing customer choice.

There are no legitimate procompetitive efficiencies that justify Broadcom's conduct or that outweigh the substantial anticompetitive effects thereof, and any legitimate objectives of Broadcom's conduct could have been achieved through significantly less restrictive means.

III. Legal Analysis

Section 5 of the FTC Act prohibits unfair methods of competition, including agreements in restraint of trade prohibited by Section 1 of the Sherman Act and monopolization prohibited by Section 2 of the Sherman Act.[3] Under section 1, a plaintiff must show (1) concerted action that (2) unreasonably restrains competition.[4] A section 2 monopolization offense requires proof of "(1) the possession of monopoly power in the relevant markets and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen or historic accident."[5]

A. Monopolization and Restraint of Trade as to Monopolized Products

An exclusive dealing arrangement is "an agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time."[6] Exclusivity need not be expressly defined by a written contract, but can also be identified by "look[ing] past the terms of the contract to ascertain the relationship between the parties and the effect of the agreement in the real world."[7] No single contract needs to require 100% exclusivity.[8] The assessment must look beyond "formalistic distinctions" and focus on "market realities."[9]

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[3] 15 U.S.C. § 45; *see, e.g., FTC v. Cement Inst.,* 333 U.S. 683, 693-94 (1948).
[4] 15 U.S.C. § 1; *see, e.g., Arizona v. Maricopa County Med. Soc.,* 457 U.S. 332, 342-343, (1982).
[5] *In re McWane, Inc.*, No, 9351, 2014 WL 556261, at *11 (F.T.C. Jan. 30, 2014), *aff'd*, 783 F.3d 814 (11th Cir. 2015) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)); 15 U.S.C. § 2.
[6] *ZF Meritor v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012).
[7] *Id.* (cleaned up) (noting also that "de facto exclusive dealing claims are cognizable under the antitrust laws."); *see also Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 326 (1961) (exclusive dealing principles apply not only to contracts that expressly require exclusivity, but also to those that have the "practical effect" of inducing a customer to purchase exclusively from a dominant seller).
[8] *ZF Meritor*, 696 F.3d at 270; *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.").
[9] *Eastman KodakI,* 504 U.S. at 466.

Exclusive dealing may be unlawful where it enables a firm to maintain or enhance monopoly or market power by impairing the ability of rivals to grow into effective competitors or by depriving customers of the ability to make a meaningful choice.[10] Of particular relevance is whether exclusive dealing has "foreclose[d] competition in such a substantial share of the relevant market so as to adversely affect competition."[11] Exclusive dealing may violate Section 1 or Section 2 of the Sherman Act, but is "of special concern when imposed by a monopolist."[12] Thus, a Section 2 exclusive dealing claim typically requires a greater degree of market power, but a lesser degree of market foreclosure, than an exclusive dealing claim under Section 1.[13]

The factual allegations in the complaint support a finding of exclusive dealings as to the Monopolized Products in violation of Sections 1 and 2 of the Sherman Act. Broadcom has monopoly power in the sale of these products, as demonstrated by both direct and indirect evidence, including high shares of markets with significant entry barriers. And Broadcom has engaged in exclusive dealings with OEMs and service providers through both formal agreements that bar purchases of Monopolized Products from a Broadcom rival and ad hoc threats of retaliation if a customer purchases from a Broadcom rival. Broadcom's exclusive deals foreclosed substantial and competitively important portions of the markets for Monopolized Products, weaking rivals, harming competition, maintaining Broadcom's monopoly position, and resulting in reduced customer choice, high prices, and less innovation in markets for Monopolized Products.

B. Restraint of Trade as to Related Products

In addition to harming competition in the markets for Monopolized Products, Broadcom leveraged its monopoly power in the markets for Monopolized Products to foreclose rivals and harm competition in the markets for Related Products. As it involves the interaction of two or more markets, the conduct is appropriately analyzed with reference to tying precedent. To demonstrate tying in violation of Section 1, a plaintiff must show (1) separate markets for the tying and tied products; (2) defendant's market power in the tying market; (3) the existence of a tie, and (4) that the arrangement forecloses a substantial volume of interstate commerce in the market for the tied product.[14] Coercion, or "the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms,"[15] is a key element in showing the existence of a tie, and can be shown using direct or circumstantial evidence.[16] Such coercion need not take the form of a threat to completely withhold the tying product; a tie may also exist where the seller

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[10] *See, e.g., In re McWane*, 2014 WL 556261 at *19, 28.
[11] *ZF Meritor*, 696 F.3d at 270; *see also McWane*, 783 F.3d at 835.
[12] *ZF Meritor*, 696 F.3d at 271.
[13] *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 69-70 (D.C. Cir. 2001).
[14] *See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461-62 (1992) (quoting *N. Pac. R. Co. v. United States*, 356 U.S. 1, 5-6 (1958) and *Fortner Enters., Inc. v. United States Steel Corp*, 394 U.S. 495, 503 (1969)); *United States v. Microsoft*, 253 F.3d 34, 85, 87 (D.C. Cir. 2001) ("[t]he core concern is that tying prevents goods from competing directly for consumer choice on their merits"); *Tic-X-Press v. Omni Promotions Co.*, 815 F.2dm 1407, 1414 (11th Cir. 1987); *see also Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 468 (7th Cir. 2020); *In re Sandoz Pharms. Corp.*, 115 F.T.C. 625, 629-30 (1992).
[15] *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984).
[16] *See, e.g., Tic-X-Press*, 815 F.2d at 1418.

offers the tying product on such terms that, under the circumstances, accepting the tying and tied products together is the only viable economic option for the buyer.[17] Finally, harm is particularly likely when the tied markets are concentrated and the tie results in substantial foreclosure in these markets.[18]

The factual allegations in the complaint support a finding of a violation of Section 1 of the Sherman Act as to the Related Products. Broadcom placed conditions on the supply and service terms associated with the Monopolized Products so as to coerce customers to source Related Products exclusively or nearly-exclusively from Broadcom. The cross-conditionality was employed in the negotiation and enforcement of relevant formal agreements and was also present in Broadcom's ad hoc threats of retaliation. As with the Monopolized Products, Broadcom's conduct has foreclosed substantial and competitively important portions of the concentrated markets for Related Products, weakening rivals, harming competition, and resulting in reduced customer choice, higher prices, and less innovation in markets for Related Products.

IV. The Proposed Order

The proposed order seeks to remedy Broadcom's anticompetitive conduct through three primary prohibitions. A core concept of the order is what is termed a "majority share requirement," referring to a requirement that a customer purchase more than 50% of the customer's requirements of a given product come from Broadcom. First, the order prohibits Broadcom from entering into majority share requirements for any Monopolized Product. Second, the order prohibits Broadcom from conditioning access to Monopolized Products on a customer's agreeing to a majority share requirement for specified Related Products. Third, the order prohibits Broadcom from retaliating against a customer that refuses a prohibited majority share requirement or that purchases products from a competitor of Broadcom.

Paragraph I of the proposed order defined the key terms used in the order.

Paragraph II.A. of the proposed order prohibits Broadcom from imposing a majority share requirement on a customer's purchase of any Monopolized Product. This provision is designed to end Broadcom's exclusive dealing practices in the markets for Monopolized Products and to enable the emergence of effective competition in those markets. The prohibition applies to sales of Monopolized Products to OEMs and to U.S. service providers. The proposed order specifically includes prohibitions of Broadcom (1) conditioning the sale of a Monopolized Product on a majority share requirement for that product, (2) conditioning price terms, or non-price terms such as delivery or support terms, for a Monopolized Product on a majority share requirement for that product, (3) conditioning other payments on a majority share requirement for a Monopolized Product, or (4) providing certain types of retroactive rebates for a Monopolized Product in exchange for a majority share requirement.

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[17] *See, e.g., United Shoe Mach. Corp\. v. United States*, 258 U.S. 451, 464 (1922); *Viamedia*, 951 F.3d at 470-72.

[18] *See, e.g.*, Areeda & Hovenkamp, Antitrust Law ¶ 1729; *see also* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397, 413 (2009).

The prohibitions in Paragraph II.A. are qualified by a number of provisos designed to assure that the order does not bar Broadcom from competing on the merits. The first proviso clarifies that the order does not prohibit Broadcom from fulfilling orders from a customer that, over time, chooses to purchase more than 50% of its requirements from Broadcom, provided that such purchases are not pursuant to a majority share requirement prohibited by the order. The second proviso clarifies that a customer's mere designation of Broadcom as an "authorized" or "preferred" provider does not alone establish a violation of the order. The third proviso clarifies that the order does not prohibit non-retroactive volume discounts. The fourth proviso allows Broadcom, in narrow circumstances, to enter into a majority share requirement in connection with a particular request for proposal (RFP). The proviso provides that Broadcom may agree to a single-source term in connection with an RFP covering a single device model (or a single device model and certain limited derivatives thereof) if the customer structures the RFP in this way. (In contrast, if a customer chooses to structure an RFP to split component supply for a particular device among multiple suppliers, Broadcom may not thwart this by insisting on exclusivity.) The fifth proviso enables Broadcom, in specified conditions, to agree to exclusivity terms with a customer to incent Broadcom to continue producing a product beyond its ordinary-course end of life.

Paragraph II.B of the proposed order prohibits Broadcom from using its monopoly power in a Monopolized Product to impose majority share requirements for the Monopolized Products or Related Products.

Paragraph II.C of the order prohibits Broadcom from retaliating against a customer for working with a Broadcom rival or for refusing to commit to or maintain a prohibited majority share requirement. Prohibited retaliation includes actual or threatened interference with the sale or delivery of Monopolized Products; withdrawal or modification of, or refusal to extend, relatively favorable price or non-price terms; or refusal to deal with the customer on terms generally available to other similarly situated customers.

The proposed order contains standard provisions designed to ensure compliance. Paragraph III requires Broadcom to maintain an antitrust compliance program and to provide notice to customers of the prohibitions contained in the order. Paragraph IV through VI contain provisions regarding compliance reports, notice of changes in respondent, and access to documents and personnel.

The proposed Order's prohibitions apply to agreements with the Service Providers that serve end users in the United States and to agreements with OEMs worldwide, with the exception of agreements for the sale of products intended for use in devices for end used in China. These products are excluded from the prohibitions on majority share requirements in light of distinct competitive conditions applicable to them. The term of the proposed order is ten years.

Complaint

IN THE MATTER OF

SEVEN & I HOLDINGS CO., LTD., 7-ELEVEN INC., AND MARATHON PETROLEUM CORPORATION

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

Docket No. C-4748; File No. 201 0108
Complaint, June 25, 2021 – Decision, November 8, 2021

This consent order addresses the $21 billion acquisition by 7-Eleven of a significant number of Marathon Petroleum Corporation's Speedway, LLC. fuel outlets and thereby obtaining market power in the relevant market. The complaint alleges that 7-Eleven acquired entities owned by Marathon Petroleum Corporation with full knowledge that the acquisition was in violation of Section 7 of the Clayton Act. Under the order Respondent must divest fuel outlets that caused harm to competition in the relevant market. The order also prohibits Respondent from enforcing any non-compete provisions on franchisees or employees working or doing business with these assets.

Participants

For the *Commission*: *Angelike Mina, Victoria Lippincott,* and *Nicholas Bush*

For the *Respondent*: *Corey Roush [Akin Gump Strauss Hauer & Feld]; Terrell McSweeny [Covington & Burling LLP]; Nelson Fitts [Wachtell, Lipton, Rosen & Katz]*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Seven & i Holdings Co., Ltd., through its wholly owned subsidiary, Respondent 7-Eleven, Inc., has acquired thirteen entities wholly owned by Respondent Marathon Petroleum Corporation with full knowledge that such acquisition was in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows.

I. RESPONDENTS

1. Respondent Seven & i Holdings Co., Inc. ("Seven & i") is a publicly-traded company with its office and principal place of business located in Tokyo, Japan.

2. Respondent 7-Eleven, Inc. ("7-Eleven") is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Texas with its office and principal place of business located in Irving, Texas. 7-Eleven is a wholly owned subsidiary of Seven & i.

3. Respondent 7-Eleven is, and at all times relevant herein has been, engaged in, among other things, the retail sale of gasoline and diesel fuel in the United States.

4. Respondent Marathon Petroleum Corporation ("Marathon") 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 in Findlay, Ohio.

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

6. Each Respondent, either directly or through its subsidiaries, is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. NATURE OF THE CASE

7. On May 14, 2021, 7-Eleven, the largest U.S. retail fuel and convenience store chain with approximately 10,000 locations, acquired substantially all of Marathon's Speedway LLC ("Speedway") business, the third largest U.S. retail fuel and convenience store chain ("the Acquisition") with full knowledge that such acquisition was in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. Pursuant to Commission Rules of Practice, a consent agreement was proposed prior to consummation of the transaction, but the Commission had not accepted the proposal because a majority did not find certain provisions in the proposal sufficient to fully remedy the likely harm from the transaction. In consummating the Acquisition, 7-Eleven illegally obtained market power that threatened consumers with higher prices at fuel pumps across the country, in the relevant markets alleged herein.

8. Both companies operate networks of retail gas and diesel stations with associated convenience stores throughout most of the United States.

9. 7-Eleven and Speedway each set site-specific retail gasoline and diesel prices based on nearby competition. At each station, Respondents identify nearby locations that compete closely for consumers and track retail fuel prices at those locations, to help establish their own fuel prices and to manage their own fuel volumes and margins. Respondents' site-specific pricing strategy relies on identifying rival fuel outlets that would gain gasoline and diesel volume if Respondents' fuel prices are too high, or from whom Respondents' would gain sales if Respondents' fuel prices are too low. Prior to the Acquisition, 7-Eleven's closest competitors frequently included Speedway, and Speedway's closest competitors frequently included 7-Eleven.

10. In local markets where 7-Eleven and Speedway were each other's close or closest competitor, the Acquisition allows 7-Eleven to raise gasoline or diesel prices at one or more of the overlapping retail locations, knowing that 7-Eleven will capture some or all of the volume that, absent the Acquisition, would otherwise have been lost. Knowing that it will recapture the "lost" volumes, 7-Eleven will profit by unilaterally increasing gasoline and/or diesel at the expense of the everyday driving public.

III. THE ACQUISITION

11. Pursuant to an Asset Purchase Agreement dated August 2, 2020, 7-Eleven, the United States subsidiary of Seven & i, acquired substantially all of Marathon's Speedway LLC retail assets for approximately $21 billion.

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

IV. THE RELEVANT MARKET

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

14. Relevant geographic markets in which to analyze the effects of the Acquisition include 293 local markets within the following states: Arizona; California; Florida; Illinois; Indiana; Kentucky; Massachusetts; Michigan; North Carolina; New Hampshire; Nevada; New York; Ohio; Pennsylvania; Rhode Island; South Carolina; Tennessee; Utah; Virginia; and West Virginia.

15. The relevant geographic markets for retail gasoline and retail diesel are highly localized, ranging from a few blocks to a few miles, depending on local circumstances. Each relevant market is distinct and reflects the commuting patterns, traffic flows, and outlet characteristics unique to each market. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes.

V. MARKET STRUCTURE

16. The Acquisition created a monopoly in 31 local markets for the retail sale of gasoline and in 26 local markets for the retail sale of diesel. In 73 local markets for the retail sale of gasoline and 63 local markets for the retail sale of diesel, the Acquisition reduced the number of independent market participants from three to two. In 160 local markets for the retail sale of gasoline and 64 local markets for the retail sale of diesel, the Acquisition reduced the number of independent market participants from four to three. The Acquisition created a highly concentrated market in each of these local markets. For many of these local markets, the Acquisition will result in competitive harm for both the retail sale of gasoline and the retail sale of diesel.

VI. BARRIERS TO ENTRY

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

VII. EFFECTS OF THE ACQUISITION

18. The Acquisition eliminated significant head-to-head competition in the relevant markets. In those areas, 7-Eleven and Speedway were each other's close or closest competitor for retail gasoline and diesel sales (and sometimes were each other's only competitor), and the competition between them benefited driving consumers across the United States.

19. The effects of the Acquisition may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by:

a. increasing the likelihood that Respondent 7-Eleven will unilaterally exercise market power in the relevant markets; and

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

VIII. VIOLATIONS CHARGED

20. The Acquisition violates 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.

21. The Asset Purchase Agreement entered into by Respondents 7-Eleven and Marathon constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Secretary and its official seal affixed, at Washington, D.C., this twenty-fifth day of June, 2021, issues its Complaint against Respondents.

By the Commission, Chair Khan not participating.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission initiated an investigation of the proposed acquisition by Respondent Seven & i Holdings Co., Ltd., through its wholly owned subsidiary, Respondent 7-Eleven, Inc., (collectively "7-Eleven"), of voting securities and non-corporate interest of 13 subsidiaries from Respondent Marathon Petroleum Corporation ("Marathon") (collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 (collectively "Acts").

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("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. 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 this Order to Maintain Assets:

1. Respondent Seven & i Holdings Co., Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of Japan, with its headquarters and principal place of business located at 8-8 Nibancho, Chiyoda-Ku, Tokyo, Japan 102-8452, and its United States address for service of process is as follows, Senior Counsel, Dawud Crooms, 7-Eleven Inc., 3200 Hackberry Road, Irving, Texas 75063.

2. Respondent 7-Eleven, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its headquarters and principal place of business located at 3200 Hackberry Road, Irving, Texas 75063.

3. Respondent Marathon Petroleum Corporation 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 539 South Main Street, Findlay, Ohio 45840.

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

ORDER

I. Definitions

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

A. "7-Eleven" means Seven & i Holdings Co., Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Seven & i Holdings Co., Ltd., including Respondent 7-Eleven, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Marathon" means Marathon Petroleum Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, including Speedway LLC, divisions, groups, and affiliates controlled by Marathon Petroleum Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "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.

D. "Commission" means the Federal Trade Commission.

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

II. Asset Maintenance

IT IS FURTHER ORDERED that:

A. Prior to the Acquisition Date, Respondent Marathon shall designate Gary Michniewicz, Division Director, Speedway LLC, as the Asset Maintenance Manager.

1. During the Asset Maintenance Period, the Asset Maintenance Manager, in consultation with and overseen by the Monitor, shall:

a. Oversee the operations of the Retail Fuel Business relating to the Retail Fuel Assets to ensure that the requirements of Paragraph II.B of this Order are met;

b. Oversee the Divestiture Pricing Team to ensure that the requirements of Paragraph V.D of this Order are met; and

c. Facilitate the transfer of the Retail Fuel Assets to the Acquirers.

2. The Asset Maintenance Manager shall serve during the Asset Maintenance Period and shall have no duties related to any other businesses other than the Retail Fuel Business related to the Retail Fuel Assets during the Asset Maintenance Period.

3. The Asset Maintenance Manager shall report directly and exclusively to the Monitor.

4. Respondents shall indemnify the Asset Maintenance Manager and hold him or her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Asset Maintenance Manager'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 either the Asset Maintenance Manager's malfeasance, gross negligence, willful or wanton acts, or bad faith.

5. If Mr. Michniewicz resigns or the Commission staff, in consultation with the Monitor, determines that he has ceased to act, has failed to act diligently, or is otherwise unable to continue serving in this role, Respondents, within 5 days of receipt of written notice of such determination and in consultation with Commission staff and the Monitor, shall designate a substitute Asset Maintenance Manager.

B. During the Asset Maintenance Period, Respondents shall, subject to legal and regulatory requirements:

1. Operate the Retail Fuel Business relating to the Retail Fuel Assets in the ordinary course of business consistent with past practices and take all actions necessary to maintain the full economic viability, marketability, and competitiveness of such Retail Fuel Business;

2. Prevent the destruction, removal, wasting, deterioration, closing, or impairment (other than as a result of ordinary wear and tear) of the Retail Fuel Assets, including:

a. Maintaining, repairing, and replacing any Equipment to the extent and in a manner consistent with past practices;

b. Maintaining Inventory levels in a manner consistent with past practices;

c. Not terminating, canceling, renewing, or amending any Contract, except as consistent with past practices and as required by Paragraph VI.B of this Order and Paragraph II.D of the Decision and Order; and

d. Not entering any Contract that would restrain or restrict the ability of the Acquirers to compete against Respondents;

3. Make any payment required to be paid under any contract or lease when due, and otherwise satisfy all liabilities and obligations associated with the Retail Fuel Assets;

4. Provide the Retail Fuel Business relating to the Retail Fuel Assets with sufficient funds to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on at least at their scheduled pace all capital projects, business plans, development projects, promotional activities, and marketing activities;

5. Provide resources as may be necessary to respond to competition against the Retail Fuel Business relating to the Retail Fuel Assets, prevent diminution in sales of such Retail Fuel Business, and maintain the competitive strength of such Retail Fuel Business;

6. Not reduce operating hours;

7. Not reduce, change, or modify in any material respect, the level of marketing, promotional, pricing, or advertising practices, programs, and policies for the Retail Fuel Business related to the Retail Fuel Assets, other than changes in the ordinary course of business consistent with changes made at Respondents' other businesses that Respondents will not divest;

8. Not target, encourage, or convert customers of the Retail Fuel Business relating to the Retail Fuel Assets to become customers of Respondents' other businesses that will not be divested; provided, however, that nothing in this subparagraph shall prevent Respondents from engaging in advertising, marketing, and promotion activities: (i) generally applicable to all of Respondent businesses, or (ii) in the ordinary course of business and in accordance with past practice;

9. Provide support services at levels customarily provided by Respondents;

10. Maintain all licenses, permits, approvals, authorizations, or certifications related to or necessary for the operation of the Retail Fuel Business relating to the Retail Fuel Assets, and otherwise operate such Retail Fuel Business in accordance and compliance with all regulatory obligations and requirements;

11. Not sell, transfer, encumber, or otherwise impair the Retail Fuel Assets (other than in the manner prescribed in the Orders);

12. Not take any action that lessens the full economic viability, marketability, or competitiveness of the Retail Fuel Assets;

13. Not terminate the operations of the Retail Fuel Business relating to the Retail Fuel Assets;

14. Preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, Site Operators, and others having business relationships with the Retail Fuel Business relating to the Retail Fuel Assets;

15. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Retail Fuel Business relating to the Retail Fuel Assets, including:

    a. Continuing to provide each member of the Divestiture Pricing Team with all employee benefits offered by Respondents, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all benefits;

    b. Providing reasonable financial incentives to encourage each member of the Divestiture Pricing Team to continue in their positions until the end of the Asset Maintenance Period, and as may be necessary, to facilitate their employment by an Acquirer;

    c. When vacancies occur, replacing the employees in the regular and ordinary course of business, in accordance with past practice; and

    d. Not transferring any employees from the Retail Fuel Business relating to the Retail Fuel Assets to any of Respondents' assets or businesses that Respondents will not divest.

    Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Retail Fuel Assets and consistent with the purposes of the Orders.

III. Transition Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information and divested all Retail Fuel Assets to the relevant Acquirer, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the relevant Acquirer with access to that Business Information (wherever located and however stored) that Respondents have not yet transferred to the relevant Acquirer, and to employees who possess the records and information.

B. At the option of an Acquirer, Respondents shall provide the Acquirer with Transitional Assistance sufficient to (1) transfer efficiently the Retail Fuel Assets to the Acquirer and (2) allow the Acquirer and Site Operator, if applicable, to operate the Retail Fuel Business with the related Retail Fuel Assets at each Location in a manner that is equivalent in all material respects to the manner in which Respondents did so prior to the Acquisition.

C. Respondents shall provide Transitional Assistance:

1. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost;

3. For a period sufficient to meet the requirements of Section III; and

4. Which shall be, at the option of each Acquirer, for up to 12 months after the last Divestiture Date for that Acquirer; provided, however, that within 15 days after a request by the Acquirer, Respondent 7-Eleven shall file with the Commission a request for prior approval to extend the term for providing Transitional Assistance as the Acquirer requests in order to achieve the purposes of this Order.

D. Respondents shall allow each Acquirer to terminate, in whole or part, any Transitional Assistance of a Divestiture Agreement or otherwise agreed upon pursuant to Paragraph III.C.1 upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transitional Assistance due to a breach by the Acquirer of a Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondent's breach of the Divestiture Agreement.

IV. Employees

IT IS FURTHER ORDERED that:

A. Until one year after the last Divestiture Date for each Acquirer, Respondents shall cooperate with and assist each Acquirer to evaluate independently and offer employment to any Relevant Employee.

B. Until 90 days after the last Divestiture Date for each Acquirer, Respondents shall:

1. No later than 10 days after a request from an Acquirer, provide a list of the requested Relevant Employees and provide Employee Information for each;

2. No later than 10 days after a request from an Acquirer, provide an opportunity to privately interview any of the Relevant Employees outside the presence or hearing of any employee or agent of any Respondent, and to make offers of employment to any of the Relevant Employees;

3. Remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with an Acquirer, including removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to an Relevant Employee who receives an offer of employment from the Acquirer; provided, however, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Relevant Employees with all employee benefits offered by Respondents, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all benefits;

5. Provide reasonable financial incentives to encourage Relevant Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Relevant Employees by an Acquirer; and

6. Not interfere, directly or indirectly, with the hiring, recruiting, or employing by an Acquirer of any Relevant Employee, including not offering any incentive to such employees to decline employment with an Acquirer.

C. Respondents shall not:

1. For a period of 90 days after the last Divestiture Date for each Acquirer, directly or indirectly, solicit or otherwise attempt to induce any Person employed at the store level by that Acquirer to terminate his or her employment with the Acquirer; and

2. For a period of 180 days after the last Divestiture Date for each Acquirer, directly or indirectly, solicit or otherwise attempt to induce any Person employed above the store level by that Acquirer to terminate his or her employment with the Acquirer.

Provided, however, Respondents may (i) hire any such Person whose employment has been terminated by the Acquirer; (ii) advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Person employed by the Acquirer; or (iii) hire a Person who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section IV.

D. To the extent that Relevant Employees are store-level employees, Site Operators shall have the same rights and access afforded to the Acquirer under Section IV.

E. Respondent 7-Eleven shall not enforce any noncompete provision or noncompete agreement against any Person seeking employment from or otherwise doing business with any Retail Fuel Assets.

V. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall not (x) disclose (including to Respondents' employees) or (y) use for any reason or purpose, any Confidential Information received or maintained by Respondents; *provided*, *however*, that Respondents may disclose or use such Confidential Information in the course of:

1. Performing its obligations or as permitted under the Orders or any Divestiture Agreement; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Retail Fuel Assets or any Retail Fuel Business, or as required by law or regulation, including any applicable securities exchange rules or regulations.

B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Section V, Respondents shall limit such disclosure or use (1) only to the extent such information is required; (2) only to those employees or Persons who require such information for the purposes permitted under Paragraph V.A; and (3) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of Section V and take necessary actions to ensure that their employees and other Persons comply with the terms of Section V, including implementing access and data controls, training its employees, and other actions that Respondents would take to protect their own trade secrets and proprietary information.

D. No later than the Acquisition Date and until the last divestiture to an Acquirer pursuant to Sections II and IX of the Decision and Order and Section VIII of this Order, Respondents shall:

1. Establish a Divestiture Pricing Team responsible for the retail fuel pricing for each of the Locations identified in Appendices IV, V, and VI of the Decision and Order, the Marysville Location, Lancaster Location, and the Reno Location, and obtain approval of the Monitor and Commission staff before changing or reducing the number of members of the Divestiture Pricing Team, once established pursuant to this Paragraph V.D.1;

2. Institute all measures and take all actions as are necessary and appropriate to prevent the direct or indirect access to or disclosure or use of any Divestiture Pricing Information by anyone other than Divestiture Pricing Team, except as is expressly permitted or required by the Orders;

3. Institute all measures and take all actions as are necessary and appropriate to prevent the direct or indirect access to or disclosure or use of any Non-Divestiture Pricing Information by the Divestiture Pricing Team; and

4. As part of the procedures and requirements described in Paragraph V.D of this Order, Respondents shall:

   a. No later than the Acquisition Date, require the Divestiture Pricing Team and any other Person who may receive Non-Divestiture Pricing Information to sign an appropriate non-disclosure agreement agreeing to comply with the prohibitions and confidentiality requirements of this Order;

   b. Require compliance with this Order and take appropriate action in the event of non-compliant access, use, or disclosure of Divestiture Pricing Information and Non-Divestiture Pricing Information in violation of this Order;

   c. Distribute guidance and provide training regarding the procedures to all Persons referenced in Paragraph V.D.4.a of this Order; and

   d. Institute all necessary information technology procedures, authorizations, protocols, and any other controls necessary to comply with this Order's prohibitions and requirements.

VI. Additional Obligations

IT IS FURTHER ORDERED that:

A. Respondents shall obtain, no later than the Divestiture Date for the particular Retail Fuel Assets divested on that particular Divestiture Date and at their sole expense, all Consents from third parties and all Governmental Authorizations that are necessary to effect the complete transfer and divestiture of those Retail Fuel Assets on such Divestiture Date to the Acquirer and for that Acquirer to operate any aspect of the relevant Retail Fuel Business.

Provided, however, that if Respondent 7-Eleven is unable to obtain the necessary landlord Consent for one or more Speedway Locations identified in Appendix VII of the Decision and Order, Respondent shall: (i) in consultation with the Monitor and Commission staff, substitute the corresponding Substitute Location, and (ii)

divest the corresponding Retail Fuel Assets, as an ongoing Retail Fuel Business, to the respective Acquirer pursuant to Paragraph II.A of the Decision and Order no later than 15 days after receipt of written notification from the Commission or its staff directing such divestiture if it has not already occurred;

Provided, further, however, that Respondents may satisfy the requirement to obtain all Consents from third parties by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant third party that are acceptable to the Commission, or has otherwise obtained all necessary Consents and waivers; and Provided, further, however, that with respect to any Governmental Authorizations that are not transferable, Respondents shall, to the extent permitted under applicable law, allow each Acquirer and Site Operator to operate the Retail Fuel Business at the relevant Location under Respondents' Governmental Authorizations pending the Acquirer's, or the Site Operator's, receipt of its own Governmental Authorizations, and Respondents shall provide such assistance as each Acquirer or each Site Operator may reasonably request in connection with its efforts to obtain such Governmental Authorizations.

B. Within 60 days of the Acquisition Date, in consultation with the respective Acquirer and the Monitor, and with the agreement of the respective Acquirer, Respondents shall obtain, at their sole expense and:

1. On customary market terms, and consistent with past practices Contracts providing an additional leasehold interest in Leased Locations 1; and

2. On terms and conditions no less favorable than current terms and conditions for such Location, a Contract providing no less than an additional 11 month leasehold interest in Leased Location 2.

Provided, however, that if Respondent 7-Eleven is unable to obtain the necessary Contract for one or more Leased Locations identified in Appendix VII of the Decision and Order, at the Acquirer's option, Respondent shall: (i) in consultation with the Monitor and Commission staff, substitute the corresponding Substitute Location, and (ii) divest the corresponding Retail Fuel Assets to the respective Acquirer pursuant to Paragraph II.A of the Decision and Order no later than 15 days after receipt of written notification from the Commission or its staff directing such divestiture if it has not already occurred.

C. Respondent 7-Eleven shall not hold a leasehold interest or operate a retail fuel business at:

1. The Lancaster Location after January 30, 2022;

2. The Marysville Location after November 28, 2021; and

3. The Reno Location after September 30, 2021.

D. Respondents shall assist each potential Acquirer to conduct a due diligence investigation of the Retail Fuel Assets such Acquirer seeks to purchase, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process, and affording each Acquirer and its representatives (including prospective lenders and their representatives) full and free access, during regular business hours, to the personnel, assets, Contracts, Governmental Authorizations, Business Information, with such rights of access to be exercised in a manner that does not unreasonably interfere with the operations of Respondents.

VII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints The Claro Group, LLC as the Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

B. The Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

1. Shall be subject to the approval of the Commission;

2. Shall not limit, and the signatories shall not construe it to limit, the terms of Section VII of this Order or the Section relating to the Monitor in the Decision and Order ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with this Order 30 days after this Order is issued, and every 60 days thereafter until Respondents have complied fully with Sections II, IV, and VI of the Decision and Order and at any other time requested by the staff of the Commission; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, VI of the Decision and Order, and files a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Paragraphs of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents who:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VII.B; or (b) receives Commission approval.

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.

VIII. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Assets as required by the Decision and 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 the Decision and Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to 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 Section shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with the Orders.

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

D. Not later than 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 divestitures required by this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Section VIII, 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 year from the date the Commission approves the trustee trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures 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 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 divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures 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 best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to Acquirers that receive the prior approval of the Commission as required by the Decision and

Order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, 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 5 days of receiving notification of the Commission's approval;

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

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

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Assets required to be divested by the Decision and Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. 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.

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 Section VIII of this Order.

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

IX. Prior Approval and Prior Notice

IT IS FURTHER ORDERED that:

A. For the term of this Order, Respondent 7-Eleven shall not, without prior approval of the Commission, acquire directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, commission franchise interest, or any other interest, in whole or in part, in the Retail Fuel Assets and the 7-Eleven Commission Franchise Location.

B. Respondent 7-Eleven shall not, without providing advance written notification to the Commission ("Notification"):

1. Acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in the Retail Fuel Assets or any concern, corporate or non-corporate, or in any assets engaged in the sale of Fuel Products at a Prior Notice Location, provided however, prior notification shall not be required by this Paragraph IX.B.1 for a transaction for which approval is required to be made, and has been made, pursuant to Paragraph IX.A; or

2. Enter into any contract with any concern, corporate or non-corporate, engaged in the sale of Fuel Products at a Prior Notice Location in which Respondents will control the retail price of such products.

C. The Notification shall:

1. Be provided on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of the Respondent 7-Eleven and not of any other party to the transaction;

2. Include a description of the proposed acquisition and provide:

   a. A map showing all retail fuel outlets by ownership (e.g., OPIS Corporate Brand) within 5 driving miles of the relevant Prior Notice Location;

   b. For each retail fuel outlet owned by Respondent 7-Eleven that is located within 5 driving miles of the relevant Prior Notice Location, a list of the retail fuel outlets that Respondent 7-Eleven monitored at any time within the preceding 12 month period (to the extent such information is available); and

   c. Respondent 7-Eleven's pricing strategy in relation to each monitored retail fuel outlet identified in response to Paragraph IX.C.2.b of this Order.

3. Provide the Notification to the Commission at least 30 days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). Further, if, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent 7-Eleven shall not consummate the transaction until 30 days after submitting such additional information or documentary material.

4. Early termination of the waiting periods in Section IX may be requested and, where appropriate, granted by letter from the Bureau of Competition, provided, however, that prior notification shall not be required by Section IX for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

5. If related to a geographic area located within a Specified State, Respondent 7- Eleven shall provide a copy of each Notification described in Section IX to the relevant Attorney General's Office for the Specified State at the same time that such Notification is transmitted to the Commission.

X. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Within 60 days of the Acquisition Date, submit a schedule of anticipated Divestiture Dates by Location that has received prior written approval by the relevant Acquirer, and within 5 days of modifying any anticipated Divestiture Date, submit the modified divestiture schedule.

2. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and of each Divestiture Date no later than 5 days after the occurrence of each; and

3. Submit each complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the last Divestiture Date for each Acquirer.

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

1. Respondents shall submit:

a. Interim Compliance Reports 30 days after this Order to Maintain Assets is issued, and every 60 days thereafter until the Commission issues a Decision and Order in this matter; and

b. Additional Compliance Reports as the Commission or its staff may request;

2. Each Compliance Report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents shall include in their Compliance Reports, among other information or documentation that may be necessary to demonstrate compliance:

a. A full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each Section the Orders; and

b. Until 60 days after the last Divestiture Date, a full description of the steps Respondents took to comply with Section VI and Section VII of the Decision and Order since the last interim Compliance Report;

3. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in each Compliance Report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent's obligations under the Orders during the period covered by such Compliance Report. Respondent shall provide copies of these documents to Commission staff upon request.

4. Each Respondent shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent shall file its Compliance Reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a). 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 Respondent Marathon's reporting obligations under Section X shall cease once it has completed its obligations under Sections II, IV and VI of the Decision and Order.

XI. Change in Respondent

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

A. The proposed dissolution of Seven & i Holdings Co., Ltd., 7-Eleven, Inc., or Marathon Petroleum Corporation, respectively;

B. The proposed acquisition, merger or consolidation of Seven & i Holdings Co., Ltd., 7- Eleven, Inc., or Marathon Petroleum Corporation, respectively; or

C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of the Orders.

XII. Access

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; or

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

XIII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to maintain the full economic viability, marketability and competitiveness of the Retail Fuel Business at the Locations identified in Appendices IV, V, and VI, and as applicable, Substitute Locations identified in Appendix VII of the Decision and Order, through their full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for such Retail Fuel Business at the Locations; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Retail Fuel Assets except for ordinary wear and tear.

XIV. Term

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate the day after the Decision and Order in this matter becomes final or the Commission withdraws acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34.

By the Commission, Chair Khan not participating.

DECISION

The Federal Trade Commission initiated an investigation of the proposed acquisition by Respondent Seven & i Holdings Co., Ltd., through its wholly owned subsidiary, Respondent 7-Eleven, Inc., (collectively "7-Eleven"), of voting securities and non-corporate interest of 13 subsidiaries from Respondent Marathon Petroleum Corporation ("Marathon") (collectively

"Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 (collectively "Acts").

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("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 makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent Seven & i Holdings Co., Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of Japan, with its headquarters and principal place of business located at 8-8 Nibancho, Chiyoda-Ku, Tokyo, Japan 102-8452, and its United States address for service of process is as follows, Senior Counsel, Dawud Crooms, 7-Eleven Inc., 3200 Hackberry Road, Irving, Texas 75063.

2. Respondent 7-Eleven, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its headquarters and principal place of business located at 3200 Hackberry Road, Irving, Texas 75063.

3. Respondent Marathon Petroleum Corporation 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 539 South Main Street, Findlay, Ohio 45840.

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

ORDER

I. Definitions

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

A. "7-Eleven" means Seven & i Holdings Co., Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Seven & i Holdings Co., Ltd., including Respondent 7-Eleven, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Marathon" means Marathon Petroleum Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, including Speedway LLC, divisions, groups, and affiliates controlled by Marathon Petroleum Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Acquirer" means:

1. Anabi Oil;

2. CrossAmerica Partners;

3. Jacksons Food Stores; or

4. Any other Person that acquires the Retail Fuel Assets pursuant to this Order.

E. "Acquisition" means the proposed acquisition described in the agreement titled "Purchase and Sales Agreement by and among Marathon Petroleum Corporation, The Entities Set Forth On Schedule I Hereto And 7-Eleven, Inc. Dated as of August 2, 2020."

F. "Acquisition Date" means the date Respondents consummate the Acquisition.

G. "7-Eleven Commission Franchise Location" means the Location at 1545 W. Ann Arbor Road, Plymouth, Michigan 48170.

H. "Anabi Oil" means Anabi Oil Corporation, a corporation organized, existing, and doing business under, and by virtue of the laws of California, with its office and principal place of business located at 1450 N. Benson Avenue, Upland, California 91786.

I. "Anabi Oil Divestiture Agreement" means the Asset Purchase Agreement by and between 7-Eleven, Inc., the Speedway Subsidiary Sellers, and Anabi Real Estate Development, LLC, FL Sonshine, Inc. and Midwest Convenience, Inc., dated as of March 15, 2021, and all amendments, exhibits, attachments, agreements (including agreements to provide Transitional Assistance), and schedules thereto, attached to this Order as Nonpublic Appendix I.

J. "Asset Maintenance Manager" means any Person designated pursuant to Section VI of this Order and Section II of the Order to Maintain Assets.

K. "Asset Maintenance Period" means the period from the Acquisition Date until one day after all Retail Fuel Assets have been divested to all Acquirers pursuant to Section II or Section IX and transferred to all Acquirers.

L. "Business Information" means books, records, data, and information, wherever located and however stored, used in the operation of the Retail Fuel Business relating to the Retail Fuel Assets, including documents, written information, graphic materials, and data and information in electronic format, along with the knowledge of employees, contractors, and representatives. Business Information includes books, records, information, and data relating to sales, marketing, logistics, products and SKUs, pricing, promotions, advertising, personnel, accounting, business strategy, information technology systems, customers, suppliers, vendors, research and development, Equipment, operations, and all other information used in the operation of the Retail Fuel Business relating to the Retail Fuel Assets.

M. "Confidential Information" means all Business Information not in the public domain, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.

N. "Consent" means an approval, consent, ratification, wavier or other authorization.

O. "Contract" means an 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.

P. "CrossAmerica Partners" means CrossAmerica Partners, LP a limited partnership organized, existing, and doing business under, and by virtue of the laws of Delaware, with its office and principal place of business located at 600 Hamilton Street, Suite 500, Allentown, Pennsylvania 18101.

Q. "CrossAmerica Partners Divestiture Agreement" means the Asset Purchase Agreement by and among 7-Eleven, Inc., Speedway Subsidiary Sellers, CAPL JKM Partners LLC, Joe's Kwik Marts LLC, CAPL JKM Realty Holdings LLC, and CAPL JKM Wholesale LLC, and all amendments, exhibits, attachments, agreements (including agreements to provide Transitional Assistance), and schedules thereto, attached to this Order as Nonpublic Appendix II.

R. "Direct Cost" means the cost of labor, materials, travel, and other expenditures directly incurred. The cost of any labor included in Direct Cost shall not exceed the hours of labor provided times the then-current average hourly wage rate, including benefits, for the employee providing such labor; *provided, however,* that with respect to the transitional supply of Fuel Products, Fuel Products Cost shall be calculated net of any rebates, Renewable Identification Number sharing, or other discounts or allowances and shall not include any mark-up, profit, overhead, minimum volume penalties, or other upward adjustments by Respondents.

S. "Divestiture Agreements" means:

1. Anabi Oil Divestiture Agreement;

2. CrossAmerica Partners Divestiture Agreement;

3. Jacksons Food Stores Divestiture Agreement; or

4. Any agreement between Respondents (or a Divestiture Trustee appointed pursuant to Section IX of this Order) and an Acquirer to purchase the Retail Fuel Assets, and all amendments, exhibits, attachments, agreements, and schedules thereto.

T. "Divestiture Date" means the closing date of any Retail Fuel Asset by a particular Acquirer as required by this Order.

U. "Divestiture Pricing Information" means any information considered in determining the Fuel Products retail price, including all final posted prices, at Locations identified in Appendices IV, V, and VI, the Marysville Location, Lancaster Location, and Reno Location.

V. "Divestiture Pricing Team" means the Asset Maintenance Manager and any employee(s) who are designated by Respondents to be solely, officially, and directly responsible for overseeing, establishing, setting, or changing the retail prices of Fuel Products at the Locations identified in Appendices IV, V, and VI, the Marysville Location, Lancaster Location, and Reno Location. The Divestiture Pricing Team initially includes those Persons identified in Appendix XIII.

W. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Section IX of this Order.

X. "Employee Information" means to the extent permitted by law, the following information summarizing the employment history of each employee that includes:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The employee's base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondent's last fiscal year, and current target or guaranteed bonus, if any;

5. Written performance reviews for the past three years, if any;

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

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

Y. "EMV Compliance" means compliance with the current standards and practices related to payment card chip technology at fuel dispensers promulgated or endorsed by the EMVCo.

Z. "Equipment" means all tangible personal property (other than Inventories) of every kind owned or leased by Respondents in connection with the operation of the Retail Fuel Business, including, but not limited to all: fixtures, furniture, computer equipment and third-party software, office equipment, telephone systems, security systems, registers, credit card systems, credit card invoice printers and electronic point of sale devices, money order machines and money order stock, shelving, display racks, walk-in boxes, furnishings, signage, canopies, fuel dispensing equipment, UST systems (including all fuel storage tanks, fill holes and fill hole covers and tops, pipelines, vapor lines, pumps, hoses, Stage I and Stage II vapor recovery equipment, containment devices, monitoring equipment, cathodic protection systems, and other elements associated with any of the foregoing), parts, tools, supplies, and all other items of equipment or tangible personal property of any nature or other systems used in the operation of the Retail Fuel Business at the Locations, together with any express or implied warranty by the manufacturers or

sellers or lessors of any item or component part, to the extent such warranty is transferrable, and all maintenance records and other related documents.

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

BB. "Governmental Authorization" means a 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.

CC. "Group A Locations" means the Locations identified in Appendix IV of this Order.

DD. "Group B Locations" means the Locations identified in Appendix V of this Order.

EE. "Group C Locations" means the Locations identified in Appendix VI of this Order.

FF. "Intellectual Property" means all intellectual property, including commercial names, assumed fictional business names, trade names, "doing business as" (d/b/a names), registered and unregistered trademarks, service marks and applications, and trade dress; patents, patent applications and inventions and discoveries that may be patentable; registered and unregistered copyrights in both published works and unpublished works; know-how, trade secrets, confidential or proprietary information, customer lists, software, technical information, data, process technology, plans, drawings, and blue prints; and rights in internet web sites and internet domain names presently used.

GG. "Inventories" means all inventories of every kind and nature held for retail sale associated with the Retail Fuel Assets, including: (1) all Fuel Products, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public; and (2) all usable, non-damaged and non-out-of-date products and items held for sale to the public, including, without limitation, all food-related items requiring further processing, packaging, or preparation and ingredients from which prepared foods are made to be sold.

HH. "Jacksons Food Stores" means Jacksons Food Stores, Inc. a corporation organized, existing, and doing business under, and by virtue of the laws of Nevada, with its office and principal place of business located at 3450 Commercial Ct., Meridian, Idaho 83642.

II. "Jacksons Food Stores Divestiture Agreement" means the Asset Purchase Agreement by and between 7-Eleven, Inc., the Speedway Subsidiary Sellers and Jacksons Food Stores, Inc. dated as of March 17, 2021, and all amendments, exhibits, attachments, agreements (including agreements to provide Transitional Assistance), and schedules thereto, attached to this Order as Nonpublic Appendix III.

JJ. "Lancaster Location" means the Location at 1711 E Avenue J, Lancaster California 93535.

KK. "Leased Locations 1" means the Locations identified in Nonpublic Appendix XI.

LL. "Leased Location 2" means the Location identified on Nonpublic Appendix XII.

MM. "Location" means any existing retail facility engaged in the activities of the Retail Fuel Business.

NN. "Marysville Location" means the Location at 8820 Quil Ceda Boulevard, Marysville, Washington 98271.

OO. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to this Order or the Order to Maintain Assets.

PP. "Non-Divestiture Pricing Information" means any information considered in determining the Fuel Products retail price, including all final posted prices, at Locations other than the Locations identified in Appendices IV, V, and VI, the Marysville Location, Lancaster Location, and Reno Location.

QQ. "Orders" means this Order and the Order to Maintain Assets entered in this action.

RR. "PCI Compliance" means compliance with the current standards and practices promulgated or endorsed by the PCI Security Standards Council.

SS. "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.

TT. "Prior Notice Location" means the Locations identified in Nonpublic Appendix VIII of this Order.

UU. "Relevant Employee" means full-time employees, part-time employees, or contract employees, who were (1) employed by or under contract with Respondent Marathon at any time during the 90 days preceding the Acquisition Date or at any time after the Acquisition Date, and whose duties relate or related to operating the Retail Fuel Business at the Locations identified in Appendices IV, V, and VI, including store-level employees district managers, regional manager, and above store-level employees relating to sales, marketing, promotions, pricing, maintenance, repairs, and back-office functions; *provided, however,* Relevant Employee for this subparagraph does not include Speedway's employees identified in Nonpublic Appendix IX to this Order; and (2) store-level employees employed by or under contract with Respondent 7-Eleven at any time during the 90 days preceding the Acquisition Date or any time after the Acquisition Date and whose

duties relate exclusively to any divested Location that was under Respondent 7-Eleven's control prior to the Acquisition Date.

VV. "Reno Location" means the Location at 99 Damonte Ranch Parkway, Reno, Nevada, 89521.

WW. "Retail Fuel Assets" means all of Respondents' right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, used in, or relating to the Retail Fuel Business operated at (x) Locations identified in Appendices IV, V, and VI, and (y) as applicable pursuant to Paragraphs II.E or II.F, Substitute Locations identified in Appendix VII, of this Order, including:

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 Equipment, including any Equipment removed from the Location since the date of the announcement of the Acquisition and not replaced;

3. All Inventories;

4. All accounts receivable;

5. All Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;

6. All Governmental Authorizations and all pending applications therefor or renewals thereof, to the extent transferable;

7. All Business Information; and

8. All intangible rights and property, including going concern value, goodwill, and telephone listings.

Provided, however, that Retail Fuel Assets shall not include any Locations identified in Appendices IV, V, and VI for which the corresponding Substitute Location identified in Appendix VII is divested;

Provided, further, however, that the Retail Fuel Assets need not include the Retained Assets or (i) corporate or regional offices, and (ii) trade secrets, trade names, and trademarks used corporate-wide.

XX. "Retail Fuel Business" means all business activities conducted by Respondents prior to the Acquisition Date including the (1) retail sale of Fuel Products, and (2) the operation of any associated convenience store and other business or service.

YY. "Retained Assets" means:

1. Intellectual Property;

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

3. Enterprise software that Respondents used primarily to manage and account for businesses other than the relevant business to be divested;

4. Any tax asset relating to (a) the Retail Fuel Assets for pre-Divestiture Date tax periods or (b) any tax liability for which any Respondent is responsible;

5. All accounts receivable, notes receivable, rebates receivable and other miscellaneous receivables of any Respondent that arise out of the operation of the Retail Fuel Business relating to the Retail Fuel Assets prior to the Divestiture Date; and

6. Assets identified in Nonpublic Appendix X to this Order

ZZ. "Site Operator" means a Person who enters into an agreement with an Acquirer to operate the convenience store and related businesses and services associated with a Location.

AAA. "Specified State" means California and Florida.

BBB. "Substitute Location" means one or more 7-Eleven Locations identified in Appendix VII corresponding to a Speedway Location.

CCC. "Transitional Assistance" means technical services, personnel, assistance, training, the supply of Fuel Product, and other logistical, administrative, and other transitional support as required by an Acquirer or Site Operator to facilitate the transfer of the Retail Fuel Assets from the Respondents to the Acquirer or Site Operator, including, but not limited to, services, training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, information technology and systems, maintenance and repair of facilities and equipment, Fuel Products supply, purchasing, quality control, R&D support, technology transfer, use of Respondents' brands for transitional purposes, operating permits and licenses, regulatory

compliance, PCI Compliance, EMV Compliance, sales and marketing, customer service, and supply chain management and customer transfer logistics.

II. Divestiture

IT IS FURTHER ORDERED that:

A. Pursuant to the scheduled Divestiture Dates submitted under Paragraph XI.A.1., Respondents shall:

1. Divest the Retail Fuel Assets related to the Group A Locations, as ongoing Retail Fuel Businesses, absolutely and in good faith, to Anabi Oil as follows:

   a. Within 90 days of the Acquisition Date, no fewer than 20 percent of the total number of Group A Locations;

   b. Within 120 days of the Acquisition Date, no fewer than an additional 20 percent of the total number of Group A Locations;

   c. Within 150 days of the Acquisition Date, no fewer than an additional 20 percent of the total number of Group A Locations; and

   d. Within 180 days of the Acquisition Date, all the Group A Locations;

2. Divest the Retail Fuel Assets related to the Group B Locations, as ongoing Retail Fuel Businesses, absolutely and in good faith, to CrossAmerica Partners as follows:

   a. Within 90 days of the Acquisition Date, no fewer than 20 percent of the total number of Group B Locations;

   b. Within 120 days of the Acquisition Date, no fewer than an additional 20 percent of the total number of Group B Locations;

   c. Within 150 days of the Acquisition Date, no fewer than an additional 20 percent of the total number of Group B Locations; and

   d. Within 180 days of the Acquisition Date, all the Group B Locations;

3. Divest the Retail Fuel Assets related to the Group C Locations, as ongoing Retail Fuel Businesses, absolutely and in good faith, to Jacksons Food Stores as follows:

a. Within 90 days of the Acquisition Date, no fewer than 20 percent of the total number of Group C Locations;

b. Within 120 days of the Acquisition Date, no fewer than an additional 20 percent of the total number of Group C Locations;

c. Within 150 days of the Acquisition Date, no fewer than an additional 20 percent of the total number of Group C Locations; and

d. Within 180 days of the Acquisition Date, all the Group C Locations.

Provided, however, that, if within 12 months after issuing this Order, the Commission determines, in consultation with the Acquirer and the Monitor, the Acquirer needs one or more Retained Assets to operate the Retail Fuel Assets in a manner that achieves the purposes of this Order, Respondents shall divest, absolutely and in good faith, such needed Retained Assets to the Acquirer;

Provided, further, however, that if Business Information includes information (i) that also relates to other retained businesses of Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Retail Fuel Assets or (ii) where Respondents have a legal obligation to retain the original copies, then Respondents shall provide only copies of the materials containing such information with appropriate redactions to the Acquirer and shall provide the Acquirer access to the original materials if copies are insufficient for regulatory or evidentiary purposes;

Provided, further, however, if an Acquirer has not obtained Governmental Authorizations and is not able to operate under Respondents' Governmental Authorizations pursuant to Paragraph II.C, at the request of the Acquirer, Respondents shall request that the Assistant Director of the Compliance Division of the Bureau of Competition grant a 30-day extension of time to divest the Retail Fuel Assets relating to the relevant Location(s) and the Assistant Director may grant such request no more than three times for any Location.

B. If Respondents have divested the Retail Fuel Assets to an Acquirer prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. An Acquirer is not an acceptable purchaser of the relevant Retail Fuel Assets, then Respondents shall rescind the divestiture to that Acquirer within 5 days of notification, and shall divest the relevant Retail Fuel Assets no later than 180 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture to an Acquirer was accomplished is not acceptable, and the Commission may direct Respondents, or appoint a Divestiture Trustee, to modify the manner of divestiture of the relevant Retail Fuel Assets as the Commission may determine is necessary to satisfy the requirements of this Order.

C. Respondents shall obtain, no later than the Divestiture Date for the particular Retail Fuel Assets divested on that particular Divestiture Date and at their sole expense, all Consents from third parties and all Governmental Authorizations that are necessary to effect the complete transfer and divestiture of those Retail Fuel Assets on such Divestiture Date to the Acquirer and for that Acquirer to operate any aspect of the relevant Retail Fuel Business.

Provided, however, that if Respondent 7-Eleven is unable to obtain the necessary landlord Consent for one or more Speedway Locations identified in Appendix VII, Respondent shall: (i) in consultation with the Monitor and Commission staff, substitute the corresponding Substitute Location, and (ii) divest the corresponding Retail Fuel Assets, as an ongoing Retail Fuel Business, to the respective Acquirer pursuant to Paragraph II.A no later than 15 days after receipt of written notification from the Commission or its staff directing such divestiture if it has not already occurred;

Provided, further, however, that Respondents may satisfy the requirement to obtain all Consents from third parties by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant third party that are acceptable to the Commission, or has otherwise obtained all necessary Consents and waivers; and

Provided, further, however, that with respect to any Governmental Authorizations that are not transferable, Respondents shall, to the extent permitted under applicable law, allow each Acquirer and Site Operator to operate the Retail Fuel Business at the relevant Location under Respondents' Governmental Authorizations pending the Acquirer's, or the Site Operator's, receipt of its own Governmental Authorizations, and Respondents shall provide such assistance as each Acquirer or each Site Operator may reasonably request in connection with its efforts to obtain such Governmental Authorizations.

D. Within 60 days of the Acquisition Date, in consultation with the respective Acquirer and the Monitor, and with the agreement of the respective Acquirer, Respondents shall obtain, at their sole expense and:

1. On customary market terms, and consistent with past practices Contracts providing an additional leasehold interest in Leased Locations 1; and

2. On terms and conditions no less favorable than current terms and conditions for such Location, a Contract providing no less than an additional 11 month leasehold interest in Leased Location 2.

Provided, however, that if Respondent 7-Eleven is unable to obtain the necessary Contract for one or more Leased Locations identified in Appendix VII, at the Acquirer's option, Respondent shall: (i) in consultation with the Monitor and Commission staff, substitute the corresponding Substitute Location, and (ii) divest the corresponding Retail Fuel Assets to the respective Acquirer pursuant to Paragraph II.A no later than 15 days after receipt of written notification from the Commission or its staff directing such divestiture if it has not already occurred.

E. Respondent 7-Eleven shall not hold a leasehold interest or operate a retail fuel business at:

1. The Lancaster Location after January 30, 2022;

2. The Marysville Location after November 28, 2021; and

3. The Reno Location after September 30, 2021.

F. Respondents shall assist each potential Acquirer to conduct a due diligence investigation of the Retail Fuel Assets such Acquirer seeks to purchase, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process, and affording each Acquirer and its representatives (including prospective lenders and their representatives) full and free access, during regular business hours, to the personnel, assets, Contracts, Governmental Authorizations, Business Information, with such rights of access to be exercised in a manner that does not unreasonably interfere with the operations of Respondents.

G. At the request of the Acquirer, Respondents shall petition the Commission for an extension of time to divest the Retail Fuel Assets.

III. Divestiture Agreements

IT IS FURTHER ORDERED that:

A. The Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of the Divestiture Agreements shall constitute a violation of this Order; *provided, however,* that the Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreements varies from or conflicts with any provision in this Order such that Respondents cannot fully comply with both, Respondents shall comply with this Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreements 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).

IV. Transition Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information and divested all Retail Fuel Assets to the relevant Acquirer, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the relevant Acquirer with access to that Business Information (wherever located and however stored) that Respondents have not yet transferred to the relevant Acquirer, and to employees who possess the records and information.

B. At the option of an Acquirer, Respondents shall provide the Acquirer with Transitional Assistance sufficient to (1) transfer efficiently the Retail Fuel Assets to the Acquirer and (2) allow the Acquirer and Site Operator, if applicable, to operate the Retail Fuel Business with the related Retail Fuel Assets at each Location in a manner that is equivalent in all material respects to the manner in which Respondents did so prior to the Acquisition.

C. Respondents shall provide Transitional Assistance:

1. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost;

3. For a period sufficient to meet the requirements of Section IV; and

4. Which shall be, at the option of each Acquirer, for up to 12 months after the last Divestiture Date for that Acquirer; *provided, however,* that within 15 days after a request by the Acquirer, Respondent 7-Eleven shall file with the Commission a request for prior approval to extend the term for providing Transitional Assistance as the Acquirer requests in order to achieve the purposes of this Order.

D. Respondents shall allow each Acquirer to terminate, in whole or part, any Transitional Assistance of a Divestiture Agreement or otherwise agreed upon pursuant to Paragraph IV.C.1 upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transitional Assistance due to a breach by the Acquirer of a Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondent's breach of the Divestiture Agreement.

V. Employees

IT IS FURTHER ORDERED that:

A. Until one year after the last Divestiture Date for each Acquirer, Respondents shall cooperate with and assist each Acquirer to evaluate independently and offer employment to any Relevant Employee.

B. Until 90 days after the last Divestiture Date for each Acquirer, Respondents shall:

1. No later than 10 days after a request from an Acquirer, provide a list of the requested Relevant Employees and provide Employee Information for each;

2. No later than 10 days after a request from an Acquirer, provide an opportunity to privately interview any of the Relevant Employees outside the presence or hearing of any employee or agent of any Respondent, and to make offers of employment to any of the Relevant Employees;

3. Remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with an Acquirer, including removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to an Relevant Employee who receives an offer of employment from the Acquirer; provided, however, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Relevant Employees with all employee benefits offered by Respondents, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all benefits;

5. Provide reasonable financial incentives to encourage Relevant Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Relevant Employees by an Acquirer; and

6. Not interfere, directly or indirectly, with the hiring, recruiting, or employing by an Acquirer of any Relevant Employee, including not offering any incentive to such employees to decline employment with an Acquirer.

C. Respondents shall not:

1. For a period of 90 days after the last Divestiture Date for each Acquirer, directly or indirectly, solicit or otherwise attempt to induce any Person employed at the store level by that Acquirer to terminate his or her employment with the Acquirer; and

2. For a period of 180 days after the last Divestiture Date for each Acquirer, directly or indirectly, solicit or otherwise attempt to induce any Person employed above the store level by that Acquirer to terminate his or her employment with the Acquirer.

Provided, however, Respondents may (i) hire any such Person whose employment has been terminated by the Acquirer; (ii) advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Person employed by the Acquirer; or (iii) hire a Person who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section V.

D. To the extent that Relevant Employees are store-level employees, Site Operators shall have the same rights and access afforded to the Acquirer under Section V.

E. Respondent 7-Eleven shall not enforce any noncompete provision or noncompete agreement against any Person seeking employment from or otherwise doing business with any Retail Fuel Assets.

VI. Asset Maintenance

IT IS FURTHER ORDERED that:

A. Prior to the Acquisition Date, Respondent Marathon shall designate Gary Michniewicz, Division Director, Speedway LLC, as the Asset Maintenance Manager.

1. During the Asset Maintenance Period, the Asset Maintenance Manager, in consultation with and overseen by the Monitor, shall:

a. Oversee the operations of the Retail Fuel Business relating to the Retail Fuel Assets to ensure that the requirements of Paragraph VI.B of this Order are met;

b. Oversee the Divestiture Pricing Team to ensure that the requirements of Paragraph VII.D of this Order are met; and

c. Facilitate the transfer of the Retail Fuel Assets to the Acquirers.

2. The Asset Maintenance Manager shall serve during the Asset Maintenance Period and shall have no duties related to any other businesses other than the Retail Fuel Business related to the Retail Fuel Assets during the Asset Maintenance Period.

3. The Asset Maintenance Manager shall report directly and exclusively to the Monitor.

4. Respondents shall indemnify the Asset Maintenance Manager and hold him or her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Asset Maintenance Manager'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 either the Asset Maintenance Manager's malfeasance, gross negligence, willful or wanton acts, or bad faith.

5. If Mr. Michniewicz resigns or the Commission staff, in consultation with the Monitor, determines that he has ceased to act, has failed to act diligently, or is otherwise unable to continue serving in this role, Respondents, within 5 days of receipt of written notice of such determination and in consultation with Commission staff and the Monitor, shall designate a substitute Asset Maintenance Manager.

B. During the Asset Maintenance Period, Respondents shall, subject to legal and regulatory requirements:

1. Operate the Retail Fuel Business relating to the Retail Fuel Assets in the ordinary course of business consistent with past practices and take all actions necessary to maintain the full economic viability, marketability, and competitiveness of such Retail Fuel Business;

2. Prevent the destruction, removal, wasting, deterioration, closing, or impairment (other than as a result of ordinary wear and tear) of the Retail Fuel Assets, including:

a. Maintaining, repairing, and replacing any Equipment to the extent and in a manner consistent with past practices;

b. Maintaining Inventory levels in a manner consistent with past practices;

c. Not terminating, canceling, renewing, or amending any Contract, except as consistent with past practices and as required by Paragraph II.D; and

d. Not entering any Contract that would restrain or restrict the ability of the Acquirers to compete against Respondents;

3. Make any payment required to be paid under any contract or lease when due, and otherwise satisfy all liabilities and obligations associated with the Retail Fuel Assets;

4. Provide the Retail Fuel Business relating to the Retail Fuel Assets with sufficient funds to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on at least at their scheduled pace all capital projects, business plans, development projects, promotional activities, and marketing activities;

5. Provide resources as may be necessary to respond to competition against the Retail Fuel Business relating to the Retail Fuel Assets, prevent diminution in sales of such Retail Fuel Business, and maintain the competitive strength of such Retail Fuel Business;

6. Not reduce operating hours;

7. Not reduce, change, or modify in any material respect, the level of marketing, promotional, pricing, or advertising practices, programs, and policies for the Retail Fuel Business related to the Retail Fuel Assets, other than changes in the ordinary course of business consistent with changes made at Respondents' other businesses that Respondents will not divest;

8. Not target, encourage, or convert customers of the Retail Fuel Business relating to the Retail Fuel Assets to become customers of Respondents' other businesses that will not be divested; provided, however, that nothing in this subparagraph shall prevent Respondents from engaging in advertising, marketing, and promotion activities: (i) generally applicable to all of Respondent businesses, or (ii) in the ordinary course of business and in accordance with past practice;

9. Provide support services at levels customarily provided by Respondents;

10. Maintain all licenses, permits, approvals, authorizations, or certifications related to or necessary for the operation of the Retail Fuel Business relating to the Retail Fuel Assets, and otherwise operate such Retail Fuel Business in accordance and compliance with all regulatory obligations and requirements;

11. Not sell, transfer, encumber, or otherwise impair the Retail Fuel Assets (other than in the manner prescribed in the Orders;

12. Not take any action that lessens the full economic viability, marketability, or competitiveness of the Retail Fuel Assets;

13. Not terminate the operations of the Retail Fuel Business relating to the Retail Fuel Assets;

14. Preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, Site Operators, and others having business relationships with the Retail Fuel Business relating to the Retail Fuel Assets;

15. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Retail Fuel Business relating to the Retail Fuel Assets, including:

    a. Continuing to provide each member of the Divestiture Pricing Team with all employee benefits offered by Respondents, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all benefits;

    b. Providing reasonable financial incentives to encourage each member of the Divestiture Pricing Team to continue in their positions until the end of the Asset Maintenance Period, and as may be necessary, to facilitate their employment by an Acquirer;

    c. When vacancies occur, replacing the employees in the regular and ordinary course of business, in accordance with past practice; and

    d. Not transferring any employees from the Retail Fuel Business relating to the Retail Fuel Assets to any of Respondents' assets or businesses that Respondents will not divest.

    Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Retail Fuel Assets and consistent with the purposes of the Orders.

VII. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall not (x) disclose (including to Respondents' employees) or (y) use for any reason or purpose, any Confidential Information received or maintained by Respondents; *provided, however,* that Respondents may disclose or use such Confidential Information in the course of:

1. Performing its obligations or as permitted under the Orders or any Divestiture Agreement; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Retail Fuel Assets or any Retail Fuel Business, or as required by law or regulation, including any applicable securities exchange rules or regulations.

B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Section VII, Respondents shall limit such disclosure or use (1) only to the extent such information is required; (2) only to those employees or Persons who require such information for the purposes permitted under Paragraph VII.A; and (3) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of Section VII and take necessary actions to ensure that their employees and other Persons comply with the terms of Section VII, including implementing access and data controls, training its employees, and other actions that Respondents would take to protect their own trade secrets and proprietary information.

D. No later than the Acquisition Date and until the last divestiture to an Acquirer pursuant to Section II and Section IX, Respondents shall:

1. Establish a Divestiture Pricing Team responsible for the retail fuel pricing for each of the Locations identified in Appendices IV, V, and VI, the Marysville Location, Lancaster Location, and the Reno Location, and obtain approval of the Monitor and Commission staff before changing or reducing the number of members of the Divestiture Pricing Team, once established pursuant to this Paragraph VI.D.1;

2. Institute all measures and take all actions as are necessary and appropriate to prevent the direct or indirect access to or disclosure or use of any Divestiture Pricing Information by anyone other than Divestiture Pricing Team, except as is expressly permitted or required by the Orders;

3. Institute all measures and take all actions as are necessary and appropriate to prevent the direct or indirect access to or disclosure or use of any Non-Divestiture Pricing Information by the Divestiture Pricing Team; and

4. As part of the procedures and requirements described in Paragraph VII.D of this Order, Respondents shall:

   a. No later than the Acquisition Date, require the Divestiture Pricing Team and any other Person who may receive Non-Divestiture Pricing Information to sign an appropriate non-disclosure agreement agreeing to comply with the prohibitions and confidentiality requirements of this Order;

   b. Require compliance with this Order and take appropriate action in the event of non-compliant access, use, or disclosure of Divestiture Pricing Information and Non-Divestiture Pricing Information in violation of this Order;

   c. Distribute guidance and provide training regarding the procedures to all Persons referenced in Paragraph VII.D.4.a of this Order; and

   d. Institute all necessary information technology procedures, authorizations, protocols, and any other controls necessary to comply with this Order's prohibitions and requirements.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints The Claro Group, LLC as the Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

B. The Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

   1. Shall be subject to the approval of the Commission;

   2. Shall not limit, and the signatories shall not construe it to limit, the terms of Section VIII of this Order or the Section relating to the Monitor in the Order to Maintain Assets ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with the Orders 30 days after the Order to Maintain Assets is issued, 30 days after this Order is issued, and every 60 days thereafter until Respondents have complied fully with Sections II, IV, and VI of this Order and at any other time requested by the staff of the Commission; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, VI, and files a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Paragraphs of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents who:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VIII.B; or (b) receives Commission approval.

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.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture 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 IX.A shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

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

C. Not later than 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 divestitures required by this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Section IX, 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 year from the date the Commission approves the trustee trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures 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 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 divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures 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 best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to Acquirers that receive the prior approval of the Commission as required by this Order;

provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, 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 5 days of receiving notification of the Commission's approval;

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

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

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

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

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

provided, however, 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 Section IX of this Order.

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 divestitures and other obligations or action required by this Order.

X. Prior Approval and Prior Notice

IT IS FURTHER ORDERED that:

A. For a period of 5 years from the date this Order is issued, Respondent 7-Eleven shall not, without prior approval of the Commission, acquire directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, commission franchise interest, or any other interest, in whole or in part, in the Retail Fuel Assets and the 7-Eleven Commission Franchise Location.

B. Respondent 7-Eleven shall not, without providing advance written notification to the Commission ("Notification"):

1. Acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in the Retail Fuel Assets or any concern, corporate or non-corporate, or in any

assets engaged in the sale of Fuel Products at a Prior Notice Location, provided however, prior notification shall not be required by this Paragraph X.B.1 for a transaction for which approval is required to be made, and has been made, pursuant to Paragraph X.A; or

2. Enter into any contract with any concern, corporate or non-corporate, engaged in the sale of Fuel Products at a Prior Notice Location in which Respondents will control the retail price of such products.

C. The Notification shall:

1. Be provided on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of the Respondent 7-Eleven and not of any other party to the transaction;

2. Include a description of the proposed acquisition and provide:

a. A map showing all retail fuel outlets by ownership (e.g., OPIS Corporate Brand) within 5 driving miles of the relevant Prior Notice Location;

b. For each retail fuel outlet owned by Respondent 7-Eleven that is located within 5 driving miles of the relevant Prior Notice Location, a list of the retail fuel outlets that Respondent 7-Eleven monitored at any time within the preceding 12 month period (to the extent such information is available); and

c. Respondent 7-Eleven's pricing strategy in relation to each monitored retail fuel outlet identified in response to Paragraph X.C.2.b of this Order.

3. Provide the Notification to the Commission at least 30 days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). Further, if, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent 7-Eleven shall not consummate the transaction until 30 days after submitting such additional information or documentary material.

4. Early termination of the waiting periods in Section X may be requested and, where appropriate, granted by letter from the Bureau of Competition, *provided, however,* that prior notification shall not be required by Section X for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

5. If related to a geographic area located within a Specified State, Respondent 7-Eleven shall provide a copy of each Notification described in Section X to the relevant Attorney General's Office for the Specified State at the same time that such Notification is transmitted to the Commission.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Within 60 days of the Acquisition Date, submit a schedule of anticipated Divestiture Dates by Location that has received prior written approval by the relevant Acquirer, and within 5 days of modifying any anticipated Divestiture Date, submit the modified divestiture schedule.

2. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and of each Divestiture Date no later than 5 days after the occurrence of each; and

3. Submit each complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the last Divestiture Date for each Acquirer.

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

1. Respondents shall submit:

a. Interim Compliance Reports 30 days after this Order is issued, and every 60 days thereafter until Respondents have complied fully with Sections II, IV, and VI of this Order;

b. Annual Compliance Reports one year after the date this Order is issued, and annually thereafter for the next 9 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 contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order. Conclusory statements that Respondents have complied with their obligations under this Order are insufficient. Respondents shall include in their Compliance Reports, among other information or documentation that may be necessary to demonstrate compliance:

   a. A full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each Section of this Order; and

   b. Until 60 days after the last Divestiture Date, a full description of the steps Respondents took to comply with Section VI and Section VII since the last interim Compliance Report;

3. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in each Compliance Report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent's obligations under this Order during the period covered by such Compliance Report. Respondent shall provide copies of these documents to Commission staff upon request.

4. Each Respondent shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent shall file its Compliance Reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a). 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 Respondent Marathon's reporting obligations under Section XI shall cease once it has completed its obligations under Sections II, IV and VI of this Order.

XII. Change in Respondent

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

A. The proposed dissolution of Seven & i Holdings Co., Ltd., 7-Eleven, Inc., or Marathon Petroleum Corporation, respectively;

B. The proposed acquisition, merger or consolidation of Seven & i Holdings Co., Ltd., 7-Eleven, Inc., or Marathon Petroleum Corporation, respectively; or

C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XIII. Access

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; or

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

XIV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to ensure the continued use of the Retail Fuel Assets in the same Retail Fuel Business in which such assets were engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate November 8, 2031.

By the Commission, Chair Khan not participating.

NONPUBLIC APPENDIX I

Anabi Oil Divestiture Agreement

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

NONPUBLIC APPENDIX II

CrossAmerica Partners Divestiture Agreement

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

NONPUBLIC APPENDIX III

Jacksons Food Stores Divestiture Agreement

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

APPENDIX IV

GROUP A LOCATIONS — Anabi Oil

Site Owner	Site No.	Address	City	State
Speedway	1411	1300 West Normantown Road	Romeoville	IL
Speedway	1423	570 East Laraway Road	New Lenox	IL
Speedway	1960	543 Amherst St	Nashua	NH
Speedway	1962	66 Nashua Rd	Londonderry	NH
Speedway	2205	22855 Huron River Drive	Rockwood	MI

Site Owner	Site No.	Address	City	State
Speedway	2431	700 Central St.	Leominster	MA
Speedway	2909	6999 Clairton Road	West Mifflin	PA
Speedway	2920	135 Lindsay Rd	Zelienople	PA
Speedway	3320	18501 Nottingham Road	Cleveland	OH
Speedway	3345	6073 Mayfield Road	Mayfield Height	OH
Speedway	3346	230 Richmond Road	Richmond Heights	OH
Speedway	3376	6885 Center Street	Mentor	OH
Speedway	3623	2827 Lexington Avenue	Lexington	OH
Speedway	3680	1045 Graham Road	Stow	OH
Speedway	3686	4969 Fishcreek Road	Stow	OH
Speedway	3694	21043 Royalton Road	Strongsville	OH
Speedway	3944	1322 E Main St	Salem	WV
Speedway	3998	4189 State Route 306	Willoughby	OH
Speedway	4251	1021 North Rand Road	Prospect Heights	IL
Speedway	4333	2110 Orchard Road	Montgomery	IL
Speedway	4611	8716 Ogden Avenue	Lyons	IL
Speedway	4646	101 Lee Highway	Verona	VA
Speedway	5160	3200 Us Highway 20 E	Elkhart	IN
Speedway	5165	2106 West Lexington Avenue	Elkhart	IN
Speedway	5338	421 West Wise Road	Schaumburg	IL
Speedway	5499	18601 Hall Road	Clinton Township	MI
Speedway	5548	1449 Mishawaka Avenue	South Bend	IN
Speedway	6086	3200 S Nappanee St	Elkhart	IN
Speedway	6410	14690 Metro Pkwy.	Fort Myers	FL
Speedway	6411	3701 E Busch Blvd.	Tampa	FL
Speedway	6413	5426 Little Rd	New Port Richey	FL
Speedway	6416	2655 S Kirkman Rd	Orlando	FL
Speedway	6419	2294 E Irlo Bronson Memorial Hwy	Kissimmee	FL
Speedway	6422	5551 Lee Blvd	Lehigh Acres	FL
Speedway	6425	3200 S John Young Pkwy	Kissimmee	FL
Speedway	6427	17951 N Tamiami Trl	North Fort Myers	FL
Speedway	6428	19600 Pines Blvd	Pembroke Pines	FL
Speedway	6439	7550 Nw 186th St	Miami	FL
Speedway	6440	11425 W Hillsborough Ave	Tampa	FL
Speedway	6453	3300 N Andrews Ave.	Oakland Park	FL
Speedway	6454	4200 Peters Rd	Fort Lauderdale	FL
Speedway	6456	621 W Broward Blvd	Fort Lauderdale	FL
Speedway	6460	5801 Johnson St.	Hollywood	FL
Speedway	6462	2710 Maguire Rd	Ocoee	FL
Speedway	6463	10544 Park Blvd.	Seminole	FL

Site Owner	Site No.	Address	City	State
Speedway	6467	20901 NW 2nd Ave.	Miami Gardens	FL
Speedway	6471	2515 W Sample Rd.	Deerfield Beach	FL
Speedway	6475	9281 Daniels Pkwy	Fort Myers	FL
Speedway	6485	6601 S. Us Highway 1	Port St. Lucie	FL
Speedway	6491	5705 NW 167th St.	Hialeah	FL
Speedway	6493	13987 Walsingham Rd.	Largo	FL
Speedway	6496	2675 W International Speedway Blvd	Daytona Beach	FL
Speedway	6497	11615 Boyette Rd	Riverview	FL
Speedway	6498	4171 Tamiami Trail E	East Naples	FL
Speedway	6506	14624 S Military Trl	Delray Beach	FL
Speedway	6507	466 Blanding Blvd	Orange Park	FL
Speedway	6532	75 Broad St	Masaryktown	FL
Speedway	6537	7319 Plathe Rd	New Port Richey	FL
Speedway	6538	13508 State Route 54	Odessa	FL
Speedway	6553	2734 Palm Harbor Blvd	Palm Harbor	FL
Speedway	6554	1625 N Mcmullen Booth Rd	Clearwater	FL
Speedway	6555	2577 Harn Blvd	Clearwater	FL
Speedway	6556	2185 Drew St	Clearwater	FL
Speedway	6557	500 S Fort Harrison Ave	Clearwater	FL
Speedway	6563	11800 66Th St	Largo	FL
Speedway	6564	2698 Roosevelt Blvd.	Clearwater	FL
Speedway	6565	5798 Roosevelt Blvd	Clearwater	FL
Speedway	6567	2499 Palm Ridge Rd	Sanibel	FL
Speedway	6568	27001 Old 41 Road	Bonita Springs	FL
Speedway	6569	12030 Bonita Beach Rd Se	Bonita Springs	FL
Speedway	6570	28070 Quails Nest Ln	Bonita Springs	FL
Speedway	6571	2055 Pine Ridge Rd	Naples	FL
Speedway	6572	2100 Goodlette Rd N	Naples	FL
Speedway	6579	6300 Davis Blvd	Naples	FL
Speedway	6580	11655 Collier Blvd	Naples	FL
Speedway	6581	5100 Golden Gate Pkwy	Naples	FL
Speedway	6584	1020 Santa Barbara Blvd	Cape Coral	FL
Speedway	6585	1351 Homestead Rd N	Lehigh Acres	FL
Speedway	6593	2045 Murrell Rd	Rockledge	FL
Speedway	6594	5511 Clarcona Ocoee Rd	Orlando	FL
Speedway	6598	5975 State Road 7	Lake Worth	FL
Speedway	6645	5981 Turkey Lake Rd	Orlando	FL
Speedway	6648	4150 N State Road 7	Coral Springs	FL
Speedway	6649	700 S Nova Rd	Ormond Beach	FL
Speedway	6654	8275 N Wickham Rd	Melbourne	FL

Site Owner	Site No.	Address	City	State
Speedway	6664	410 East Vistula Street	Bristol	IN
Speedway	6683	2755 S Nappanee St	Elkhart	IN
Speedway	6855	13179 Us Highway 301 S	Riverview	FL
Speedway	6861	5980 S Jog Rd.	Lake Worth	FL
Speedway	6871	4287 Nw Federal Hwy	Jensen Beach	FL
Speedway	6876	8923 State Road 54	New Port Richey	FL
Speedway	6895	7900 World Center Dr	Orlando	FL
Speedway	6897	2885 University Pkwy	Sarasota	FL
Speedway	6904	4695 N University Dr.	Lauderhill	FL
Speedway	6909	3202 Daniels Rd	Winter Garden	FL
Speedway	6911	5149 Adamo Drive	Tampa	FL
Speedway	6912	16500 State Route 50	Clermont	FL
Speedway	7015	3920 Ridge Road	Highland	IN
Speedway	7542	352 South Bolingbrook Drive	Bolingbrook	IL
Speedway	7568	499 West Boughton Road	Bolingbrook	IL
Speedway	7576	1199 Elmhurst Road	Des Plaines	IL
Speedway	7658	776 Bedford Rd.	Bedford Hills	NY
Speedway	8329	5550 West 79th Street	Burbank	IL
Speedway	8338	9651 Kennedy Avenue	Highland	IN
Speedway	8529	302 Lincolnway West	Mishawaka	IN
Speedway	8531	2702 Mishawaka Avenue	South Bend	IN
Speedway	8715	1223 Broadway Street	Bay City	MI
Speedway	8727	18650 Hall Road	Clinton Township	MI
Speedway	8736	19985 W 130th St	North Royalton	OH
Speedway	8859	40500 Van Dyke Avenue	Sterling Heights	MI
Speedway	9200	3211 Murdoch Avenue	Parkersburg	WV
Speedway	9257	1606 Grand Central Avenue	Vienna	WV
Speedway	9293	25032 Us-119	Belfry	KY
Speedway	9303	1295 West Main Street	Kent	OH
Speedway	9351	2 Green Road	Charleston	WV
Speedway	9409	10615 South 700 East	Sandy	UT
Speedway	9431	502 East 2100 South	Salt Lake City	UT
Speedway	9439	7210 West 3500 South	Magna	UT
Speedway	9440	7746 Union Park Avenue	Sandy	UT
Speedway	9446	95 W. 10600 South	Sandy	UT
Speedway	9453	4408 Emerson Ave	Parkersburg	WV
Speedway	9794	8657 Elk River Rd N	Clendenin	WV
Speedway	9898	6125 Main St.	Williamsville	NY
7-Eleven	37225	13191 Reams Road	Windermere	FL

APPENDIX V

GROUP B LOCATIONS — Cross America Partners

Site Owner	Site No.	Address	City	State
Speedway	2413	453 Cooley St	Springfield	MA
Speedway	2418	231 Main St	North Reading	MA
Speedway	2456	123 Cambridge St.	Charlestown	MA
Speedway	2457	251 Everett Ave.	Chelsea	MA
Speedway	2460	251 E Central St	Franklin	MA
Speedway	2468	558 Pawtucket St.	Lowell	MA
Speedway	2479	41 Lee Burbank Hwy	Revere	MA
Speedway	2484	800 Gar Hwy.	Swansea	MA
Speedway	2493	219 Cambridge St.	Charlestown	MA
Speedway	2495	287 Prospect Street	Cambridge	MA
Speedway	2501	300 Merrimack St.	Lowell	MA
Speedway	2818	2400 W Shore Rd	Warwick	RI
Speedway	2822	864 W Main Rd.	Middletown	RI
Speedway	2826	1308 Stafford Rd	Tiverton	RI
Speedway	2828	442 Manton Ave.	Providence	RI
Speedway	2830	473 Reservoir Avenue	Cranston	RI
Speedway	2833	83 Point St	Providence	RI
Speedway	2839	2790 Maybank Hwy	Johns Island	SC
Speedway	2841	1602 Sam Rittenberg Blvd.	Charleston	SC
Speedway	2848	2245 Savannah Hwy	Charleston	SC
Speedway	2850	670 College Park Rd	Ladson	SC
Speedway	2853	5777 Dorchester Rd.	North Charleston	SC
Speedway	2854	1401 Old Trolley Rd.	Summerville	SC
Speedway	2856	8620 Dorchester Rd	North Charleston	SC
Speedway	2865	8976 University Blvd	North Charleston	SC
Speedway	2872	3299 Wilson Blvd.	Arlington	VA
Speedway	2875	3801 Mechanicsville Tpke	Richmond	VA
Speedway	2876	7700 W Broad St	Richmond	VA
Speedway	4565	3400 South Fraser St.	Georgetown	SC
Speedway	4655	120 Berry Hill Road	Orange	VA
Speedway	4659	197 S. Rosemont Road	Virginia Beach	VA
Speedway	4660	4404 Princess Anne Road	Virginia Beach	VA
Speedway	4662	600 Battlefield Blvd. S.	Chesapeake	VA
Speedway	4665	6692 G.W. Memorial Hwy	Gloucester	VA
Speedway	4671	11702 Jefferson Ave.	Newport News	VA
Speedway	4672	3601 Airline Blvd.	Portsmouth	VA
Speedway	4674	3910 G.W. Memorial Hwy	Yorktown	VA
Speedway	4675	1555 Holland Rd.	Suffolk	VA

Decision and Order

Site Owner	Site No.	Address	City	State
Speedway	6711	1518 S 4th St.	Allentown	PA
Speedway	6723	2855 Perkiomen Ave.	Reading	PA
Speedway	6725	258 S Easton Rd	Glenside	PA
Speedway	6727	164 E Dekalb Pike	King of Prussia	PA
Speedway	6728	4175 Carlisle Pike	Camp Hill	PA
Speedway	6751	4002 Chestnut St	Emmaus	PA
Speedway	6758	104 N State Rd	Marysville	PA
Speedway	6759	710 Limekiln Rd	New Cumberland	PA
Speedway	6765	750 E Main St	Annville	PA
Speedway	6785	1008 2nd Street Pike	Richboro	PA
Speedway	6788	615 S Broad St	Philadelphia	PA
Speedway	6791	4640 Chestnut Street	Philadelphia	PA
Speedway	6792	5110 City Line Ave	Philadelphia	PA
Speedway	6797	3300 Grays Ferry Ave.	Philadelphia	PA
Speedway	6803	747 Bethlehem Pike	Montgomeryville	PA
Speedway	6807	7000 Frankford Avenue	Philadelphia	PA
Speedway	6808	6101 Passyunk Avenue	Philadelphia	PA
Speedway	6942	826 South Main Street	Kernersville	NC
Speedway	7105	5540 Murfreesboro Rd.	Lavergne	TN
Speedway	7115	7420 Bonny Oaks Drive	Chattanooga	TN
Speedway	7584	758 Erie Blvd W	Syracuse	NY
Speedway	7585	711 S Main St	North Syracuse	NY
Speedway	7592	146 Delaware Avenue	Elsemere	NY
Speedway	7593	1952 Lyell Ave.	Rochester	NY
Speedway	7621	1910 Empire Blvd.	Webster	NY
Speedway	7624	4350 Dewey Ave	Greece	NY
Speedway	7661	7409 Pittsford Palmyra Rd	Fairport	NY
Speedway	7662	685 Hiawatha Blvd. W	Syracuse	NY
Speedway	7663	3006 Route 50	Saratoga Springs	NY
Speedway	7682	400 Erie Blvd E	Syracuse	NY
Speedway	7724	1338 Route 52	Carmel	NY
Speedway	7727	285 Wading River Rd	Manorville	NY
Speedway	7739	933 W Ridge Rd	Rochester	NY
Speedway	7747	4803 W Taft Rd.	Liverpool	NY
Speedway	7805	1801 N Ocean Ave.	Farmingvile	NY
Speedway	7871	1215 Route 300	Newburgh	NY
Speedway	7872	386 S Broadway	Tarrytown	NY
Speedway	7892	951 New Loudon Rd	Latham	NY
Speedway	7894	5028 Ridge Rd W	Spencerport	NY
Speedway	7898	1877 W Ridge Rd.	Greece	NY
Speedway	7911	1523 N Highway 16	Denver	NC

Site Owner	Site No.	Address	City	State
Speedway	7989	10207 N. Tryon Street	Charlotte	NC
Speedway	7990	10925 University City Blvd.	Charlotte	NC
Speedway	9867	1555 N. French Rd.	Amherst	NY
Speedway	9874	5114 Transit Rd.	Cheektowaga	NY
Speedway	9875	642 Cleveland Dr.	Cheektowaga	NY
Speedway	9879	8925 Main St.	Clarence	NY
Speedway	9880	1199 French Rd.	Depew	NY
Speedway	9884	2080 Abbott Rd.	Lackawanna	NY
Speedway	9888	4221 Walden Ave.	Lancaster	NY
Speedway	9891	6724 Williams Rd.	Niagara Falls	NY
Speedway	9896	3085 Delaware Ave.	Tonawanda	NY
Speedway	9914	819 Ridge Rd	Webster	NY
Speedway	9929	31 S West Street	Homer	NY
Speedway	9940	300 Maple Ave	Elmira	NY
Speedway	9942	1268 Arsenal Street	Watertown	NY
Speedway	9945	152 Clinton Ave	Homer	NY
Speedway	9957	3068 E Henrietta Road	Henrietta	NY
Speedway	9965	6180 Collett Road	Farmington	NY
Speedway	9968	5300 Main Street	Williamsville	NY
Speedway	9969	6640 Clinton St	Elma	NY
Speedway	9970	661 Jamison Rd	Elma	NY
Speedway	9974	56 Hamburg St	East Aurora	NY
Speedway	9976	697 Orchard Park Rd	Buffalo	NY
Speedway	9977	3001 Winton Rd S	Rochester	NY
Speedway	9980	6896 E Genesee St	Fayetteville	NY
Speedway	9985	4031 Ny-31	Liverpool	NY
7-Eleven	23450	1701 Union Blvd.	Bay Shore	NY

APPENDIX VI

GROUP C LOCATIONS — Jacksons Food Stores

Site Owner	Site No.	Address	City	State
Speedway	1480	500 Appian Way	El Sobrante	CA
Speedway	1490	1915 Auto Center Drive	Antioch	CA
Speedway	1801	40500 Fremont Blvd.	Fremont	CA

Decision and Order

Site Owner	Site No.	Address	City	State
Speedway	2000	3096 Sunrise Blvd.	Rancho Cordova	CA
Speedway	2091	8990 Bolsa Ave.	Westminster	CA
Speedway	2993	1530 W Saint Marys Rd	Tucson	AZ
Speedway	3015	205 South Stephanie St	Henderson	NV
Speedway	3016	2979 E Desert Inn Road	Las Vegas	NV
Speedway	3019	5556 Boulder Hwy	Las Vegas	NV
Speedway	3037	1902 Freedom Blvd.	Freedom	CA
Speedway	3048	2281 W Casmalia St	Rialto	CA
Speedway	3052	2195 S Haven Ave	Ontario	CA
Speedway	3056	33070 Antelope Rd	Murrieta	CA
Speedway	3057	44239 Margarita Rd	Temecula	CA
Speedway	3523	305 Carmen Dr	Camarillo	CA
Speedway	3524	518 Rancho Conejo Blvd	Newbury Park	CA
Speedway	3596	10710 Alondra Blvd.	Norwalk	CA
Speedway	3598	51 Technology Dr	Irvine	CA
Speedway	3745	400 Sycamore Ave	Vista	CA
Speedway	3746	679 W San Marcos Blvd	San Marcos	CA
Speedway	3751	761 N Broadway	Escondido	CA
Speedway	3785	1525 N Magnolia Ave	El Cajon	CA
Speedway	3787	902 Broadway	Chula Vista	CA
Speedway	3788	1137 Broadway St.	King City	CA
Speedway	3790	1000 N H St	Lompoc	CA
Speedway	4055	12109 Woodside Avenue	Lakeside	CA
Speedway	4069	125 Hidden Valley Pkwy	Norco	CA
Speedway	4108	1302 S Imperial Ave	El Centro	CA
Speedway	4109	13352 East Imperial Highway	Santa Fe Springs	CA
Speedway	4112	1356 Erringer Road	Simi Valley	CA
Speedway	4150	1484 East Washington Avenue	El Cajon	CA
Speedway	4164	1551 Rosecrans Street	San Diego	CA
Speedway	4223	15980 Perris Blvd	Moreno Valley	CA
Speedway	4399	1861 South San Gabriel Boulevard	San Gabriel	CA
Speedway	4469	201 W Main St	Brawley	CA
Speedway	4492	2132 Mariposa Road	Stockton	CA
Speedway	4510	2215 S Archibald Ave	Ontario	CA
Speedway	4531	23038 Lake Forest Drive	Laguna Hills	CA
Speedway	4600	23905 Catt Rd	Wildomar	CA
Speedway	4606	2411 Jamacha Road	El Cajon	CA
Speedway	4858	3302 Del Mar Avenue	Rosemead	CA
Speedway	4865	33 S Sanborn	Salinas	CA
Speedway	4868	3430 Taylor Road	Loomis	CA
Speedway	4884	3711 Camino Del Rio West	San Diego	CA

Site Owner	Site No.	Address	City	State
Speedway	4909	39614 Los Alamos Rd	Murrieta	CA
Speedway	4965	44260 Redhawk Pkwy.	Temecula	CA
Speedway	4984	525 E 5th St	Holtville	CA
Speedway	5027	6098 University Ave	San Diego	CA
Speedway	5053	633 Birmingham Dr	Cardiff-by-the-Sea	CA
Speedway	5056	6404 Mission Gorge Road	San Diego	CA
Speedway	5060	665 Palomar Airport Road	Carlsbad	CA
Speedway	5083	6901 Federal Boulevard	Lemon Grove	CA
Speedway	5099	72300 Highway 111	Palm Desert	CA
Speedway	5156	8345 Mira Mesa Boulevard	San Diego	CA
Speedway	5429	8659 Jamacha Road	Spring Valley	CA
Speedway	5436	9009 Carlton Hills Boulevard	Santee	CA
Speedway	5446	9155 San Gabriel Road	Atascadero	CA
Speedway	5452	960 N Imperial Ave	El Centro	CA
Speedway	6000	9811 Mission Gorge Road	Santee	CA
Speedway	6168	2501 Pacheco Boulevard	Martinez	CA
Speedway	6171	25336 Madison Ave	Murrieta	CA
Speedway	6183	2680 Soquel Ave	Santa Cruz	CA

APPENDIX VII

SUBSTITUTE LOCATIONS

Speedway Site No.	Corresponding 7-Eleven Site No.	7-ElevenAddress	7-ElevenCity	7-Eleven State
Speedway 1960	Seven 24433	361 Amherst St.	Nashua	NH
	Seven 30290	496 Amherst St.	Nashua	NH
Speedway 2000	Seven 35347	11079 Folsom Blvd	Rancho Cordova	CA
Speedway 2091	Seven 33161	15991 Magnolia Street	Westminster	CA
Speedway 2418	Seven 30238	237 Main Street	North Reading	MA
Speedway 2456	Seven 38902	1 Rutherford Ave	Charlestown	MA
Speedway 3015	Seven 32404	1400 W Horizon Ridge Pkwy	Henderson	NV
Speedway 3037	Seven 38002	1597 Freedom Blvd	Watsonville	CA
Speedway 3524	Seven 33162	609 Rancho Conejo	Thousand Oaks	CA

Speedway Site No.	Corresponding 7-Eleven Site No.	7-ElevenAddress	7-ElevenCity	7-Eleven State
Speedway 3598	Seven 33252	8693 Irvine Center Dr.	Irvine	CA
Speedway 3745	Seven 33160	298 Sycamore Ave	Vista	CA
Speedway 4510	Seven 33035	3490 E. Jurupa St.	Ontario	CA
Speedway 4565	Seven 40397	1806 S. Fraser St.	Georgetown	SC
Speedway 4671	Seven 10837	11504 Jefferson Ave	Newport News	VA
	Seven 33238	11825 Jefferson Ave	Newport News	VA
	Seven 34307	12460 Warwick Blvd	Newport News	VA
	Seven 37710	12646 Nettles Dr.	Newport News	VA
	Seven 37167	12330 Warwick Blvd	Newport News	VA
Speedway 4674	Seven 32333	5101 Geo Washington Hwy	Yorktown	VA
Speedway 4865	Seven 24340	335 S. Sanborn Rd.	Salinas	CA
	Seven 35065	1020 Terven	Salinas	CA
Speedway 4884	Seven 37988	1083 Morena Blvd	San Diego	CA
Speedway 4954	Seven 37942	3225 Buck Owens Blvd	Bakersfield	CA
Speedway 5060	Seven 27109	901 Palomar Airport Rd	Carlsbad	CA
Speedway 5156	Seven 25629	11205 Camino Ruiz	San Diego	CA
	Seven 32131	8261 Gold Coast Drive	San Diego	CA
Speedway 5429	Seven 25807	1075 Elkelton Rd	Spring Valley	CA
	Seven 20508	948 Grand Ave	Spring Valley	CA
	Seven 15944	9365 Jamacha Blvd	Spring Valley	CA
	Seven 16498	103 Worthington St.	Spring Valley	CA
Speedway 6553	Seven 25548	100 Palm Harbor Blvd	Palm Harbor	FL
Speedway 6565	Seven 26894	5860 Roosevelt Blvd	Clearwater	FL
Speedway 6571	Seven 34813	2495 Pine Ridge Rd	Naples	FL
	Seven 17114	1871 Pine Ridge Road	Naples	FL
Speedway 6572	Seven 37617	450 Goodlette-Frank Rd N	Naples	FL
Speedway 6580	Seven 34325	12125 Collier Blvd	Naples	FL
	Seven 41151	4704 Golden Gate Pkwy	Naples	FL
Speedway 6645	Seven 32838	6758 Conroy Road	Orlando	FL
	Seven 34768	5490 S Kirkman Rd	Orlando	FL
Speedway 6912	Seven 34286	17100 W Colonial Dr.	Oakland	FL

Speedway Site No.	Corresponding 7-Eleven Site No.	7-ElevenAddress	7-ElevenCity	7-Eleven State
	Seven 33299	2605 E State Road 50	Clermont	FL
Speedway 6942	Seven 36068	1005 S Main St.	Kernersville	NC
Speedway 7805	Seven 37615	984 Waverly Avenue	Holtsville	NY
Speedway 7911	Seven 38767	2821 Business 16 Hwy	Denver	NC
Speedway 9351	Seven 35942	100 Childress Pl	South Charleston	WV
Speedway 9431	Seven 23099	2102 S State St. South	Salt Lake	UT
Speedway 9439	Seven 35627	2471 S 7200 W	West Valley City	UT
Speedway 9867	Seven 36674	690 N French Rd	Amherst	NY
Speedway 9888	Seven 35245	5821 Broadway	Lancaster	NY
Speedway 9977	Seven 40183	1540 Jefferson Rd	Rochester	NY

NONPUBLIC APPENDIX VIII

PRIOR NOTICE LOCATIONS

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

NONPUBLIC APPENDIX IX

Speedway Employees referenced in I.TT of this Order

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

NONPUBLIC APPENDIX X- Anabi Oil

Assets referenced in I.XX.6 of this Order

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

NONPUBLIC APPENDIX X- Anabi Oil

Assets referenced in I.XX.6 of this Order

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

NONPUBLIC APPENDIX XI

Leased Locations 1

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

NONPUBLIC APPENDIX XII

Leased Location 2

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

APPENDIX XIII

Divestiture Pricing Team

1. Hardin, Gina
2. Michniewicz, Gary
3. Sparks, Lucas
4. Vojtisek, David

List of Divestiture Assets

Divestiture Buyer: Anabi Oil

Divestiture Site	Address	City	State	Fuel Sold
Speedway 1411	1300 West Normantown Road	Romeoville	IL	Gas/Diesel
Speedway 1423	570 East Laraway Road	New Lenox	IL	Gas/Diesel
Speedway 1960	543 Amherst St	Nashua	NH	Gas
Speedway 1962	66 Nashua Rd	Londonderry	NH	Gas
Speedway 2205	22855 Huron River Drive	Rockwood	MI	Gas/Diesel
Speedway 2431	700 Central St.	Leominster	MA	Gas/Diesel
Speedway 2909	6999 Clairton Road	West Mifflin	PA	Gas/Diesel
Speedway 2920	135 Lindsay Rd	Zelienople	PA	Gas/Diesel
Speedway 3320	18501 Nottingham Road	Cleveland	OH	Gas
Speedway 3345	6073 Mayfield Road	Mayfield Height	OH	Gas/Diesel
Speedway 3346	230 Richmond Road	Richmond Heights	OH	Gas
Speedway 3376	6885 Center Street	Mentor	OH	Gas/Diesel
Speedway 3623	2827 Lexington Avenue	Lexington	OH	Gas/Diesel
Speedway 3680	1045 Graham Road	Stow	OH	Gas/Diesel
Speedway 3686	4969 Fishcreek Road	Stow	OH	Gas/Diesel
Speedway 3694	21043 Royalton Road	Strongsville	OH	Gas/Diesel
Speedway 3944	1322 E Main St	Salem	WV	Gas/Diesel
Speedway 3998	4189 State Route 306	Willoughby	OH	Gas/Diesel
Speedway 4251	1021 North Rand Road	Prospect Heights	IL	Gas/Diesel
Speedway 4333	2110 Orchard Road	Montgomery	IL	Gas/Diesel
Speedway 4611	8716 Ogden Avenue	Lyons	IL	Gas/Diesel
Speedway 4646	101 Lee Highway	Verona	VA	Gas/Diesel
Speedway 5160	3200 Us Highway 20 E	Elkhart	IN	Gas/Diesel
Speedway 5165	2106 West Lexington Avenue	Elkhart	IN	Gas
Speedway 5338	421 West Wise Road	Schaumburg	IL	Gas/Diesel
Speedway 5499	18601 Hall Road	Clinton Township	MI	Gas/Diesel

Decision and Order

Divestiture Site	Address	City	State	Fuel Sold
Speedway 5548	1449 Mishawaka Avenue	South Bend	IN	Gas
Speedway 6086	3200 S Nappanee St	Elkhart	IN	Gas
Speedway 6410	14690 Metro Pkwy.	Fort Myers	FL	Gas/Diesel
Speedway 6411	3701 E Busch Blvd.	Tampa	FL	Gas/Diesel
Speedway 6413	5426 Little Rd	New Port Richey	FL	Gas/Diesel
Speedway 6416	2655 S Kirkman Rd	Orlando	FL	Gas
Speedway 6419	2294 E Irlo Bronson Memorial Hwy	Kissimmee	FL	Gas/Diesel
Speedway 6422	5551 Lee Blvd	Lehigh Acres	FL	Gas/Diesel
Speedway 6425	3200 S John Young Pkwy	Kissimmee	FL	Gas/Diesel
Speedway 6427	17951 N Tamiami Trl	North Fort Myers	FL	Gas/Diesel
Speedway 6428	19600 Pines Blvd	Pembroke Pines	FL	Gas/Diesel
Speedway 6439	7550 Nw 186th St	Miami	FL	Gas
Speedway 6440	11425 W Hillsborough Ave	Tampa	FL	Gas/Diesel
Speedway 6453	3300 N Andrews Ave.	Oakland Park	FL	Gas
Speedway 6454	4200 Peters Rd	Fort Lauderdale	FL	Gas/Diesel
Speedway 6456	621 W Broward Blvd	Fort Lauderdale	FL	Gas/Diesel
Speedway 6460	5801 Johnson St.	Hollywood	FL	Gas
Speedway 6462	2710 Maguire Rd	Ocoee	FL	Gas/Diesel
Speedway 6463	10544 Park Blvd.	Seminole	FL	Gas/Diesel
Speedway 6467	20901 NW 2nd Ave.	Miami Gardens	FL	Gas
Speedway 6471	2515 W Sample Rd.	Deerfield Beach	FL	Gas/Diesel
Speedway 6475	9281 Daniels Pkwy	Fort Myers	FL	Gas/Diesel
Speedway 6485	6601 S. Us Highway 1	Port St. Lucie	FL	Gas/Diesel
Speedway 6491	5705 NW 167th St.	Hialeah	FL	Gas/Diesel
Speedway 6493	13987 Walsingham Rd.	Largo	FL	Gas/Diesel
Speedway 6496	2675 W International Speedway Blvd	Daytona Beach	FL	Gas/Diesel
Speedway 6497	11615 Boyette Rd	Riverview	FL	Gas/Diesel
Speedway 6498	4171 Tamiami Trail E	East Naples	FL	Gas
Speedway 6506	14624 S Military Trl	Delray Beach	FL	Gas/Diesel
Speedway 6507	466 Blanding Blvd	Orange Park	FL	Gas/Diesel
Speedway 6532	75 Broad St	Masaryktown	FL	Gas/Diesel
Speedway 6537	7319 Plathe Rd	New Port Richey	FL	Gas/Diesel
Speedway 6538	13508 State Route 54	Odessa	FL	Gas/Diesel
Speedway 6553	2734 Palm Harbor Blvd	Palm Harbor	FL	Gas/Diesel
Speedway 6554	1625 N Mcmullen Booth Rd	Clearwater	FL	Gas/Diesel
Speedway 6555	2577 Harn Blvd	Clearwater	FL	Gas
Speedway 6556	2185 Drew St	Clearwater	FL	Gas/Diesel
Speedway 6557	500 S Fort Harrison Ave	Clearwater	FL	Gas

Divestiture Site	Address	City	State	Fuel Sold
Speedway 6563	11800 66Th St	Largo	FL	Gas
Speedway 6564	2698 Roosevelt Blvd.	Clearwater	FL	Gas
Speedway 6565	5798 Roosevelt Blvd	Clearwater	FL	Gas
Speedway 6567	2499 Palm Ridge Rd	Sanibel	FL	Gas/Diesel
Speedway 6568	27001 Old 41 Road	Bonita Springs	FL	Gas/Diesel
Speedway 6569	12030 Bonita Beach Rd Se	Bonita Springs	FL	Gas/Diesel
Speedway 6570	28070 Quails Nest Ln	Bonita Springs	FL	Gas/Diesel
Speedway 6571	2055 Pine Ridge Rd	Naples	FL	Gas
Speedway 6572	2100 Goodlette Rd N	Naples	FL	Gas
Speedway 6579	6300 Davis Blvd	Naples	FL	Gas/Diesel
Speedway 6580	11655 Collier Blvd	Naples	FL	Gas
Speedway 6581	5100 Golden Gate Pkwy	Naples	FL	Gas
Speedway 6584	1020 Santa Barbara Blvd	Cape Coral	FL	Gas/Diesel
Speedway 6585	1351 Homestead Rd N	Lehigh Acres	FL	Gas/Diesel
Speedway 6593	2045 Murrell Rd	Rockledge	FL	Gas
Speedway 6594	5511 Clarcona Ocoee Rd	Orlando	FL	Gas/Diesel
Speedway 6598	5975 State Road 7	Lake Worth	FL	Gas/Diesel
Speedway 6645	5981 Turkey Lake Rd	Orlando	FL	Gas
Speedway 6648	4150 N State Road 7	Coral Springs	FL	Gas/Diesel
Speedway 6649	700 S Nova Rd	Ormond Beach	FL	Gas/Diesel
Speedway 6654	8275 N Wickham Rd	Melbourne	FL	Gas/Diesel
Speedway 6664	410 East Vistula Street	Bristol	IN	Gas/Diesel
Speedway 6683	2755 S Nappanee St	Elkhart	IN	Gas
Speedway 6855	13179 Us Highway 301 S	Riverview	FL	Gas/Diesel
Speedway 6861	5980 S Jog Rd.	Lake Worth	FL	Gas/Diesel
Speedway 6871	4287 Nw Federal Hwy	Jensen Beach	FL	Gas/Diesel
Speedway 6876	8923 State Road 54	New Port Richey	FL	Gas/Diesel
Speedway 6895	7900 World Center Dr	Orlando	FL	Gas
Speedway 6897	2885 University Pkwy	Sarasota	FL	Gas/Diesel
Speedway 6904	4695 N University Dr.	Lauderhill	FL	Gas
Speedway 6909	3202 Daniels Rd	Winter Garden	FL	Gas/Diesel
Speedway 6911	5149 Adamo Drive	Tampa	FL	Gas/Diesel
Speedway 6912	16500 State Route 50	Clermont	FL	Gas/Diesel
Speedway 7015	3920 Ridge Road	Highland	IN	Gas/Diesel
Speedway 7542	352 South Bolingbrook Drive	Bolingbrook	IL	Gas/Diesel
Speedway 7568	499 West Boughton Road	Bolingbrook	IL	Gas/Diesel
Speedway 7576	1199 Elmhurst Road	Des Plaines	IL	Gas/Diesel
Speedway 7658	776 Bedford Rd.	Bedford Hills	NY	Gas/Diesel
Speedway 8329	5550 West 79th Street	Burbank	IL	Gas/Diesel
Speedway 8338	9651 Kennedy Avenue	Highland	IN	Gas/Diesel

Divestiture Site	Address	City	State	Fuel Sold
Speedway 8529	302 Lincolnway West	Mishawaka	IN	Gas
Speedway 8531	2702 Mishawaka Avenue	South Bend	IN	Gas
Speedway 8715	1223 Broadway Street	Bay City	MI	Gas/Diesel
Speedway 8727	18650 Hall Road	Clinton Township	MI	Gas/Diesel
Speedway 8736	19985 W 130th St	North Royalton	OH	Gas/Diesel
Speedway 8859	40500 Van Dyke Avenue	Sterling Heights	MI	Gas/Diesel
Speedway 9200	3211 Murdoch Avenue	Parkersburg	WV	Gas
Speedway 9257	1606 Grand Central Avenue	Vienna	WV	Gas/Diesel
Speedway 9293	25032 Us-119	Belfry	KY	Gas
Speedway 9303	1295 West Main Street	Kent	OH	Gas/Diesel
Speedway 9351	2 Green Road	Charleston	WV	Gas/Diesel
Speedway 9409	10615 South 700 East	Sandy	UT	Gas/Diesel
Speedway 9431	502 East 2100 South	Salt Lake City	UT	Gas/Diesel
Speedway 9439	7210 West 3500 South	Magna	UT	Gas/Diesel
Speedway 9440	7746 Union Park Avenue	Sandy	UT	Gas/Diesel
Speedway 9446	95 W. 10600 South	Sandy	UT	Gas/Diesel
Speedway 9453	4408 Emerson Ave	Parkersburg	WV	Gas
Speedway 9794	8657 Elk River Rd N	Clendenin	WV	Gas/Diesel
Speedway 9898	6125 Main St.	Williamsville	NY	Gas
7-Eleven 37225	13191 Reams Road	Windermere	FL	Gas/Diesel

Divestiture Buyer: CrossAmerica Partners LP

Divestiture Site	Address	City	State	Fuel Sold
Speedway 2413	453 Cooley St	Springfield	MA	Gas/Diesel
Speedway 2418	231 Main St	North Reading	MA	Gas/Diesel
Speedway 2456	123 Cambridge St.	Charlestown	MA	Gas/Diesel
Speedway 2457	251 Everett Ave.	Chelsea	MA	Gas
Speedway 2460	251 E Central St	Franklin	MA	Gas/Diesel
Speedway 2468	558 Pawtucket St.	Lowell	MA	Gas
Speedway 2479	41 Lee Burbank Hwy	Revere	MA	Gas/Diesel
Speedway 2484	800 Gar Hwy.	Swansea	MA	Gas/Diesel
Speedway 2493	219 Cambridge St.	Charlestown	MA	Gas
Speedway 2495	287 Prospect Street	Cambridge	MA	Gas/Diesel
Speedway 2501	300 Merrimack St.	Lowell	MA	Gas
Speedway 2818	2400 W Shore Rd	Warwick	RI	Gas
Speedway 2822	864 W Main Rd.	Middletown	RI	Gas/Diesel
Speedway 2826	1308 Stafford Rd	Tiverton	RI	Gas/Diesel
Speedway 2828	442 Manton Ave.	Providence	RI	Gas/Diesel

Divestiture Site	Address	City	State	Fuel Sold
Speedway 2830	473 Reservoir Avenue	Cranston	RI	Gas/Diesel
Speedway 2833	83 Point St	Providence	RI	Gas/Diesel
Speedway 2839	2790 Maybank Hwy	Johns Island	SC	Gas/Diesel
Speedway 2841	1602 Sam Rittenberg Blvd.	Charleston	SC	Gas/Diesel
Speedway 2848	2245 Savannah Hwy	Charleston	SC	Gas/Diesel
Speedway 2850	670 College Park Rd	Ladson	SC	Gas/Diesel
Speedway 2853	5777 Dorchester Rd.	North Charleston	SC	Gas/Diesel
Speedway 2854	1401 Old Trolley Rd.	Summerville	SC	Gas/Diesel
Speedway 2856	8620 Dorchester Rd	North Charleston	SC	Gas/Diesel
Speedway 2865	8976 University Blvd	North Charleston	SC	Gas/Diesel
Speedway 2872	3299 Wilson Blvd.	Arlington	VA	Gas/Diesel
Speedway 2875	3801 Mechanicsville Tpke	Richmond	VA	Gas/Diesel
Speedway 2876	7700 W Broad St	Richmond	VA	Gas
Speedway 4565	3400 South Fraser St.	Georgetown	SC	Gas/Diesel
Speedway 4655	120 Berry Hill Road	Orange	VA	Gas/Diesel
Speedway 4659	197 S. Rosemont Road	Virginia Beach	VA	Gas/Diesel
Speedway 4660	4404 Princess Anne Road	Virginia Beach	VA	Gas/Diesel
Speedway 4662	600 Battlefield Blvd. S.	Chesapeake	VA	Gas/Diesel
Speedway 4665	6692 G.W. Memorial Hwy	Gloucester	VA	Gas/Diesel
Speedway 4671	11702 Jefferson Ave.	Newport News	VA	Gas
Speedway 4672	3601 Airline Blvd.	Portsmouth	VA	Gas/Diesel
Speedway 4674	3910 G.W. Memorial Hwy	Yorktown	VA	Gas/Diesel
Speedway 4675	1555 Holland Rd.	Suffolk	VA	Gas/Diesel
Speedway 6711	1518 S 4th St.	Allentown	PA	Gas
Speedway 6723	2855 Perkiomen Ave.	Reading	PA	Gas/Diesel
Speedway 6725	258 S Easton Rd	Glenside	PA	Gas
Speedway 6727	164 E Dekalb Pike	King of Prussia	PA	Gas/Diesel
Speedway 6728	4175 Carlisle Pike	Camp Hill	PA	Gas/Diesel
Speedway 6751	4002 Chestnut St	Emmaus	PA	Gas/Diesel
Speedway 6758	104 N State Rd	Marysville	PA	Gas
Speedway 6759	710 Limekiln Rd	New Cumberland	PA	Gas
Speedway 6765	750 E Main St	Annville	PA	Gas/Diesel
Speedway 6785	1008 2nd Street Pike	Richboro	PA	Gas
Speedway 6788	615 S Broad St	Philadelphia	PA	Gas
Speedway 6791	4640 Chestnut Street	Philadelphia	PA	Gas
Speedway 6792	5110 City Line Ave	Philadelphia	PA	Gas/Diesel
Speedway 6797	3300 Grays Ferry Ave.	Philadelphia	PA	Gas
Speedway 6803	747 Bethlehem Pike	Montgomeryville	PA	Gas/Diesel
Speedway 6807	7000 Frankford Avenue	Philadelphia	PA	Gas
Speedway 6808	6101 Passyunk Avenue	Philadelphia	PA	Gas
Speedway 6942	826 South Main Street	Kernersville	NC	Gas/Diesel

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Divestiture Site	Address	City	State	Fuel Sold
Speedway 7105	5540 Murfreesboro Rd.	Lavergne	TN	Gas/Diesel
Speedway 7115	7420 Bonny Oaks Drive	Chattanooga	TN	Gas/Diesel
Speedway 7584	758 Erie Blvd W	Syracuse	NY	Gas/Diesel
Speedway 7585	711 S Main St	North Syracuse	NY	Gas
Speedway 7592	146 Delaware Avenue	Elsemere	NY	Gas
Speedway 7593	1952 Lyell Ave.	Rochester	NY	Gas
Speedway 7621	1910 Empire Blvd.	Webster	NY	Gas/Diesel
Speedway 7624	4350 Dewey Ave	Greece	NY	Gas/Diesel
Speedway 7661	7409 Pittsford Palmyra Rd	Fairport	NY	Gas/Diesel
Speedway 7662	685 Hiawatha Blvd. W	Syracuse	NY	Gas/Diesel
Speedway 7663	3006 Route 50	Saratoga Springs	NY	Gas/Diesel
Speedway 7682	400 Erie Blvd E	Syracuse	NY	Gas
Speedway 7724	1338 Route 52	Carmel	NY	Gas/Diesel
Speedway 7727	285 Wading River Rd	Manorville	NY	Gas/Diesel
Speedway 7739	933 W Ridge Rd	Rochester	NY	Gas
Speedway 7747	4803 W Taft Rd.	Liverpool	NY	Gas
Speedway 7805	1801 N Ocean Ave.	Farmingvile	NY	Gas/Diesel
Speedway 7871	1215 Route 300	Newburgh	NY	Gas/Diesel
Speedway 7872	386 S Broadway	Tarrytown	NY	Gas/Diesel
Speedway 7892	951 New Loudon Rd	Latham	NY	Gas
Speedway 7894	5028 Ridge Rd W	Spencerport	NY	Gas/Diesel
Speedway 7898	1877 W Ridge Rd.	Greece	NY	Gas
Speedway 7911	1523 N Highway 16	Denver	NC	Gas/Diesel
Speedway 7989	10207 N. Tryon Street	Charlotte	NC	Gas/Diesel
Speedway 7990	10925 University City Blvd.	Charlotte	NC	Gas/Diesel
Speedway 9867	1555 N. French Rd.	Amherst	NY	Gas
Speedway 9874	5114 Transit Rd.	Cheektowaga	NY	Gas
Speedway 9875	642 Cleveland Dr.	Cheektowaga	NY	Gas
Speedway 9879	8925 Main St.	Clarence	NY	Gas
Speedway 9880	1199 French Rd.	Depew	NY	Gas
Speedway 9884	2080 Abbott Rd.	Lackawanna	NY	Gas/Diesel
Speedway 9888	4221 Walden Ave.	Lancaster	NY	Gas/Diesel
Speedway 9891	6724 Williams Rd.	Niagara Falls	NY	Gas
Speedway 9896	3085 Delaware Ave.	Tonawanda	NY	Gas
Speedway 9914	819 Ridge Rd	Webster	NY	Gas
Speedway 9929	31 S West Street	Homer	NY	Gas/Diesel
Speedway 9940	300 Maple Ave	Elmira	NY	Gas/Diesel
Speedway 9942	1268 Arsenal Street	Watertown	NY	Gas/Diesel
Speedway 9945	152 Clinton Ave	Homer	NY	Gas
Speedway 9957	3068 E Henrietta Road	Henrietta	NY	Gas/Diesel
Speedway 9965	6180 Collett Road	Farmington	NY	Gas

Divestiture Site	Address	City	State	Fuel Sold
Speedway 9968	5300 Main Street	Williamsville	NY	Gas/Diesel
Speedway 9969	6640 Clinton St	Elma	NY	Gas
Speedway 9970	661 Jamison Rd	Elma	NY	Gas/Diesel
Speedway 9974	56 Hamburg St	East Aurora	NY	Gas/Diesel
Speedway 9976	697 Orchard Park Rd	Buffalo	NY	Gas/Diesel
Speedway 9977	3001 Winton Rd S	Rochester	NY	Gas
Speedway 9980	6896 E Genesee St	Fayetteville	NY	Gas/Diesel
Speedway 9985	4031 Ny-31	Liverpool	NY	Gas/Diesel
7-Eleven 23450	1701 Union Blvd.	Bay Shore	NY	Gas

Divestiture Buyer: Jacksons Food Stores, Inc.

Divestiture Site	Address	City	State	Fuel Sold
Speedway 1480	500 Appian Way	El Sobrante	CA	Gas/Diesel
Speedway 1490	1915 Auto Center Drive	Antioch	CA	Gas/Diesel
Speedway 1801	40500 Fremont Blvd.	Fremont	CA	Gas/Diesel
Speedway 2000	3096 Sunrise Blvd.	Rancho Cordova	CA	Gas/Diesel
Speedway 2091	8990 Bolsa Ave.	Westminster	CA	Gas
Speedway 2993	1530 W Saint Marys Rd	Tucson	AZ	Gas
Speedway 3015	205 South Stephanie St	Henderson	NV	Gas
Speedway 3016	2979 E Desert Inn Road	Las Vegas	NV	Gas
Speedway 3019	5556 Boulder Hwy	Las Vegas	NV	Gas
Speedway 3037	1902 Freedom Blvd.	Freedom	CA	Gas/Diesel
Speedway 3048	2281 W Casmalia St	Rialto	CA	Gas
Speedway 3052	2195 S Haven Ave	Ontario	CA	Gas/Diesel
Speedway 3056	33070 Antelope Rd	Murrieta	CA	Gas/Diesel
Speedway 3057	44239 Margarita Rd	Temecula	CA	Gas/Diesel
Speedway 3523	305 Carmen Dr	Camarillo	CA	Gas/Diesel
Speedway 3524	518 Rancho Conejo Blvd	Newbury Park	CA	Gas
Speedway 3596	10710 Alondra Blvd.	Norwalk	CA	Gas
Speedway 3598	51 Technology Dr	Irvine	CA	Gas
Speedway 3745	400 Sycamore Ave	Vista	CA	Gas/Diesel
Speedway 3746	679 W San Marcos Blvd	San Marcos	CA	Gas/Diesel
Speedway 3751	761 N Broadway	Escondido	CA	Gas/Diesel
Speedway 3785	1525 N Magnolia Ave	El Cajon	CA	Gas
Speedway 3787	902 Broadway	Chula Vista	CA	Gas
Speedway 3788	1137 Broadway St.	King City	CA	Gas/Diesel
Speedway 3790	1000 N H St	Lompoc	CA	Gas/Diesel
Speedway 4055	12109 Woodside Avenue	Lakeside	CA	Gas
Speedway 4069	125 Hidden Valley Pkwy	Norco	CA	Gas

Decision and Order

Divestiture Site	Address	City	State	Fuel Sold
Speedway 4108	1302 S Imperial Ave	El Centro	CA	Gas/Diesel
Speedway 4109	13352 East Imperial Highway	Santa Fe Springs	CA	Gas/Diesel
Speedway 4112	1356 Erringer Road	Simi Valley	CA	Gas
Speedway 4150	1484 East Washington Avenue	El Cajon	CA	Gas/Diesel
Speedway 4164	1551 Rosecrans Street	San Diego	CA	Gas
Speedway 4223	15980 Perris Blvd	Moreno Valley	CA	Gas
Speedway 4399	1861 South San Gabriel Blvd.	San Gabriel	CA	Gas
Speedway 4469	201 W Main St	Brawley	CA	Gas/Diesel
Speedway 4492	2132 Mariposa Road	Stockton	CA	Gas/Diesel
Speedway 4510	2215 S Archibald Ave	Ontario	CA	Gas/Diesel
Speedway 4531	23038 Lake Forest Drive	Laguna Hills	CA	Gas/Diesel
Speedway 4600	23905 Catt Rd	Wildomar	CA	Gas/Diesel
Speedway 4606	2411 Jamacha Road	El Cajon	CA	Gas
Speedway 4858	3302 Del Mar Avenue	Rosemead	CA	Gas
Speedway 4865	33 S Sanborn	Salinas	CA	Gas/Diesel
Speedway 4868	3430 Taylor Road	Loomis	CA	Gas/Diesel
Speedway 4884	3711 Camino Del Rio West	San Diego	CA	Gas/Diesel
Speedway 4909	39614 Los Alamos Rd	Murrieta	CA	Gas/Diesel
Speedway 4954	4200 Buck Owens Blvd.	Bakersfield	CA	Gas/Diesel
Speedway 4965	44260 Redhawk Pkwy.	Temecula	CA	Gas/Diesel
Speedway 4984	525 E 5th St	Holtville	CA	Gas/Diesel
Speedway 5027	6098 University Ave	San Diego	CA	Gas
Speedway 5053	633 Birmingham Dr	Cardiff-by-the-Sea	CA	Gas/Diesel
Speedway 5056	6404 Mission Gorge Road	San Diego	CA	Gas/Diesel
Speedway 5060	665 Palomar Airport Road	Carlsbad	CA	Gas/Diesel
Speedway 5083	6901 Federal Boulevard	Lemon Grove	CA	Gas
Speedway 5099	72300 Highway 111	Palm Desert	CA	Gas/Diesel
Speedway 5156	8345 Mira Mesa Boulevard	San Diego	CA	Gas
Speedway 5429	8659 Jamacha Road	Spring Valley	CA	Gas
Speedway 5436	9009 Carlton Hills Boulevard	Santee	CA	Gas
Speedway 5446	9155 San Gabriel Road	Atascadero	CA	Gas/Diesel
Speedway 5452	960 N Imperial Ave	El Centro	CA	Gas/Diesel
Speedway 6000	9811 Mission Gorge Road	Santee	CA	Gas
Speedway 6168	2501 Pacheco Boulevard	Martinez	CA	Gas/Diesel
Speedway 6171	25336 Madison Ave	Murrieta	CA	Gas
Speedway 6183	2680 Soquel Ave	Santa Cruz	CA	Gas/Diesel

Concurring Statement

STATEMENT OF ACTING CHAIRWOMAN REBECCA KELLY SLAUGHTER AND COMMISSIONER ROHIT CHOPRA

May 14, 2021

Today, Seven & i Holdings, the Tokyo-based owner of 7-Eleven, announced that it closed a $21 billion transaction with Marathon Petroleum Corporation, purchasing roughly 3,900 Speedway retail gasoline and convenience store businesses from Marathon.

We have reason to believe that this transaction is illegal under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, raising significant competitive concerns in hundreds of local retail gasoline and diesel fuel markets across the country. In many local markets, the transaction is either a merger-to-monopoly or reduces the number of competitors from three to two. With the support of a majority of Commissioners, the Commission can and routinely does challenge these harmful mergers.

The Commission has spent significant resources investigating this transaction, but has not yet come to an agreement with the parties and a majority of the Commission that would fully resolve the competitive concerns. Seven and Marathon's decision to close under these circumstances is highly unusual, and we are extremely troubled by it.

The parties have closed their transaction at their own risk. The Commission will continue to investigate to determine an appropriate path forward to address the anticompetitive harm, and will also continue to work with State Attorneys General.

STATEMENT OF COMMISSIONERS NOAH JOSHUA PHILLIPS AND CHRISTINE S. WILSON

May 14, 2021

Today, the Federal Trade Commission ("Commission") is failing to act as Seven & i Holdings Co. consummates its purchase of nearly 4,000 gas stations from Marathon Petroleum Corporation, which transaction includes hundreds of retail gasoline and convenience store overlaps that we have reason to believe violate the antitrust laws. Rather than resolve the issues and order divestitures (or sue to block the transaction), the Acting Chairwoman and Commissioner Chopra have issued a strongly worded statement. Their words do not bind the merging parties, leaving consumers completely unprotected.

There is no good reason for the Commission to be in this mess. This deal was announced last August, the better part of a year ago. Both companies duly notified the Commission and the Department of Justice, pursuant to the Hart Scott Rodino Antitrust Improvements Act (the "HSR

Act"). That left plenty of time for staff—who, since late January, have worked at the direction of the Acting Chairwoman—and the parties to negotiate a resolution. As she and Commissioner Chopra note, extensive resources have been devoted to this matter. It also gave plenty of time for all commissioners to learn about such a resolution and resolve their concerns. To the extent that our colleagues insinuate that the parties have acted in bad faith in this process, we have been given no information suggesting the parties failed to work constructively with staff to negotiate a timely and effective resolution. Yet the Commission is opting to permit the transaction to close without a remedy in place.

Congress enacted the HSR Act to create a framework that would give the government an opportunity to investigate and either challenge or resolve anticompetitive mergers before they close. For decades, the Commission—whether controlled by Democrats or Republicans—has worked within the HSR Act framework, providing security to consumers and certainty to businesses. The Commission failed to do that today, and consumers and businesses both lost. We sincerely hope this lapse is an isolated incident, not the beginning of a trend.

JOINT CONCURRING STATEMENT OF COMMISSIONERS REBECCA KELLY SLAUGHTER AND ROHIT CHOPRA

June 25, 2021

Today, the Commission accepted for public comment an order that would resolve competitive concerns raised by the illegal acquisition of a Marathon Petroleum subsidiary by Seven & I Holdings (collectively "7-Eleven"). The approximately $21 billion deal involved nearly 4,000 retail fuel and convenience store locations. On May 14, 2021, the parties consummated the deal, despite knowing that the Commission had outstanding—but resolvable—concerns about the transaction and about the parties' proposal to resolve those concerns at the time. The agreement to merge and the decision to consummate substantially lessened competition in 293 local geographic markets across twenty states, in violation of Section 5 of the FTC Act and Section 7 of the Clayton Act. While Commission staff had worked diligently to resolve the competitive concerns raised by the transaction, negotiating hundreds of divestitures to three different buyers, the parties had not reached a settlement that the Commission could accept when they closed.

The job of the Commission is to pursue the correct outcome in cases, not the expedient one. Here, it was important to take the few extra weeks necessary to ensure that the resolution would effectively preserve competition and that any risk would be borne by the parties, not by consumers, workers, and other market participants. Today's settlement achieves that in a few key ways.

First, the order holds 7-Eleven accountable for executing divestitures quickly and efficiently. The Commission's general preference is for divestitures to happen as close in time to

the transaction as is practicable in order to protect competition.[1] Here, given the scope and complexity of the required divestitures, a longer end date is justified, provided the divestitures happen on an ongoing basis. Today's proposal includes provisions with rolling divestiture timelines, benchmarked at 90, 120, and 150 days, and completed within 180 days from May 14, 2021—the date of the illegal merger. If 7-Eleven fails to follow these benchmarks and the buyers' schedules, 7-Eleven will be in violation of today's proposed order.

Second, 7-Eleven will be prohibited from enforcing noncompete provisions against current franchisees or others who might seek employment at the divestiture outlets. Noncompete provisions generally prevent workers and small business franchises from fairly bargaining for employment and opportunity. In this instance, they could also prevent divestiture buyers from accessing the talent that could best facilitate their ability to restore competition in the relevant markets. The prohibition in the order is consistent with prior Commission action,[2] but is especially important in this case, given that 7-Eleven consummated an illegal transaction. Expressly safeguarding the buyers' access to essential employees or business partners is particularly necessary to protect the effectiveness of the divestitures.

The terms of this order are well-grounded in Commission precedent and reflect learned experience from past orders. The Commission's past experiences show that divestitures that are not carefully constructed end up failing to adequately protect consumers, workers, and

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[1] *See, e.g.*, Press Release, Fed. Trade Comm'n, *FTC Requires Divestitures as Condition of 7-Eleven, Inc. Parent Company's $3.3 Billion Acquisition of Nearly 1,100 Retail Fuel Outlets from Competitor Sunoco* (Jan. 18, 2020), https://www.ftc.gov/news-events/press-releases/2018/01/ftc-requires-divestitures-condition-7-eleven-inc-parentcompanys (requiring the parties divest 26 stations over the course of 90 days); Press Release, Fed. Trade Comm'n, FTC Approves Final Order Imposing Conditions on Arko Holdings Ltd.'s Acquisition of Empire Petroleum Partners, LLC (Oct. 7, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/10/ftc-approves-final-order-imposing-conditions-arko-holdings-ltds-acquisition-empire-petroleum (ordering divestiture of 7 stations over the course of 20 days); Press Release, Fed. Trade Comm'n, FTC Approves Final Order Imposing Conditions on Tri Star Energy, LLC's Acquisition of Certain Assets of Hollingsworth Oil Company, Inc., C & H Properties, and Ronald L. Hollingsworth (Aug. 14, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/08/ftc-approves-final-order-imposing-conditions-tri-star-energy-llcs-acquisition-certain-assets (ordering divestiture of 2 stations over the course of 10 days); *but see* Press Release, Fed. Trade Comm'n, *FTC Requires Retail Fuel Station and Convenience Store Operator Alimentation Couche-Tard Inc. and its affiliate CrossAmerica Partners LP to Divest 10 Fuel Stations in Minnesota and Wisconsin as a Condition of Acquiring Holiday Companies* (Dec. 15, 2017), https://www.ftc.gov/news-events/news/press-releases/2017/12/ftc-requires-retail-fuel-station-convenience-store-operator-alimentation-couche-tard-inc-its (allowing 120 days to find a buyer for and divest 10 stations; the Commission later alleged the parties violated the divestiture order, and the parties agreed to pay a $3.5 million civil penalty to the FTC to settle those allegations).

[2] *See Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter in the Matter of DTE Energy/Generation Pipeline*, Fed. Trade Comm'n (Sept. 12, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544138/joint_statement_of_chopra_and_slaughter_dte_energy-generation_pipeline_9-13-19.pdf; Press Release, Fed. Trade Comm'n, *FTC Approves Final Order Imposing Conditions on Merger of Air Medical Group Holdings, Inc. and AMR Holdco, Inc.* (May 3, 2018), https://www.ftc.gov/news-events/press-releases/2018/05/ftc-approves-final-order-imposing-conditions-merger-airmedical (divestiture of air ambulance services in Hawaii).

competition.[3] It is disturbing that 7-Eleven failed to resolve these matters before consummating their illegal transaction. Typically, merging parties will wait for the Commission to accept an order for public comment before closing on their transaction. Here, the transaction involved billions of dollars in thousands of unique geographic markets across the United States; when parties propose transactions this large and complex, with obvious violations of the law, they must accept that proper review may take time. Notwithstanding that scope, in this case, Commission staff conducted an extensive investigation, identified overlaps, vetted divestiture buyers, and negotiated terms of divestitures with the parties—all in a matter of months. Working through the remaining concerns at the Commission level would not have been and was not time-consuming.

7-Eleven chose to close under a cloud of legal uncertainty rather than to resolve its issues with the Commission; it learned that this Commission will not be dared into accepting settlements we do not find adequate. We hope other parties will learn that working constructively with the Commission—rather than consummating an illegal merger—is a more effective and responsible path.

STATEMENT OF COMMISSIONERS NOAH JOSHUA PHILLIPS AND CHRISTINE S. WILSON

June 25, 2021

Today, the Federal Trade Commission has accepted for public comment a consent agreement resolving all competition concerns presented by Seven & i Holdings Co.'s acquisition of nearly 4,000 gas stations from Marathon Petroleum Corporation. A settlement in this matter is long overdue. As we noted in our statement of May 14, 2021,[1] the day on which the parties consummated their transaction, the Commission had ample opportunity to act before the parties merged.[2]

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[3] *See* Press Release, Fed. Trade Comm'n, *FTC Releases Staff Study Examining Commission Merger Remedies between 2006 and 2012* (Feb. 3, 2017), https://www.ftc.gov/news-events/news/press-releases/2017/02/ftc-releases-staff-study-examining-commission-merger-remedies-between-2006-2012; Fed. Trade Comm'n, *A Study of the Commission's Divestiture Process* (1999), https://www ftc.gov/sites/default/files/documents/reports/study-commissions-divestiture-process/divestiture_0.pdf .

[1] See Statement of Commissioners Noah Joshua Phillips & Christine S. Wilson, Seven & i Holdings Co., Ltd./Marathon Petroleum Corp., FTC File No. 201-0108 (May 14, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590067/2010108sevenmarathonphillipswilsonstatement.pdf .

[2] Indeed, the settlement before the Commission on May 14 required the divestiture of 293 fuel outlets, see Press Release, 7-Eleven Inc., Response to FTC Commissioner Statement (May 14, 2021), https://corp.7-eleven.com/corppress-releases/05-14-2021-7-eleven-inc-response-to-ftc-commissioner-statement; and the settlement unanimously accepted by the Commission today similarly requires the divestiture of 293 fuel outlets. Commissioners

To the extent the Analysis to Aid Public Comment or other statements issued suggest that Seven & i Holdings or its U.S. subsidiary 7-Eleven Inc. acted in bad faith, the public is free to read our earlier statement and Seven & i Holding's side of the story,[3] the veracity of which no commissioner has disputed in the month since they were issued. Those accounts paint a different, and regrettable, picture of what happened.

We thank our staff for their diligence, professionalism, and responsiveness throughout this process; the Commission's failures here are in no way a reflection of their efforts.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") fromSeven & i Holdings Co., Ltd., a Japanese company, 7-Eleven, Inc., the U.S. subsidiary, (collectively, "7-Eleven") and Marathon Petroleum Corporation ("Marathon") (collectively, the "Respondents"). The Consent Agreement is designed to remedy the anticompetitive effects that likely are resulting from 7-Eleven's consummated acquisition of Marathon's wholly-owned subsidiary Speedway LLC ("Speedway"). The Commission also issued the Order to Maintain Assets included in the Consent Agreement. Pursuant to Commission Rules of Practice, a consent agreement was proposed prior to Respondents' consummation of the transaction, but the Commission had not accepted the proposal because a majority did not find certain provisions in the proposal sufficient to fully resolve competitive concerns stemming from the transaction. 7-Eleven closed on the acquisition on May 14, 2021 with full knowledge that the acquisition was in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.

Respondents subsequently agreed to a revised proposed Decision and Order ("Order"), described herein, that restores competition lost from the transaction. Under the terms of the Order included in the Consent Agreement, 7-Eleven must divest to Commission-approved Buyers certain Speedway retail fuel outlets and related assets in 291 local markets, and certain 7-Eleven retail fuel outlets and related assets in 2 local markets, across 20 states. The Order requires the divestitures

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Slaughter and Chopra highlight the order provision that prohibits Seven & i's subsidiary 7-Eleven from enforcing noncompete provisions against current franchisees or others who might seek employment at the divestiture outlets. This narrow provision is consistent with previous Commission orders that impose conditions to ensure that divested assets have access to the employees necessary to ensure the success of the divestiture.

[3] Statement of Commissioners Noah Joshua Phillips & Christine S. Wilson, supra note 1; Press Release, 7-Eleven, Inc., supra note 2.

to take place no later than 180 days after May 14, 2021, the day 7- Eleven closed on its acquisition of Marathon's assets. The Commission prefers divestitures to upfront buyers that occur close in time with the closing of the main transaction, but Commission orders will allow for a longer divestiture period when specific, demonstrable circumstances warrant. In this matter, the Commission recognizes that the particular logistical and regulatory requirements of transferring 293 stations across 20 states necessitates a longer process of rolling divestitures to three Buyers. To ensure that as many divestitures happen as quickly as possible, the Order requires that 7-Eleven divests the outlets to the Buyers based on the Buyer-approved divestiture schedules which are incorporated into the Order, and that 7-Eleven meets specific divestiture benchmarks at 90, 120, and 150 days.

The Order to Maintain Assets requires Respondents to operate and maintain each divestiture outlet in the normal course of business through the date the Commission-approved Buyer acquires the outlet. In addition, the Order and Order to Maintain Assets require that until7-Eleven divests the outlets, it must maintain separate retail fuel pricing teams and keep information related to pricing decisions for the divestiture outlets separate from the retail fuel pricing for 7-Eleven's other outlets.

The Order also prohibits 7-Eleven from enforcing noncompete provisions in its franchise agreements against current franchisees or others who might seek employment at the divestiture outlets. This provision reduces the likelihood that any 7-Eleven noncompete provisions will have a chilling effect on franchisees or others in seeking employment or doing business with the divestiture outlets. Given that 7-Eleven consummated an illegal transaction, expressly safeguarding the Buyers' access to essential employees or business partners is particularly necessary to protect the effectiveness of the divestitures.

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

II. The Respondents

Seven & i Holdings Co., Ltd., a publicly-traded company headquartered in Tokyo, Japan, owns and operates convenience stores and retail fuel outlets worldwide under the 7-Eleven brand. 7-Eleven, Inc. owns, operates, and franchises approximately 9,000 stores in the United States, making it the largest convenience store chain in the country. Roughly 46 percent of 7-Eleven's stores offer fuel. 7-Eleven's revenue in 2020 totaled over $20 billion, with fuel sales accounting for over $13 billion.

Marathon, a publicly-traded company headquartered in Findlay, Ohio, operates a vertically-integrated refining, marketing, retail, and transportation system for petroleum and petroleum products. Marathon is the largest U.S. refiner, with approximately 2.9 million barrels per day of crude oil refining capacity. In 2020, Marathon's revenues totaled over $69 billion.

Marathon's former wholly-owned subsidiary, Speedway, controls and sets retail fuel pricing at 3,898 retail transportation fuel and convenience stores across the United States, making it the third-largest domestic chain of company-owned and -operated retail fuel outlets and convenience stores. Speedway's 2020 retail business revenues totaled over $19 billion, with sales of nearly 6 billion gallons of gasoline and diesel in 2019.

III. The Transaction

Pursuant to an Asset Purchase Agreement dated August 2, 2020, 7-Eleven acquired substantially all of Marathon's Speedway retail assets for approximately $21 billion, subject to adjustments (the "Transaction").

7-Eleven and Marathon also entered into a 15-year agreement under which Marathon will supply and transport fuel to the Speedway business, with a base volume of 7.7 billion gallons per year of gasoline and diesel.

The Commission's Complaint alleges that the Transaction violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition for the retail sale of gasoline and/or the retail sale of diesel in 293 local markets across 20 states.

IV. The Retail Sale of Gasoline and Diesel

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

The Commission's Complaint alleges 293 local relevant geographic markets in which to assess the competitive effects of the Transaction within the following states: Arizona; California; Florida; Illinois; Indiana; Kentucky; Massachusetts; Michigan; North Carolina; New Hampshire; Nevada; New York; Ohio; Pennsylvania; Rhode Island; South Carolina; Tennessee; Utah; Virginia; and West Virginia.

The geographic markets for retail gasoline and retail diesel are highly localized, depending on the unique circumstances of each area. Each relevant market is distinct and fact- dependent, reflecting many considerations, including commuting patterns, traffic flows, and outlet characteristics. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes. The geographic markets for the retail sale of diesel are similar to the corresponding geographic markets for retail gasoline, as many diesel consumers exhibit preferences and behaviors similar to those of gasoline consumers.

The Transaction substantially lessens competition in each of these local markets, resulting in 264 highly concentrated markets for the retail sale of gasoline and 153 highly concentrated markets for the retail sale of diesel fuel, with many of the 293 markets presenting concerns for both products. Retail fuel outlets compete on price, store format, product offerings, and location, and pay close attention to competitors in close proximity, on similar traffic flows, and with similar store characteristics. In each of the local gasoline and diesel retail markets, the Transaction reduces the number of competitively constraining independent market participants to three or fewer. 7-Eleven will be able to raise prices unilaterally in markets where 7-Eleven and Speedway are close competitors. Absent the Transaction, 7-Eleven and Speedway would have continued to compete head-to-head in these local markets.

Moreover, the Transaction enhances the incentives for interdependent behavior in local markets where, including 7-Eleven, only two or three competitively constraining independent market participants remain. Two aspects of the retail fuel industry make it vulnerable to such coordination. First, retail fuel outlets post their fuel prices on price signs that are visible from the street, allowing competitors easily to observe each other's fuel prices. Second, retail fuel outlets regularly track their competitors' fuel prices and change their own prices in response. These repeated interactions give retail fuel outlets familiarity with how their competitors price and how changing prices affect fuel sales.

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

V. The Order

The Order remedies the Transaction's likely anticompetitive effects by requiring 7- Eleven to divest Speedway retail fuel outlets in 291 local markets, and 7-Eleven retail fuel outlets in 2 local markets, in three separate packages, to CrossAmerica Partners LP ("CAPL"), Jacksons Food Stores, Inc. ("Jacksons"), and Anabi Oil Corporation ("Anabi") (collectively, the"Buyers").

CAPL is a publicly-traded master limited partnership and a wholesale supplier of motor fuels, a convenience store operator, and an owner and lessor of real estate used in the retail distribution of motor fuels. CAPL distributes branded and unbranded fuel to approximately 1,800 locations and owns or leases approximately 1,100 sites, including 150 company-operatedsites.

In 2020, the Commission fined Alimentation Couche-Tard Inc. ("ACT") and its then-affiliate CAPL $3.5 million to settle allegations that the companies violated a 2018 Commission order requiring divestitures of 10 retail fuel outlets related to ACT's acquisition of Holiday Companies. ACT controlled CAPL's general partner when the alleged order violation occurred and agreed to divest a package of retail fuel outlets that were part of CAPL's retail network to resolve the Commission's concerns. The alleged order violation resulted from, among other things, ACT's failure to divest the CAPL outlets by the Commission-imposed deadline.

The alleged violation does not disqualify CAPL from consideration as an acceptable buyer in this instance. CAPL has not been affiliated with ACT in any way since November 2019, when Mr. Joseph V. Topper, Jr. and his organization, the Topper Group, acquired the controlling interest in CAPL's general partner from ACT, and thereby severed completely CAPL's affiliation with ACT. CAPL has since revamped its management. Mr. Topper now serves as CAPL's chairman of the board, and he and his organization have the ability to appointall members of CAPL's board as well as control CAPL's operations and activities. Moreover, prior to Mr. Topper acquiring control of CAPL, ACT agreed to indemnify CAPL for penalties and legal costs associated with the alleged order violation.

The two other Buyers are Jacksons and Anabi. Jacksons is a privately-held corporation that controls a chain of over 230 Chevron-, Shell-, and Texaco-branded retail fuel locations in six western states. Jacksons also is a joint venture partner in Jackson Energy, a wholesale fuel supply company that distributes gasoline and diesel fuel to retail fuel outlets in the western United States. Anabi, a privately-owned and operated retail fuel supplier, is one of the largest Shell-branded distributors in California and controls retail fuel locations in California, Nevada, and Alaska. The Commission is satisfied that the Buyers present no competitive problems in markets where they will acquire divested assets and are otherwise qualified to acquire and operate the assets in their respective divestiture packages.

The Order requires 7-Eleven to divest: (a) 105 Speedway retail fuel outlets and a single 7-Eleven retail fuel outlet to CAPL; (b) 63 Speedway retail fuel outlets to Jacksons; and (c) 123 Speedway retail fuel outlets and a single 7-Eleven retail fuel outlet to Anabi. To ensure that 7-Eleven is incentivized to complete all of the divestitures in an expedient manner, the Order requires 7-Eleven to: (1) divest on Buyer-approved divestiture schedules, and (2) divest no fewer than a certain number of outlets at certain points within the 180-day divestiture period.

Specifically, Paragraph II.A of the Order requires Respondents to divest pursuant to the Buyer-approved divestiture schedules. Under Paragraph XI.A.1 of the Order, 7-Eleven is required to submit to the Commission the Buyer-approved divestiture schedules – identifying the divestiture date for each location – within 60 days after May 14. The Buyers will control the divestiture schedules, and those schedules are enforceable by the Commission against 7-Eleven. The Order also requires 7-Eleven to meet certain divestiture benchmarks – with no fewer than 20 percent of each package divested within 90 days, an additional 20 percent of each package divested within 120 days, and an additional 20 percent of each package divested within 150 days of the main Transaction closing. 7-Eleven will have to complete all of the divestitures within 180 days. Taken together, this divestiture process will incentivize 7-Eleven to complete the divestitures in a timely and expeditious manner, and give the Commission close oversight into the divestiture schedules.

The Order contains additional provisions designed to ensure the effectiveness of the relief, and to prevent 7-Eleven from having access to critical competitive information regarding the divestiture outlets. The Order requires 7-Eleven and Marathon to maintain the economic viability, marketability, and competitiveness of each divestiture asset until the divestitures are complete. Also, the Order requires Respondents to designate an Asset Maintenance Manager to oversee operations of the divestiture assets to ensure the Respondents maintain the divestiture assets' full

economic viability, marketability, and competitiveness until the divestitures are completed and to help facilitate the transfer of the divestiture assets to the Buyers. Additionally, the Order requires the Respondents to establish a divestiture pricing team that will handle retail fuel pricing at the divestiture outlets, and to prevent access and disclosure of that pricing information to anyone other than the divestiture pricing team. The Asset Maintenance Manager will oversee the divestiture pricing team to ensure that confidential pricing information is not shared with other employees at 7-Eleven who may price retail fuel at competing stations. The Order requires the Respondents to institute information technology procedures, authorizations, protocols, and any other controls necessary to prevent unauthorized disclosure or access of information to or from the divestiture pricing team. Finally, the Order appoints The Claro Group as an independent third-party Monitor to oversee the Respondents' compliance with the requirements of the Order and to oversee the Asset Maintenance Manager.

The Order also contains provisions regarding Respondents' employees and franchisees, designed to protect the viability of the divestiture assets. Section V contains provisions to ensure that the Buyers face no impediments in hiring employees necessary to operate the divestiture assets as competitively as Speedway operated them before the Transaction. Paragraph V.E prohibits 7-Eleven from enforcing noncompete provisions against current franchisees or others who might seek employment at the divestiture outlets. This provision reduces the likelihood that the noncompete provisions will have a chilling effect on franchisees or others in seeking employment or doing business with the divestiture outlets. Given that 7-Eleven has consummated an illegal transaction, expressly safeguarding the Buyers' access to essential employees or business partners is particularly necessary to protect the effectiveness of the divestitures.

In addition to requiring retail fuel outlet divestitures, the Order also requires 7-Eleven, for a period of five years, to obtain prior Commission approval before purchasing any of the divested outlets, and for a period of ten years, to provide the Commission prior notice of future acquisitions of the divested outlets and of Commission-identified retail fuel outlets located in the 293 local markets at issue and three additional markets. These three additional markets raised concerns that are addressed by Speedway's near-term exit from the markets for reasons outside its control. The prior notice provision is necessary because an acquisition in close proximity to divested assets likely would raise the same competitive concerns as the Transaction and may fall below the Hart-Scott-Rodino Act premerger notification thresholds.

The purpose of this analysis is to facilitate public comment on the Order, and the Commission does not intend this analysis to constitute an official interpretation of the Order or to modify its terms in any way. The Offices of the California and Florida Attorneys General participated in both the investigation and the consent process.

Complaint

IN THE MATTER OF

SUPPORT KING, LLC.,
AND
SCOTT ZUCKERMAN

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

Docket No. C-4756; File No. 192 3003
Complaint, September 1, 2021 – Decision, December 20, 2021

This order addresses a violation of the FTC Act through the unfair sales of surreptitious monitoring devices, illegal harvesting and sharing of private information, and failure to secure user data of Support King, LLC., formerly doing business as SpyFone.com. Under the order the Respondent is banned from offering, promoting, selling, or advertising any surveillance app, services, or business. The Respondents must delete any information illegally collected from their apps and notify owners of devices on which SpyFone's apps were installed that their devices might have been monitored and the devices might not be secure.

Participants

For the *Commission*: *Jacqueline Connor Ford*

For the *Respondent*: *Alexandra Megaris* and *Leonard Gordon [Venable LLP]*.

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that Support King, LLC, a limited liability company, and Scott Zuckerman, individually and as an officer of Support King, LLC (collectively, "Respondents"), have violated the provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

I. RESPONDENTS

1. Respondent Support King, LLC ("Support King"), also formerly doing business as SpyFone.com ("SpyFone"), is a Puerto Rico limited liability company with a principal office or principal place of business at 5900 Ave Isla Verde, Carolina, Puerto Rico 00979-5746. At all times material to this Complaint, acting alone or in concert with others, Support King has advertised, marketed, distributed, or sold monitoring products and services to consumers throughout the United States.

2. Respondent Scott Zuckerman ("Zuckerman") is the president, founder, resident agent, and chief executive officer of Support King. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had authority to control, or participated in the acts or practices of Support King, including the acts and practices set forth in this Complaint. Among other things, Respondent Zuckerman created Support King's websites,

hired service providers for these websites, and signed contracts on behalf of Respondent Support King. His principal office or place of business is the same as that of Support King.

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

II. RESPONDENTS' BUSINESS PRACTICES

4. Respondents license, market, and sell various monitoring products and services, each of which allows a purchaser to monitor surreptitiously another person's activities on that person's mobile device (the "device user"). These types of surreptitious monitoring apps have been used by stalkers and domestic abusers to monitor their victims' physical movements and online activities, as well as to obtain their sensitive personal information without authorization.

5. Respondents offer or have offered various monitoring products and services with varying capabilities and costs for Android devices (collectively, "SpyFone products and services").

a. SpyFone for Android Basic: Respondents' SpyFone for Android Basic ("Android Basic") is marketed as a product to monitor children or employees. Android Basic first became available in 2018, and is sold on a subscription basis for $99.95 for twelve months. Once installed, Android Basic captures and logs, among other things, the following: SMS messages; call history; GPS location and live location; web history; contacts; pictures; calendar; files downloaded on the device; and notifications. It gives purchasers the ability to block apps, receive an app usage report, and also claimed it could spoof text messages so that the purchaser can send text messages that appear to be coming from the monitored device.

b. SpyFone for Android Premium: Respondents' SpyFone for Android Premium ("Android Premium") is also marketed as a product to monitor children or employees. Android Premium first became available in 2018, and is sold on a subscription basis for $119.95 for three months, or $199.95 for twelve months. In addition to the functionality included with Android Basic, Android Premium is marketed as able to capture and log or transmit, among other things, the following: emails; video chats; and activity on or through apps, including posts made on social media, contents of messages sent and received, pictures shared on photo apps, and information exchanged on online dating apps.

c. SpyFone for Android Xtreme: Respondents' SpyFone for Android Xtreme ("Android Xtreme") is marketed as SpyFone's "most popular" product, and also as a tool to monitor children or employees. Android Xtreme first became available in 2018, and is sold on a subscription basis for $179.95 for three months, or $299.95 for twelve months. In addition to the functionality included with Android Premium, Android Xtreme includes,

among other things, a key logger, and live screen viewing. It also includes the ability to remotely take pictures, record audio by turning on the device's microphone, record calls, and send the mobile device commands through SMS, such as commands to vibrate or ring the mobile device.

d. SpyFone for Android Xpress: Respondents' SpyFone for Android Xpress ("Android Xpress") was a mobile device sold through at least spring 2019 that came preinstalled with a one-year subscription for Android Xtreme, and started at $495.

III. INSTALLATION AND MONITORING

6. Installing the SpyFone products requires that the purchaser have physical access to the device. The products are not available through the Google Play store, and instead must be downloaded from Respondents' website. Purchasers of SpyFone Android products that require installation must take steps to bypass numerous restrictions implemented by the operating system or the mobile device manufacturer on the monitored mobile device. Among other things, SpyFone instructs purchasers to enable the monitored mobile device to allow downloads from "unknown sources" for certain versions of Android. Android warns users "[i]f you download apps from unknown sources, your device and personal information can be at risk. Your device could get damaged or lose data. Your personal information could be harmed or hacked." SpyFone also instructs the purchaser to "disable [] the verification of applications," a security setting that identifies potentially harmful applications by scanning what applications are on the mobile device.

7. To enable certain functions of the SpyFone products, such as viewing outgoing email, purchasers must gain administrative privileges to the mobile device, such as through "rooting" the mobile device, giving the purchaser privileges to install other software on the mobile device that the manufacturer would not otherwise allow. This access enables features of the SpyFone products to function, exposes a mobile device to various security vulnerabilities, and can invalidate warranties that a mobile device manufacturer or carrier provides.

8. SpyFone, unlike most other mobile applications, does not appear as an application with an icon on the mobile device. During the installation process for SpyFone Android products, SpyFone gives the purchaser instructions on further steps he or she can take to hide the product on the device so that the device user will be unaware the device is being monitored. For example, the purchaser can disable notifications that would otherwise appear warning the monitored mobile device user that the SpyFone product captures "everything that is displayed on the screen." After installation, the purchaser is instructed to "[r]eboot the device to hide the application" and is then counseled for "[b]est [d]iscretion" to delete the mobile device's web browsing history, delete the installation file on the mobile device, delete the notification on the mobile device, disable notifications, and "make the application trusted," all steps to ensure the device user never learns of the surreptitious monitoring. The SpyFone software can then only be found by navigating through the device's "Settings," where, according to SpyFone's website, it is labeled as "System Service" in order "to be more stealthy[.]"

9. Once the purchaser installs the SpyFone Android product, he or she does not need physical access to the monitored mobile device, and can remotely monitor the device user's activities from an online dashboard.

10. Despite stating in a disclaimer that its monitoring products and services are designed for monitoring children or employees, Respondents do not take any steps to ensure that purchasers use Respondents' monitoring products and services for such purposes.

11. The purported use of the monitoring products and services for employment or child-monitoring purposes is a pretext. Parents and employers would not typically want the monitoring product to spoof text messages from the device, a feature SpyFone marketed to its customers, or want to disable security measures on a mobile phone to install Respondents' Android monitoring products and services—particularly when doing so may void a warranty and weaken the mobile device's security. Many other monitoring products are available in the marketplace that do not carry these risks.

12. Device users who are surreptitiously monitored using Respondents' monitoring products and services cannot stop the monitoring because they do not know it is happening. In fact, Respondents instruct the purchasers on how to hide the SpyFone products and services on the mobile device so that device users are unaware they are being monitored.

IV. RESPONDENTS' DATA SECURITY PRACTICES

13. Since 2018, Respondents have collected personal information about purchasers and device users monitored by SpyFone products and services as described above. This personal information includes, but is not limited to, photos, text messages, web histories, and GPS locations.

14. In 2018 and into 2019, Respondents' Terms of Use for Respondents' monitoring products and services stated, "SpyFone cares about the integrity and security of your personal information. We will take all reasonable precautions to safeguard customer information, including but not limited to contact information, personally identifiable information (PII), and payment details," and "Spyfone uses its database to store your encrypted personal information."

15. Data is collected from a user's mobile device and stored on a server accessible to Respondents ("Respondents' server") once SpyFone products and services are installed on an Android mobile device.

16. After initial setup, all information surreptitiously captured from a device user's mobile device is stored on a separate server that was accessible only by one of Respondents' service providers.

17. Respondents have engaged in a number of practices that failed to provide reasonable data security for consumers' personal information. Among other things, Respondents:

a. Failed to encrypt personal information stored on Respondents' server, including photos, text messages, web histories, and GPS locations;

b. Failed to ensure access to Respondents' server was properly configured so that only authorized users could access consumers' personal information;

c. Failed to adequately assess and address vulnerabilities of its Application Programming Interfaces (APIs), including failing to whitelist IP Addresses that could access the API;

d. Transmitted purchasers' passwords for their SpyFone accounts in plain text; and

e. Failed to contractually require its service provider that stored monitored information from the SpyFone products and services to adopt and implement data security standards, policies, procedures or practices.

18. As a result of some of these failures, in August 2018, an unauthorized third party accessed Respondents' server, thereby gaining access to the data of approximately 2,200 consumers. The information exposed included records collected from the mobile devices, including photos.

19. Respondents disseminated a notice to purchasers following the breach in August 2018 representing that they had "partner[ed] with leading data security firms to assist in our investigation" and that they would "coordinate with law enforcement authorities" on the matter.

20. Respondents did not partner with any data security firms to assist in their investigation of the unauthorized access.

21. Respondents did not work with or coordinate with law enforcement on any aspect of the unauthorized access.

V. INJURY

22. Respondents' SpyFone monitoring products and services substantially injure device users by enabling purchasers to stalk them surreptitiously. Stalkers and abusers use mobile device monitoring software to obtain victims' sensitive personal information without authorization and monitor surreptitiously victims' physical movements and online activities. Stalkers and abusers then use the information obtained via monitoring to perpetuate stalking and abusive behaviors, which cause mental and emotional abuse, financial and social harm, and physical harm, including death.

23. Stalking victims experience financial loss both directly and indirectly. Directly, stalkers and abusers can use the information obtained through monitoring products and services to take over a victim's financial accounts, and redirect any (or all) funds to the stalker or abuser. Indirectly, victims experience financial loss through the costs associated with therapy or counseling, and moving away from an abuser.

24. Even after stalking or domestic abuse ends, victims continue to experience substantial harm, including injury in the form of depression, anxiety, and ongoing fear for one's safety.

25. The sale of Respondents' surreptitious monitoring products and services also substantially injures device users by undermining their mobile devices' security features. Installation of Respondents' Android monitoring products and services requires the purchaser to circumvent certain security features and settings, such as disabling the verification of applications, disabling pop-up notifications, and enabling installation of apps from unknown sources. Such actions could expose a mobile device to various security vulnerabilities, including outdated operating systems and malware, and consumers may experience lost warranty coverage and need to purchase a new mobile device.

26. With surreptitious monitoring products and services, these mobile device security risks are compounded by the fact that, in most circumstances, the device user is unaware that security features have been compromised, and thus does not know that he or she should implement heightened safeguards to protect the security of his or her mobile device.

27. These harms are not reasonably avoidable by consumers, as device users do not know that their mobile devices are surreptitiously tracked using Respondents' SpyFone monitoring products and services. Even if device users eventually learn that they are being monitored, information from their mobile devices has already been collected by Respondents.

28. These harms outlined above are not outweighed by countervailing benefits to consumers or competition.

VI. COUNT I – UNFAIRNESS
Unfair Sales of Surreptitious Monitoring Devices

29. In numerous instances, Respondents sell or have sold monitoring products and services that operate surreptitiously on mobile devices without taking reasonable steps to ensure that the purchasers use the monitoring products and services only for legitimate and lawful purposes.

30. Respondents' actions cause or are likely to cause substantial injury to consumers that consumers cannot reasonably avoid themselves and that is not outweighed by countervailing benefits to consumers or competition. Therefore, Respondents' acts or practices as described in Paragraph 29 constitute unfair acts or practices.

COUNT II – DECEPTION
Data Security Misrepresentations

31. In numerous instances in connection with the sale of the monitoring products and services, Respondents have represented, directly or indirectly, expressly or by implication, that Respondents will take all reasonable precautions to safeguard customer information, including by using their database to store consumers' personal information encrypted.

32. In truth and in fact, as set forth in Paragraphs 13 through 18, Respondents did not take all reasonable precautions to safeguard customer information and information stored in Respondents' database was not encrypted. Therefore, Respondents' representations as described in Paragraph 31 of this Complaint are false and misleading and constitute deceptive acts or practices.

COUNT III – DECEPTION
Data Breach Response Misrepresentations

33. In numerous instances in connection with the sale of the monitoring products and services, Respondents represented, directly or indirectly, expressly or by implication, that Respondents partnered with leading data security firms to investigate the data breach and coordinated with law enforcement authorities.

34. In truth and in fact, as set forth in Paragraphs 20 and 21, Respondents did not actually partner with leading data security firms or work with law enforcement authorities. Therefore, Respondents' representations as described in Paragraph 33 of this Complaint are false and misleading and constitute deceptive acts or practices.

Violations of Section 5 of the FTC Act

35. 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 FTC Act.

THEREFORE, the Federal Trade Commission, this twentieth day of December 2021, 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 the Respondents with violations 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 thirty (30) days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested Persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondents are:

   a. Respondent Support King, LLC ("Support King"), also formerly doing business as SpyFone.com, is a Puerto Rico limited liability company with a principal office or principal place of business at 5900 Ave Isla Verde, Carolina, Puerto Rico 00979-5746. At all times material to this Complaint, acting alone or in concert with others, Support King has advertised, marketed, distributed, or sold monitoring products and services to consumers throughout the United States.

   b. Respondent Scott Zuckerman ("Zuckerman") is the president, founder, resident agent, and chief executive officer of Support King. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had authority to control, or participated in the acts or practices of Support King, including the acts and practices set forth in this Complaint. Among other things, Respondent Zuckerman created Support King's websites, hired service providers for these websites, and signed contracts on behalf of Respondent Support King. His principal office or place of business is the same as that of Support King.

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. "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 is made in 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 representation that requires the disclosure appears.

6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices 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. "Corporate Respondent" means Support King, LLC, also formerly d/b/a SpyFone.com, and its successors and assigns.

C. "Covered Business" means Corporate Respondent, any business that Corporate Respondent controls, directly or indirectly, and any business that Individual Respondent controls, directly or indirectly.

D. "Covered Incident" means any instance in which any United States federal, state, or local law or regulation requires Respondents to notify any U.S. federal, state, or local government entity that information collected or received, directly or indirectly, by Respondents from or about an individual consumer was, or is reasonably believed to have been, accessed or acquired without authorization.

E. "Individual Respondent" means Scott Zuckerman.

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

G. "Internet" means collectively the myriad of computer and telecommunication facilities, including equipment and operating software, which comprises the interconnected world- wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire, radio, or other methods of transmission.

H. "Mobile Device" means any portable computing device that operates using a mobile operating system, including but not limited to, any smartphone, tablet, wearable, or sensor, or any periphery of any portable computing device.

I. "Monitoring Product or Service" means any software application, program, or code that can track or monitor a user's activities on a Mobile Device, including but not limited to, the user's text messages, web browser history, geolocation, and photos.

J. "Person" means any individual, partnership, corporation, trust, estate, cooperative, association, or other entity.

K. "Personal Information" means individually identifiable information from or about an individual consumer, including: (a) a first and last name; (b) a home or other physical address; (c) an email address; (d) a telephone number; (e) a Social Security number; (f) a driver's license or other government issued identification number; (g) a financial account number; (h) credit or debit card information; (i) a date of birth;

(j) a persistent identifier that can be used to recognize a user over time and across different Web sites or online services, such as a user name, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier; (k) photograph, video, audio file, or contents of email or other messages; and (l) geolocation information sufficient to identify street name and name of a city of town.

L. "Purchaser" means any Person who buys or subscribes to, including on a trial basis, any Monitoring Product or Service provided by Respondents.

Provisions

I. COLLECTION OF INFORMATION

IT IS ORDERED that Respondents, and all other Persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or indirectly, immediately disable all access to any information collected by or through a monitored Mobile Device and immediately cease collection of any data through any Monitoring Product or Service installed before the date of entry of this Order.

II. DATA DELETION

IT IS FURTHER ORDERED that within thirty (30) days after entry of this Order, 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, must destroy all Personal Information collected from a Monitoring Product or Service sold or distributed by Respondents prior to entry of this Order.

III. NOTICE TO PAST PURCHASERS AND MOBILE DEVICE USERS

IT IS FURTHER ORDERED that Respondents must:

A. Within five (5) days after the date of entry of this order post a Clear and Conspicuous notice on all of Corporate Respondent's consumer-facing websites, which will remain posted for two years after entry of this Order, and which states:

> The Federal Trade Commission (FTC) [hyperlink to www.ftc.gov], the nation's consumer protection agency, recently alleged that Support King sold illegal monitoring products and services. To settle the lawsuit, Support King agreed to disable its monitoring products and services and tell people that it is against the law to monitor other adults without their permission. A previous notice of June 2020 inaccurately suggested the settlement pertained only to subscribers in the United States. The settlement relates to Support King's services worldwide.

> If you think someone is illegally monitoring your phone or your phone was compromised by this software, please call 1-877-382-4357 or visit the Federal Trade Commission [hyperlink to FTC consumer blog post announcing settlement] for more information.
>
> For help, please use a different, secure phone to call the National Domestic Violence Hotline at 1-800-799-7233. If you're in danger right now, call 911.

B. Send an email with the subject line "Notice of FTC Settlement: Illegal Monitoring Products Disabled" to Purchasers of a Monitoring Product or Service prior to entry of this Order, which Clearly and Conspicuously states:

> The Federal Trade Commission (FTC) [hyperlink to www.ftc.gov], the nation's consumer protection agency, recently alleged that Support King sold illegal monitoring products and services. To settle the lawsuit Support King agreed to disable its software and let you know that it is against the law to monitor other adults without their permission. A previous notice of June 2020 inaccurately suggested the settlement pertained only to subscribers in the United States. The settlement relates to Support King's services worldwide.

C. Send a Clear and Conspicuous notice via on-screen notification to Mobile Device users with a Monitoring Product or Service installed on their Mobile Device prior to the entry of this Order, which shall Clearly and Conspicuously state:

> **Someone may have secretly monitored your phone.**
>
> The Federal Trade Commission has alleged that Support King sold illegal monitoring products, which may have been installed on this phone. The software has been disabled.
>
> This phone may still not be secure. Photos, emails, texts, and location were collected from this phone.
>
> For details, visit [hyperlink to FTC blog] or call 877-382-4357.
>
> For help, call the National Domestic Violence Hotline 800-799-7233 using a secure phone. If you're in danger, call 911.

IV. BAN ON MONITORING PRODUCTS AND SERVICES

IT IS FURTHER ORDERED that Respondents are permanently restrained and enjoined from licensing, advertising, marketing, promoting, distributing, or offering for sale, or assisting in the licensing, advertising, marketing, promoting, distributing, or offering for sale, any Monitoring Products or Services to consumers.

V. PROHIBITION AGAINST MISREPRESENTATIONS

IT IS FURTHER ORDERED that Respondents, 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 any product or service, are hereby permanently restrained and enjoined from misrepresenting, expressly or by implication, the extent to which Respondents work with privacy or security firms, and the extent to which Respondents maintain and protect the privacy, security, confidentiality, or integrity of Personal Information.

VI. MANDATED INFORMATION SECURITY PROGRAM

IT IS FURTHER ORDERED that Corporate Respondent, and any Covered Business, must not transfer, sell, share, collect, maintain, or store Personal Information unless it establishes and implements, and thereafter maintains, a comprehensive information security program ("Information Security Program") that protects the security, confidentiality, and integrity of such Personal Information. To satisfy this requirement, each Respondent must, at a minimum:

A. Document in writing the content, implementation, and maintenance of the Information Security Program;

B. Provide the written program and any evaluations thereof or updates thereto to its board of directors or governing body or, if no such board or equivalent governing body exists, to a senior officer responsible for its Information Security Program at least once every twelve (12) months and promptly (not to exceed thirty (30) days) after a Covered Incident;

C. Designate a qualified employee or employees to coordinate and be responsible for the Information Security Program;

D. Assess and document, at least once every twelve (12) months and promptly (not to exceed thirty (30) days) following a Covered Incident, internal and external risks to the security, confidentiality, or integrity of Personal Information that could result in the unauthorized disclosure, misuse, loss, theft, alteration, destruction, or other compromise of such information;

E. Design, implement, maintain, and document safeguards that control for the internal and external risks to the security, confidentiality, or integrity of Personal Information identified in response to sub-Provision VI.D. Each safeguard must be based on the volume and sensitivity of the Personal Information that is at risk, and the likelihood that the risk could be realized and result in the unauthorized access, collection, use, alteration, destruction, or disclosure of the Personal Information. Such safeguards must include:

1. Training of all of Respondents' employees, at least once every twelve (12) months, on how to safeguard Personal Information;

2. Technical measures to monitor all of Respondents' networks and systems and assets within those networks to identify data security events, including unauthorized attempts to exfiltrate Personal Information from those networks;

3. Technical measures to secure Respondents' web applications and mobile applications and address well-known and reasonably foreseeable vulnerabilities identified by Respondents through risk assessments and/or penetration testing;

4. Data access controls for all databases storing Personal Information, including by, at a minimum, (a) requiring authentication to access them, and (b) limiting employee or service provider access to what is needed to perform that employee's job function;

5. Encryption of (a) Personal Information collected through Monitoring Products and Services and (b) financial account information; and

6. Policies and procedures to ensure that all service providers with access to Respondents' network or access to Personal Information are adhering to Respondents' Information Security Program.

F. Assess, at least once every twelve (12) months and promptly (not to exceed thirty (30) days) following a Covered Incident, the sufficiency of any safeguards in place to address the risks to the security, confidentiality, or integrity of Personal Information, and modify the Information Security Program based on the results. Test and monitor the effectiveness of the safeguards at least once every twelve (12) months and promptly (not to exceed thirty (30) days) following a Covered Incident, and modify the Information Security Program based on the results.

G. Select and retain service providers capable of safeguarding Personal Information they receive from each Covered Business, and contractually require service providers to implement and maintain safeguards for Personal Information; and

H. Evaluate and adjust the Information Security Program in light of any changes to Respondents' operations or business arrangements, a Covered Incident, or any other circumstances that Respondents know or have reason to know may have an impact on the effectiveness of the Information Security Program. At a minimum, each Covered Business must evaluate the Information Security Program at least once every twelve (12) months and modify the Information Security Program based on the results.

VII. INFORMATION SECURITY ASSESSMENTS BY A THIRD PARTY

IT IS FURTHER ORDERED that, in connection with compliance with Provision VI of this Order titled Mandated Information Security Program, for any Covered Business that collects Personal Information online, Respondents must obtain initial and biennial assessments ("Assessments"):

A. The Assessments must be obtained from a qualified, objective, independent third-party professional ("Assessor"), who: (1) uses procedures and standards generally accepted in the profession; (2) conducts an independent review of the Information Security Program; and (3) retains all documents relevant to each Assessment for five (5) years after completion of such Assessment and will provide such documents to the Commission within ten (10) days of receipt of a written request from a representative of the Commission. No documents may be withheld on the basis of a claim of confidentiality, proprietary or trade secrets, work product, attorney client privilege, statutory exemption, or any similar claim.

B. For each Assessment, Respondents must provide the Associate Director for Enforcement for the Bureau of Consumer Protection at the Federal Trade Commission with the name and affiliation of the Person selected to conduct the Assessment, which the Associate Director shall have the authority to approve in his or her sole discretion.

C. The reporting period for the Assessments must cover: (1) the first one-hundred eighty (180) days after the issuance date of the Order for the initial Assessment; and (2) each two (2)-year period thereafter for twenty (20) years after issuance of the Order for the biennial Assessments.

D. Each Assessment must, for the entire Assessment period: (1) determine whether each Covered Business has implemented and maintained the Information Security Program required by Provision VI of this Order, titled Mandated Information Security Program; (2) assess the effectiveness of each Covered Business's implementation and maintenance of sub-Provisions VI.A-I; (3) identify any gaps or weaknesses in, or instances of material noncompliance with, the Security Program; and (4) identify specific evidence (including, but not limited to, documents reviewed, sampling and testing performed, and interviews conducted) examined to make such determinations, assessments, and identifications, and

explain why the evidence that the Assessor examined is sufficient to justify the Assessor's findings. No finding of any Assessment shall rely solely on assertions or attestations by a Covered Business's management. The Assessment must be signed by the Assessor and must state that the Assessor conducted an independent review of the Information Security Program and did not rely solely on assertions or attestations by a Covered Business's management. To the extent that Respondents revise, update, or add one or more safeguards required under Provision VII of this Order in the middle of an Assessment period, the Assessment shall assess the effectiveness of the revised, updated, or added safeguard(s) for the time period in which it was in effect, and provide a separate statement detailing the basis for each revised, updated, or additional safeguard.

E. Each Assessment must be completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Unless otherwise directed by a Commission representative in writing, Respondents must submit the initial Assessment to the Commission within 10 days after the Assessment has been completed via email to DEbrief@ftc.gov or 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, "Support King, LLC, FTC File No. 192 3003." All subsequent biennial Assessments must be retained by Respondents until the order is terminated and provided to the Associate Director for Enforcement within ten (10) days of request.

VIII. COOPERATION WITH THIRD PARTY INFORMATION SECURITY ASSESSOR

IT IS FURTHER ORDERED that Respondents, whether acting directly or indirectly, in connection with any Assessment required by Provision VII of this Order titled Information Security Assessments by a Third Party, must:

A. Provide or otherwise make available to the Assessor all information and material in its possession, custody, or control, that is relevant to the Assessment for which there is no reasonable claim of privilege.

B. Disclose all material facts to the Assessor, and not misrepresent in any manner, expressly or by implication, any fact material to the Assessor's: (1) determination of whether Respondents have implemented and maintained the Information Security Program required by Provision VI of this Order, titled Mandated Information Security Program; (2) assessment of the effectiveness of the implementation and maintenance of sub- Provisions VI.A-I; or (3) identification of any gaps or weaknesses in the Information Security Program.

IX. ANNUAL CERTIFICATION

IT IS FURTHER ORDERED that Respondents must:

A. One year after the issuance date of this Order, and each year thereafter, provide the Commission with a certification from a senior corporate manager, or, if no such senior corporate manager exists, a senior officer of each Covered Business responsible for each Covered Business's Information Security Program that: (1) each Covered Business has established, implemented, and maintained the requirements of this Order; (2) each Covered Business is not aware of any material noncompliance that has not been (a) corrected or (b) disclosed to the Commission; and (3) includes a brief description of any Covered Incident. The certification must be based on the personal knowledge of the senior corporate manager, senior officer, or subject matter experts upon whom the senior corporate manager or senior officer reasonably relies in making the certification.

B. Unless otherwise directed by a Commission representative in writing, submit all annual certifications to the Commission pursuant to this Order via email to DEbrief@ftc.gov or 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, "Support King, LLC, FTC File No. 192 3003."

X. COVERED INCIDENT REPORTS

IT IS FURTHER ORDERED that Respondents, for any Covered Business, within a reasonable time after the date of Respondents' discovery of a Covered Incident, but in any event no later than twenty-one (21) days after the date Respondents first notify any U.S. federal, state, or local government entity of the Covered Incident, must submit a report to the Commission. The report must include, to the extent possible:

A. The date, estimated date, or estimated date range when the Covered Incident occurred;

B. A description of the facts relating to the Covered Incident, including the causes and scope of the Covered Incident, if known;

C. A description of each type of information that triggered the notification obligation to the U.S. federal, state, or local government entity;

D. The number of consumers whose information triggered the notification obligation to the U.S. federal, state, or local government entity;

E. The acts that the Covered Business has taken to date to remediate the Covered Incident and protect Personal Information from further exposure or access, and protect affected individuals from identity theft or other harm that may result from the Covered Incident; and

F. A representative copy of each materially different notice required by U.S. federal, state, or local law or regulation and sent by the Covered Business or any of its clients to consumers or to any U.S. federal, state, or local government entity.

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, "Support King, LLC, FTC File No. 192 3003."

XI. ORDER ACKNOWLEDGMENTS

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

A. Each Respondent, within seven (7) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For five (5) years after entry of this Order, the Individual Respondent for any business that such Respondent, individually or collectively with any the other Respondent, is the majority owner or controls directly or indirectly, and the Corporate Respondent, must deliver a copy 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 Reporting. Delivery must occur within seven (7) days of entry of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

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

XII. COMPLIANCE REPORTING

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

A. One year after entry 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 Respondents; (b) identify all of the Respondents' businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Respondent (which Individual Respondent must describe if he knows or should know due to his own involvement); (d) describe in detail whether and how that Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondents made to comply with the Order; and (e) provide a copy of each Order Acknowledgment obtained pursuant to this Order, unless previously submitted to the Commission.

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

B. For ten (10) years after entry of this Order, each Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any changes in the following:

1. Each Respondent must report 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 control 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 report any change in: (a) name, including aliases or fictitious name, or residence address; or (b) title or role in any business activity, including (i) any business for which Individual Respondent performs services whether as an employee or otherwise and (ii) any entity in which Individual Respondent has any ownership interest and over which Individual 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 to the Commission notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to 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: "Support King, LLC, FTC File No. 192 3003."

XIII. RECORDKEEPING

IT IS FURTHER ORDERED that Respondents must create certain records for ten (10) years after the issuance date of this Order and retain each such record for five (5) years. 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, whether as an employee or otherwise, that Person's: name; address; 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 all attestations; and

D. A copy of each unique advertisement or other marketing material.

XIV. COMPLIANCE MONITORING

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

A. Within ten (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; appear for depositions; and produce documents 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 any employee or other Person affiliated with any Respondent who has agreed to such an interview. The Person interviewed 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 of 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 the Individual Respondent, pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. §1681b(a)(1).

XV. ORDER EFFECTIVE DATES

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on December 20, 2041, 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 this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

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

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

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

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

By the Commission.

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Today, the Commission has proposed banning Support King, the operator of SpyFone, and its top executive, Scott Zuckerman, from marketing surveillance software to address severe misconduct related to their spying software scheme.

As alleged in the Commission's complaint, Support King licensed and marketed products where stalkers [1] and other users were given instructions on how to install an app on another person's mobile device, allowing users to have unfettered access to their target's location, text messages, and more. The company also employed shoddy security protocols that led to unauthorized access of sensitive personal records. To top it off, the company lied to its users about how it was handling the intrusion.

Surveillance Ban

The Commission is seeking public comment on banning Support King and Scott Zuckerman from licensing, marketing, or offering for sale surveillance products. This is a significant change from the agency's past approach. For example, in a 2019 stalkerware settlement, the Commission allowed the violators to continue developing and marketing monitoring products. [2]

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[1] *See* Press Release, Electronic Frontier Foundation, Watch EFF Cybersecurity Director Eva Galperin's TED Talk about Stalkerware (May 28, 2020) https://www.eff.org/deeplinks/2020/05/watch-eff-cybersecurity-director-evagalperins-ted-talk-about-stalkerware.

[2] The Commission's settlement in Retina-X Studios allowed the bad actors to continue to develop and market surveillance products, subject to certain requirements that the product would be used "legitimately." Press Release, Fed. Trade Comm'n, FTC Gives Final Approval to Settlement with Stalking Apps Developer (Mar. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/03/ftc-gives-final-approval-settlement-stalking-appsdeveloper. I reluctantly supported the resolution, despite my concerns about the leniency of the sanctions for illegal stalkerware behavior. The proposed ban in this matter will be easier to enforce, rather than making determinations about "legitimate" surveillance.

In addition to the surveillance ban, affected individuals will receive notifications that someone may have been surreptitiously monitoring their mobile device, as well as information to seek help if they may be in danger.[3] The Commission welcomes public comment on these provisions.

Criminal Law Enforcement

The FTC's proposed order in no way releases or absolves Support King or Scott Zuckerman of any potential criminal liability. While this action was worthwhile, I am concerned that the FTC will be unable to meaningfully crack down on the underworld of stalking apps using our civil enforcement authorities.[4] I hope that federal and state enforcers examine the applicability of criminal laws, including the Computer Fraud and Abuse Act, the Wiretap Act, and other criminal laws, to combat illegal surveillance, including the use of stalkerware.[5]

While certain applications of these laws have been concerning,[6] I believe it would be appropriate for enforcers to use these laws to seek criminal sanctions against individuals and firms that facilitate human endangerment through surveillance and stalkerware.

[3] Notice to affected individuals promotes greater accountability for bad actors and better functioning markets. Past Commissions routinely deprived these individuals of direct notice from bad actors, but we have changed course.

[4] Ideally, the Commission can also secure redress and damages for affected individuals in these matters. But monetary relief may not be sufficient to deter wrongdoing, given the structure of the market.

[5] The Computer Fraud and Abuse Act prohibits, among other things, "intentionally access[ing] a computer without authorization or exceed[ing] authorized access" and obtaining information. 18 U.S.C. § 1030 (a)(2)(C). The Act also prohibits "knowingly and with intent to defraud, access[ing] a protected computer without authorization, or exceed[ing] authorized access, and by means of such conduct further[ing] the intended fraud and obtain[ing] anything of value . . . ." 18 U.S.C. § 1030 (a)(4).

[6] The indictment of Aaron Swartz for violations of the Computer Fraud and Abuse Act raised serious concerns about the application of the Act. *See e.g.* Kim Zetter, *The Most Controversial Hacking Cases of the Past Decade*, WIRED (Oct. 26, 2015), https://www.wired.com/2015/10/cfaa-computer-fraud-abuse-act-most-controversial-computerhacking-cases/.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from Support King, LLC, formerly d/b/a SpyFone.com ("Corporate Respondent"), and Scott Zuckerman ("Individual Respondent") (collectively, "Respondents").

The Commission has placed the proposed consent order ("Proposed Order") 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.

Support King has sold various monitoring products and services, each of which allowed a purchaser to monitor surreptitiously another person's activities on that person's mobile device. Scott Zuckerman is the president, founder, resident agent, and chief executive of Support King. Individually or in concert with others, Mr. Zuckerman controlled or had the authority to control, or participated in the acts and practices alleged in the proposed complaint.

Respondents' monitoring products and services included SpyFone for Android Basic, Premium, Xtreme, and Xpress. These monitoring products and services had varying capabilities and costs. Purchasers of these products had to take steps to bypass numerous restrictions implemented by the operating system or the mobile device manufacturer on the monitored mobile device during installation. To enable certain functions of the monitoring products and services, purchasers had to gain administrative privileges, exposing mobile devices to various security vulnerabilities.

All of Respondents' monitoring products and services required that the purchaser have physical access to the device user's mobile device for installation, and then the purchaser could remotely monitor the device user's activities from an online dashboard. Once installed, the monitoring products and services ran surreptitiously, meaning that the device user was unaware that he or she was being monitored. The SpyFone software would then only be found by navigating through the device's "Settings," where, according to SpyFone's website, it is labeled as "System Service" in order "to be more stealthy[.]"

Device users surreptitiously monitored by Respondents' monitoring products and services could not uninstall or remove Respondents' monitoring products and services because they did not know that they were being monitored. Device users often had no way of knowing that Respondents' monitoring products and services were being used on their phones. Respondents did not take any steps to ensure that purchasers would use Respondents' monitoring products and services for legitimate purposes.

Moreover, Respondents did not take steps to secure the personal information collected from device users being monitored despite stating, "SpyFone cares about the integrity and security of your personal information. We will take all reasonable precautions to safeguard customer

information, including but not limited to contact information, personally identifiable information (PII), and payment details," and "SpyFone uses its databases to store your encrypted personal information." Respondents engaged in a number of practices that, taken together, failed to provide reasonable data security to protect the personal information collected from device users.

As a result of these unreasonable data security practices, in August 2018, an unauthorized third party accessed Respondents' server, gaining access to the data of approximately 2,200 consumers. Respondents then disseminated a notice to purchasers following the unauthorized access, representing that Respondents had "partner[ed] with leading data security firms to assist in our investigation" and that they would "coordinate with law enforcement authorities" on the matter. In reality, Respondents did not partner with any data security firms or coordinate with law enforcement authorities.

The Commission's proposed three-count complaint alleges that Respondents violated Section 5(a) of the Federal Trade Commission Act. The first count alleges that Respondents unfairly sell or have sold monitoring products and services that operate surreptitiously on mobile devices without taking reasonable steps to ensure that the purchasers use the monitoring products and services only for legitimate and lawful purposes.

The second count alleges Respondents deceived consumers about Respondents' data security practices by falsely representing that it would take all reasonable precautions to safeguard customer information, including by using their database to store consumers' personal information encrypted. Respondents failed to implement appropriate security procedures to protect the personal information they collected from consumers, such as by: (1) failing to encrypt personal information stored on Respondents' server; (2) failing to ensure access to Respondents' server was properly configured so that only authorized users could access consumers' personal information; (3) failing to adequately assess and address vulnerabilities of its Application Programing Interfaces (APIs); (4) transmitting purchasers' passwords for their SpyFone accounts in plain text; and (5) failing to contractually require its service provider to adopt and implement data security standards, policies, procedures or practices.

The third count alleges Respondents deceived consumers about Respondents' data breach response, when Respondents stated they were partnering with leading data security firms to investigate the data breach and coordinating with law enforcement authorities, when in fact Respondents did not.

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 requires Respondents to disable immediately all access to any information collected through a monitored mobile device, and immediately to cease collection of any data through any monitoring software.

Part II requires that within 30 days of the entry of the Proposed Order, Respondents must delete all consumer data collected.

Analysis to Aid Public Comment

Part III of the Proposed Order requires Respondents to provide notice on all of Support King's websites, and to provide notice through emails to purchasers and trial users, stating that the FTC alleged Support King sold illegal monitoring products and services, that Support King agreed to disable the software, and that Respondents' previous notice of June 2020 was inaccurate. Respondents must also provide notice to each user of a monitored device, through an on-screen notification, informing the user that Support King collected information from his or her phone, and that the phone may not be secure.

Part IV of the Proposed Order bans Respondents from licensing, advertising, marketing, promoting, distributing, selling, or assisting in any of the former, any monitoring product or service to consumers.

Part V of the Proposed Order prohibits Respondents from making any misrepresentations about the extent to which Respondents work with privacy or security firms, or the extent to which Respondents maintain and protect the privacy, security, confidentiality, and integrity of personal information.

Part VI of the Proposed Order prohibits Corporate Respondent, and any Covered Business (any business controlled, directly or indirectly, by either Corporate Respondent or Individual Respondent) from transferring, selling, sharing, collecting, maintaining, or storing personal information unless it establishes and implements, and thereafter maintains, a comprehensive information security program that protects the security, confidentiality, and integrity of such personal information.

Part VII requires Respondents to obtain initial and biennial data security assessments for twenty years for any Covered Business that collects personal information online.

Part VIII of the Proposed Order requires Respondents to disclose all material facts to the assessor and prohibits Respondents from misrepresenting any fact material to the assessments required by Part VII.

Part IX requires Respondents to submit an annual certification from a senior corporate manager (or senior officer responsible for its information security program), that Respondents have implemented the requirements of the Proposed Order, are not aware of any material noncompliance that has not been corrected or disclosed to the Commission, and includes a brief description of any covered incident involving unauthorized access to or acquisition of personal information.

Part X requires Respondents to submit a report to the Commission following their discovery of any covered incident.

Parts XI through XIV of the Proposed Order are reporting and compliance provisions, which include recordkeeping requirements and provisions requiring Respondents to provide information or documents necessary for the Commission to monitor compliance. Part XV states that the Proposed Order will remain in effect for 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 complaint or Proposed Order, or to modify in any way the Proposed Order's terms.

Complaint

IN THE MATTER OF

BOARD OF DENTAL EXAMINERS OF ALABAMA

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

Docket No. C-4757; File No. 191 0153
Complaint, September 28, 2021 – Decision, December 20, 2021

This consent order addresses the Board of Dental Examiners of Alabama's violation of the FTC Act through the exclusion of new competition in the relevant market. The complaint alleges that the Board of Dental Examiners of Alabama prohibited dental assistants and other non-dentist practitioners from performing scans inside a patient's mouth without on-site dentist supervision thereby limiting new and innovative teledentistry platforms and the dentists who partner with these platforms. Under the order the Respondent must no longer impede clear aligner platforms or dental professionals affiliated with them from providing clear aligner therapy through remote treatment.

Participants

For the *Commission*: *Philip Kehl*, *Elizabeth Gillen*, and *Melissa Westman-Cherry*.

For the *Respondent*: *Ashby Pate*, *Jackson Sharman*, and *Logan Matthews [Lightfoot Law]*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the Respondent, Board of Dental Examiners of Alabama, has violated the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

NATURE OF THE CASE

1. This case challenges actions of the Board of Dental Examiners of Alabama ("Dental Board") that unreasonably exclude emerging competition from certain new and innovative teledentistry platforms, and the dentists who partner with these platforms. The Dental Board is comprised of seven members, six of whom are practicing dentists.

2. In recent years, dentists working with several new firms have started to offer teeth alignment treatment that differs from the traditional treatments offered through dental offices, such as braces or clear aligners prescribed following an in-office appointment with a dentist. In this new treatment model, patients are fitted for clear aligners following a visit to a storefront location, where a digital scan is performed by a dental assistant. The scan is then reviewed by a dentist working remotely. Patient interactions with dental professionals also take place on a remote basis. This mode of treatment often is substantially less expensive than traditional treatments.

3. In 2017 and 2018, the Dental Board took actions to stop the expansion in Alabama of firms providing clear aligners in Alabama through a teledentistry model. First, the Board amended Alabama Administrative Code § 270-X-3.10(o)(2). The Board's interpretation of that amendment, in conjunction with other existing Board regulations, operates to prohibit non-dentists from performing digital scans without on-site dentist supervision. Thereafter, the Dental Board directed the leading provider of clear aligners through a teledentistry model to cease performing digital scans without on-site dentist supervision.

4. The actions of the Dental Board have deprived consumers in Alabama of low-price, convenient options for teeth alignment treatment without any legitimate justification or defense. The actions of the Dental Board have unreasonably restrained competition and violate Section 5 of the Federal Trade Commission Act.

RESPONDENT

5. Respondent Dental Board is the regulatory body responsible for the licensure and monitoring of the practice of dentistry in the State of Alabama. The Dental Board is organized, exists, and transacts business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at 2229 Rocky Ridge Road, Birmingham, Alabama.

6. The State of Alabama created the Dental Board pursuant to the Alabama Dental Practice Act, Code of Alabama, Title 34, Chapter 9 (Dentists and Dental Hygienists) (Ala. Code § 34-9-1, *et. seq.*) ("Act") to carry out the purposes and enforce the provisions of the Act. It is unlawful for an individual to practice dentistry or to provide dental hygiene services in Alabama without holding a current license to practice issued by the Dental Board.

7. The Dental Board is responsible for the licensure of all dentists practicing in Alabama, including orthodontists.

8. The Dental Board is comprised of seven members: six dentists and one dental hygienist. To be eligible for Dental Board membership, the dentist members must be actively engaged in the practice of dentistry in Alabama for at least five years prior to their selection to the Dental Board. Members of the dental profession select the Dental Board members. Licensed dentists residing and practicing in Alabama vote to elect five of the six dentist members. The Alabama Dental Society selects the sixth. Licensed dental hygienists residing and practicing in the state elect the dental hygienist member.

9. Collectively, the six dentist members can and do control the operation of the Dental Board. While serving on the Dental Board, dentist members continue to engage in the for-profit business of providing dental services.

10. Except to the extent that competition has been restrained as alleged herein, and depending on their geographic location, dentists in Alabama compete with each other and with dentist members of the Dental Board in the provision of dental services. Through their dental practices, dentist board members are distinct economic actors.

JURISDICTION

11. The Dental Board is a "person" within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

12. The acts and practices of the Dental Board, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44. In particular, dentists and non-dentist providers of dental services in Alabama purchase and receive products and equipment that are shipped across state lines by manufacturers and suppliers located out of state, and transfer money across state lines in payment for these products and equipment.

BACKGROUND

13. "Malocclusion" is a clinical term for the misalignment of or incorrect relation between teeth. Many dentists and orthodontists offer patients treatment for malocclusion. This treatment may include prescribing braces or clear aligners.

14. Braces are the traditional form of treatment for malocclusion. Braces typically employ visible components, including wires or brackets and rubber bands. Braces are installed and adjusted during in-person visits to a dentist's or orthodontist's office, and patients, or their insurance providers, pay dentists or orthodontists directly for these services.

15. Clear aligners are custom-made, removable plastic mouthpieces that are molded to fit the patient's teeth for the treatment of malocclusion. Clear aligners are less conspicuous than braces.

16. Clear aligner therapy consists of supplying the dental patient with a series of mouthpieces sequenced to correct incrementally the malocclusion over a prescribed period. Wearing clear aligners places gentle pressure on the patient's teeth to reposition them gradually.

17. Clear aligner therapy often begins with an intraoral scan of the patient's teeth using a scanning device placed inside the patient's mouth. The intraoral scanning device, also known as an "optical impression device," is a wand-like tool inserted into the patient's mouth to create a three-dimensional digital model of the patient's teeth, bite, gums, and palate. The scanning device enables clinical evaluations without a conventional plaster-cast impression. After the scan is completed, a dentist or orthodontist determines whether the patient is a candidate for clear aligner therapy.

18. Many patients are prescribed clear aligners through a visit to a dentist's or orthodontist's office. A patient will schedule an in-person visit with a dentist or orthodontist for assessment of and possible treatment for malocclusion and may receive a prescription for clear aligners from the dentist or orthodontist. As with braces, patients or their insurance providers typically pay dentists or orthodontists directly for these services.

19. In recent years, several new firms, referred to herein as clear aligner platforms, have launched a new business model utilizing teledentistry. Under this model, the clear aligner platform may send an "impression kit" to the prospective patient's home, which the patient uses to take impressions of her teeth and then sends to the provider. Alternatively, the prospective patient may visit a storefront location, where a dental hygienist, dental assistant, or other non-dentist professional performs an intraoral scan of the patient's teeth. For reasons of ease and convenience, many patients prefer to initiate treatment with clear aligner platforms by visiting a physical storefront.

20. The typical patient treatment process employed by clear aligner platforms is as follows. After an impression or digital scan of the prospective patient's teeth is taken, the clear aligner platform provides the results to a dentist working remotely. The dentist reviews the results and determines whether the patient is a candidate for clear aligner therapy. If so, the dentist may prescribe a set of clear aligners for the patient. A set of custom-made clear aligners is manufactured and sent to the patient's home. Dental professionals are available for consultations on a remote basis.

21. Several firms employ this teledentistry model to provide clear aligner therapy to patients, including SmileDirectClub, Candid, and Smilelove. These firms typically offer clear aligner therapy at prices substantially below the prices associated with treatment using braces or clear aligners supplied by a dentist or orthodontist in a traditional office setting.

22. Many patients prefer clear aligner therapy supplied through a teledentistry model to treatment through a traditional dentist's or orthodontist's office. These patients find this model to be less expensive and more convenient than clear aligners or braces fitted through in-person office visits to a dentist or orthodontist.

THE CHALLENGED CONDUCT

23. Following the rollout and initial success of the first clear aligner platforms, the Dental Board adopted a regulation impeding their operations. Specifically, in September 2017, members of the Board voted to amend Alabama Administrative Code § 270-X-3.10(o)(2). The Board's interpretation of that amendment, in conjunction with other existing Board regulations, operates to prohibit non-dentist dental personnel, such as dental hygienists and assistants, from taking digital intraoral scans of a patient's teeth without supervision by a dentist who is physically present in the dental facility. The business model employed by emerging clear aligner platforms is not compatible with the Board's interpretation of the amended rule, as dental hygienists or assistants who perform digital scans for the platforms are supervised by dentists working remotely.

24. In September 2018, pursuant to a Dental Board vote, the Dental Board sent a cease-and-desist letter to SmileDirectClub. In the letter, the Dental Board instructed SmileDirectClub that the firm and its affiliated personnel were engaged in the unauthorized practice of dentistry.

25. The actions of the Dental Board described above constitute concerted action for purposes of the antitrust laws.

26. As a result of the Dental Board's actions, SmileDirectClub halted a planned expansion of facilities in Alabama. In addition, the Dental Board's actions were widely publicized, including as a result of related litigation between the Dental Board and SmileDirectClub. Other clear aligner platforms are therefore aware of the Board's conduct.

27. The Dental Board's actions have unreasonably restrained competition for the treatment of malocclusion in Alabama. Consumers in Alabama have been deprived of full competition across all channels through which consumers could access treatment for malocclusion.

28. The Dental Board's actions do not yield procompetitive benefits sufficient to justify their harmful effect on competition.

29. The Dental Board's actions have not been reviewed or approved by any neutral state officials with the power to veto or modify the Board's actions.

VIOLATION ALLEGED

30. The acts and practices described above unreasonably restrain competition and constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such acts and practices or the effects thereof are continuing and will likely continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of December 2021, issues its Complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission initiated an investigation of certain acts and practices of the Board of Dental Examiners of Alabama ("Board" or "Respondent"). 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 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondent and the Bureau of Competition executed an Agreement Containing Consent Order ("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.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the said Act, and that a complaint should issue stating its charges in that respect. 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. 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 makes the following jurisdictional findings:

1. Respondent Board of Dental Examiners of Alabama is the regulatory board responsible for the licensure, monitoring and safe practice of dentistry in the State of Alabama with its executive offices and principal place of business located at 2229 Rocky Ridge Road, Birmingham, Alabama 35216.

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

ORDER

I. Definitions

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

A. "Board" or "Respondent" means the Board of Dental Examiners of Alabama, and its committees, groups, members, employees, agents, representatives, and assigns.

B. "Commission" means the Federal Trade Commission.

C. "Alabama Dental Practice Act" means the Code of Alabama, Title 34, Chapter 9 (Dentists and Dental Hygienists) (Ala. Code § 34-9-1, *et. seq.*).

D. "Clear Aligner Platform" means any Person that provides, or facilitates the provision of, remote treatment for malocclusion through the provision of Clear Aligner Therapy, using remote supervision by a Dentist.

E. "Clear Aligner Therapy" means the use of Intraoral Scanning and fabricated, removable aligners for the treatment of malocclusion.

F. "Dentist" means any individual holding a license, issued by the Board, to practice dentistry in Alabama.

G. "Intraoral Scan" or "Intraoral Scanning" means the capture and creation of dental pictures, photographs, or images using a device, such as an *iTero* brand device or similar device, to scan inside of a patient's mouth. The terms Intraoral Scan and Intraoral Scanning do not include radiographic or x-ray imagining techniques.

H. "Non-Dentist Provider" means any Person other than a Dentist that provides Clear Aligner Therapy.

I. "Person" means both natural and artificial persons, including but not limited to, corporations and unincorporated entities.

II. Injunction

IT IS FURTHER ORDERED that Respondent, in connection with its activities 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, directly or indirectly:

A. Requiring any Non-Dentist Provider affiliated with any Clear Aligner Platform to have on-site supervision by a Dentist when performing Intraoral Scanning; and

B. Prohibiting, restricting, impeding, or discouraging any (i) Clear Aligner Platform or (ii) Dentist or Non-Dentist Provider affiliated with any Clear Aligner Platform from providing or facilitating the provision of Clear Aligner Therapy through remote treatment;

Provided, however, nothing in this Order shall prohibit Respondent from filing, or causing to be filed, a court action against a Non-Dentist Provider, Dentist, or Clear Aligner Platform for an alleged violation of the Alabama Dental Practice Act;

For the avoidance of doubt, and other than as set out above in Paragraphs II.A. and II.B., this Order shall not be construed as preventing Respondent from pursuing any administrative remedies against a Dentist or Non-Dentist Provider pursuant to and in accordance with the Alabama Dental Practice Act and Chapter 270 of the Alabama Administrative Code.

III. Notice to Board Members

IT IS FURTHER ORDERED that Respondent shall:

A. No later than 30 days from the date this Order is issued, distribute by electronic mail with return receipt requested, a copy of this Order and the Complaint to:

1. Each Board member;

2. Each officer, director, manager, representative, agent, attorney, and employee of the Board;

3. Each Dentist or Non-Dentist Provider to whom the Board sent any correspondence related to Intraoral Scanning; and

4. Each Clear Aligner Platform identified in Appendix A.

B. For a period of 5 years from the date this Order is issued, distribute by electronic mail with return receipt requested, a copy of this Order and the Complaint to each new Board member, officer, director, manager, attorney, representative, agent or employee, and who did not previously receive a copy of this Order and the Complaint from Respondent, no later than 30 days from the date that such Person assumes his or her position.

IV. Notice to the Commission

IT IS FURTHER ORDERED that, from the date this Order is issued, Respondent shall notify the Commission no later than 60 days after any publication of advance notice of any proposed change to Chapter 270 of the Alabama Administrative Code that relates to Intraoral Scanning or Clear Aligner Platforms, including modifications to the existing rules or proposals for new rules.

V. Compliance Reports

IT IS FURTHER ORDERED that Respondent shall file verified written reports ("compliance reports") in accordance with the following:

A. Respondent shall submit interim compliance reports 30 days after the Order is issued, and every 60 days thereafter until Respondent has fully complied with Paragraph III.A.; annual compliance reports one year after the date this Order is issued, and annually for the next 5 years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request.

B. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent is in compliance with the Order. Conclusory statements that Respondent has complied with its obligations under the Order are insufficient. Respondent shall include in its report, among other information or documentation that may be necessary to demonstrate compliance:

1. A full description of the measures Respondent has implemented or plans to implement to ensure that it has complied or will comply with each paragraph of the Order;

2. A full description of any enforcement action and the circumstances leading to such enforcement action, including the sending of any cease and desist letter, against any Clear Aligner Platform. Each description should include copies of any cease and desist letter or compliant filed by the Board, as applicable;

3. A full description of any enforcement action and the circumstances leading to such enforcement action, including the sending of any cease and desist letter, against any Dentist or Non-Dentist Provider related to Intraoral Scanning. Each description should include copies of any cease and desist letter or compliant filed by the Board, as applicable; and

4. Copies of notices sent pursuant to Paragraph III of the Order.

Provided, however, that the Board need not provide any information under Paragraphs V.B.2 or V.B.3 the disclosure of which would violate Ala. Admin. Code r. 270-x-1.08(3).

C. Respondent shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent's obligations under the Order and provide copies of these documents to Commission staff upon request.

D. Respondent shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the President or another officer or employee specifically authorized to perform this function. Respondent 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.

VI. Change in Respondent

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least 20 days prior to:

A. Any change in the Board of Dental Examiners of Alabama's principal place of business address; or

B. Any other change in Respondent if such change may affect compliance obligations arising out of this Order.

VII. Access

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 Respondent, made to its principal place of business as identified in this Order, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books 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 Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative of the Commission and at the expense of Respondent; and

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

VIII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition in the provision of Clear Aligner Therapy as the Commission alleged in its Complaint.

IX. Term

IT IS FURTHER ORDERED that this Order shall terminate on December 20, 2031.

By the Commission.

Analysis to Aid Public Comment

Appendix A

1. SmileDirectClub, LLC
2. Candid Care Co.
3. Smilelove LLC

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission has accepted, subject to final approval, a consent agreement with the Board of Dental Examiners of Alabama (the "Board"). The Board is an Alabama state agency comprised of six licensed dentists and one licensed dental hygienist. The Board is charged with administering dental licensing in Alabama and carrying out the provisions of the Alabama Dental Practice Act.

The consent agreement contains a proposed order addressing allegations in the proposed complaint that the Board has unreasonably excluded competition from providers of teledentistry-based teeth alignment products and services without adequate supervision from neutral state officials, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

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

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint, the consent agreement, or the proposed order, or to modify their terms in any way. The consent agreement is for settlement purposes only and does not constitute an admission by the Board that the law has been violated as alleged in the complaint or that the facts alleged in the complaint, other than jurisdictional facts, are true.

II. Challenged Conduct

This matter involves allegations that the Board unreasonably impeded competition from new providers of clear aligner therapy in Alabama. The Board is a state regulatory agency controlled by practicing, Alabama-licensed dentists.

Braces and clear aligners (removable, fabricated molds) are treatment options for misalignment or incorrect relation between teeth (called malocclusion). Many patients are prescribed braces or clear aligners following a visit to a dentist's or orthodontist's office.

In recent years, several new firms have launched platforms that facilitate treatment for malocclusion using teledentistry. These firms typically offer clear aligner therapy at prices substantially below the prices associated with treatment using braces or clear aligners supplied by a dentist or orthodontist in a traditional office setting. To initiate treatment with a clear aligner platform, a prospective patient may visit a storefront location, where a non-dentist professional will perform a digital scan of the patient's teeth and gums to create a 3D image of the patient's mouth. The results of this intraoral scan are provided to a dentist working remotely, who determines whether the patient is a candidate for clear aligner therapy.

For reasons of price and convenience, many consumers prefer clear aligner therapy supplied through a teledentistry model.

After the entry and expansion of clear aligner platforms in Alabama, in September 2017, the Board voted to amend Alabama Administrative Code § 270-X-3.10(o)(2). The Board's interpretation of that amendment, in conjunction with other existing Board regulations, operates to prohibit non-dentist personnel from taking intraoral scans without on-site supervision by a dentist. Following a Board vote, in September 2018, the Board sent SmileDirectClub, LLC ("SmileDirectClub"), a clear aligner platform, a letter directing SmileDirectClub to cease and desist from taking intraoral scans without on-site dentist supervision.

Because of the Board's conduct, consumers in Alabama have been deprived of full competition for the treatment of malocclusion. For example, because of the Board's conduct, SmileDirectClub has halted a planned expansion of storefronts in Alabama.

III. Legal Analysis

Section 5 of the FTC Act prohibits unfair methods of competition, including concerted action prohibited by Section 1 of the Sherman Act.[1] To establish a violation of Section 1, a plaintiff must show (1) concerted action that (2) unreasonably restrains competition.[2]

State regulatory boards comprised of active market participants can violate Section 1 by promulgating and enforcing rules that harm competition in the industry in which board members participate.[3] The Board's rule amendment and cease-and-desist letter harmed competition by impeding consumer access to a low-cost and convenient option for the treatment of malocclusion.

The state action defense is not applicable here. Active market participants control the Board. Therefore, for the Board's conduct to constitute state action, neutral state officials must

[1] 15 U.S.C. § 45; *see, e.g., FTC v. Cement Inst.*, 333 U.S. 683, 693–94 (1948).
[2] 15 U.S.C. § 1; *see, e.g., National Collegiate Athletic Ass'n v. Alston*, 141 S.Ct. 2141, 2151 (2021); *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 342–43 (1982).
[3] *See N.C. Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 510-12 (2015).

actively supervise the Board's conduct. The State's supervision mechanisms must provide "realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."[4]

Although the Board's rule amendment was reviewed by Alabama's Legislative Services Agency ("LSA"), that review did not satisfy the "constant requirements" of active supervision articulated by the Supreme Court.[5] The LSA did not review the substance of the rule amendment, specifically whether the rule comports with clearly articulated state policy to displace competition.[6] Additionally, the LSA lacked the authority to veto or modify the Board's decisions.[7] Furthermore, the Board's cease-and-desist letter to SmileDirectClub did not receive any review by the LSA or any other state officials.

IV. Proposed Order

The proposed order seeks to remedy the Board's anticompetitive conduct by requiring the Board to cease and desist from requiring on-site supervision by dentists when non-dentists perform intraoral scans on prospective patients.

Section II of the proposed order addresses the core of the Board's anticompetitive conduct. Paragraph II.A. orders the Board to cease and desist from requiring non-dentists affiliated with clear aligner platforms to maintain on-site dentist supervision. Paragraph II.B. prohibits the Board from impeding clear aligner platforms, or dental professionals affiliated with clear aligner platforms, from providing clear aligner therapy through remote treatment.

Section III requires the Board to provide notice of the proposed order to Board members and employees, and to certain dentists and clear aligner platforms.

Section IV requires the Board to notify the Commission of any changes to its rules related to intraoral scanning or clear aligner platforms.

Section IX provides that the Order will terminate 10 years from the date it is issued.

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[4] *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

[5] *See N.C. Bd. of Dental Exam'rs*, 574 U.S. at 515 ("The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the mere potential for state supervision is not an adequate substitute for a decision by the State. Further, the state supervisor may not itself be an active market participant.") (internal citations and quotations omitted).

[6] Instead, the LSA determined, without explanation, that the rule amendment "does not affect competition at all." *See* Exhibit A to Brief in Support of Motion to Dismiss (Memo to File from Paula M. Greene, Feb. 12, 2018) at 13, 15, *Leeds v. Board of Dental Examiners of Alabama*, No. 2:18-cv-01679, (N.D. Ala. Nov. 21, 2018), ECF No. 33. Because the LSA made this determination, it did not review whether the rule was made pursuant to a clearly articulated state policy. *See* Ala. Code § 41-22-22.1.

[7] Alabama statutes provide a procedure by which certain Board action may be reviewed by the Alabama Legislature's Joint Committee on Administrative Regulation Review. *See* Ala. Code § 41-22-22.1. The Joint Committee did not review the actions at issue in this case.

Complaint

IN THE MATTER OF

ASCENSION DATA & ANALYTICS, LLC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF THE GRAMM-LEACH-BLILEY ACT.

Docket No. C-4758; File No. 191 0153
Complaint, December 22, 2021 – Decision, December 22, 2021

This consent order addresses Ascension Data & Analytics' violation of the GLB Act's Safeguards Rule through the failure to maintain a comprehensive information security program to protect customer information in their control. The complaint alleges that Ascension Data & Analytics' stored sensitive personal information from mortgage documents in plain text on a cloud-based server without any protections to block unauthorized access. Under the order Respondent must establish and implement comprehensive data security protections and oversight of third-party providers to ensure compliance with those safeguards.

Participants

For the *Commission*: *Jarad Brown* and *Miles Plant*.

For the *Respondent*: *Claudia McCarron* and *Kathleen Laubenstein [Mullen Coughlin LLC]*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Ascension Data & Analytics, LLC, a limited liability company, has violated the provisions of the Commission's Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, issued pursuant to Title I of the Gramm-Leach-Bliley ("GLB") Act, 15 U.S.C. § 6801 *et seq.*; and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Ascension Data & Analytics, LLC ("Ascension" or "Respondent") is a Delaware limited liability company with its principal place of business at 701 Highlander Boulevard, Suite 510, Arlington, Texas 76015.

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

RESPONDENT'S BUSINESS ACTIVITIES

3. Respondent is an analytics company that provides data, analytics, and system-based technology services and products to other companies in its corporate family in connection with mortgages. Respondent's many services include systems development, such as the creation of document management systems, automation of data-driven decision-making, and case management task scheduling; creating valuation models and comparative market analyses; and

various due diligence reviews or analyses, such as title searches, analyses of foreclosure dockets, and risk analyses related to the foregoing.

4. In or around 2017, Respondent contracted to provide the following services for a related company in connection with due diligence for residential mortgages: (a) building and maintaining a document management system for use in storing, indexing, tracking, organizing, and displaying mortgage documents; (b) valuation review services, which included creating automated valuation models and conducting comparative market analyses; (c) reviewing and analyzing loan servicing comments; (d) compliance reviews related to loan originations; and (e) collateral reviews of imaged documents.

5. Respondent's work for the related company included hiring an unaffiliated company to process the mortgage documents of borrowers relating to approximately 37,000 mortgages. These documents included mortgage applications and various associated documents, such as tax returns, that contained information about 60,593 consumers. The types of personal information in the documents included names, dates of birth, Social Security numbers, loan information, credit and debit account numbers, drivers' license numbers, credit files, or other personal and financial information of borrowers, as well as of family members and others whose information was included in the mortgage applications.

BREACH OF CUSTOMER INFORMATION

6. In February 2017, Respondent contracted with an unaffiliated company, PairPrep, Inc., doing business as OpticsML ("OpticsML"), to conduct Optical Character Recognition ("OCR") scanning on the mortgage documents.

7. Per its own policies, Respondent was required to vet the security measures of OpticsML to ensure it could properly protect the sensitive personal information of consumers. However, Respondent did nothing to assess OpticsML's security measures.

8. Despite never vetting OpticsML's security, Respondent provided it with the aforementioned mortgage documents, which contained the personal information of tens of thousands of consumers, including sensitive financial information.

9. OpticsML stored the contents of the documents on a cloud-based server and in a separate cloud-based storage location. But, in doing so, OpticsML misconfigured both the server and the storage location, leaving the sensitive personal information of tens of thousands of consumers exposed to anyone on the internet for a year, beginning in January 2018. As a result, all that was needed to view or download this personal information was the internet address of the server or the storage location; no password was required.

10. The information sat unprotected until about January 2019, when media reports revealed that this information was publicly exposed online.

11. During the year the server and the storage location were unsecured, approximately 52 unauthorized IP addresses accessed them. Most of these IP addresses were associated with computers outside the United States, including addresses from Russia and China.

GRAMM-LEACH-BLILEY ACT SAFEGUARDS RULE

12. Respondent is a financial institution, as that term is defined by Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A), because it is significantly engaged in, among other things, data processing, 12 C.F.R. § 225.28(b)(14); financial and investment advisory services, § 225.28(b)(6); and real estate settlement services, § 225.28(b)(2)(viii). Respondent is subject to the GLB Safeguards Rule, 16 C.F.R. Part 314, because it is a financial institution that handles and maintains nonpublic personal information, as defined by 16 C.F.R. § 313.3(n), that pertains to customers of other financial institutions that provide such information to Respondent.

13. The Safeguards Rule, which implements Section 501(b) of the GLB Act, 15 U.S.C. § 6801(b), was promulgated by the Commission on May 23, 2002, and became effective on May 23, 2003. The Rule requires financial institutions to protect the security, confidentiality, and integrity of customer information by developing, implementing, and maintaining a comprehensive information security program that is written in one or more readily accessible parts, and that contains administrative, technical, and physical safeguards that are appropriate to the financial institution's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information at issue, including:

a. Designating one or more employees to coordinate the information security program;

b. Identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks;

c. Designing and implementing information safeguards to control the risks identified through risk assessment, and regularly testing or otherwise monitoring the effectiveness of the safeguards' key controls, systems, and procedures;

d. Overseeing service providers by taking reasonable steps to select and retain service providers that are capable of maintaining appropriate safeguards for customer information, and requiring service providers by contract to implement such safeguards; and

e. Evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances.

16 C.F.R. §§ 314.3 and 314.4. Violations of the Safeguards Rule are enforced through the FTC Act. 15 U.S.C. § 6805(a)(7).

RESPONDENT FAILED TO OVERSEE SERVICE PROVIDERS

14. Since at least September 2016, Respondent has failed to take reasonable steps to select service providers capable of maintaining appropriate safeguards for the personal information Respondent provided.

15. Since at least July 2016, Respondent maintained a "Third Party Vendor Risk Management" policy describing the due diligence Respondent required for service providers. The policy recommends numerous steps Respondent's Chief Information Security Officer (CISO) and business managers were to take to evaluate service providers, such as having service providers provide their policies and procedures and fill out an information security questionnaire.

16. Despite its policy, Respondent has not taken any formal steps to evaluate whether service providers could reasonably protect the personal information Respondent had entrusted to them. For example, before Respondent provided documents containing consumers' sensitive personal information to OpticsML, Respondent did not take any of the steps described in its own policy to evaluate OpticsML's security capabilities.

17. Since at least September 2016, Respondent has also failed to require service providers by contract to implement appropriate safeguards for personal information that Respondent provided to those service providers. Instead, Respondent's service provider contracts have only included an agreement that "any nonpublic personal information . . . shall be protected from disclosure with all the provisions of the Gramm-Leach-Bailey [sic] Act," and not disclosed by either party without prior written consent. But these clauses did not make clear that the service providers, including OpticsML, were responsible for protecting the information in accordance with the GLB's Safeguards Rule, or that they were even subject to the rule. Respondent's service provider contracts failed to specify safeguards that service providers must implement, or otherwise require them to take reasonable steps to secure personal information.

18. Indeed, Respondent's service provider contracts do not satisfy its Third Party Vendor Risk Management policy, which requires Respondent to "contractually require its third party vendors to implement appropriate measures" with respect to customer information.

RESPONDENT FAILED TO ADEQUATELY ASSESS RISK

19. Respondent has also failed to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assess the sufficiency of any safeguards in place to control those risks.

20. Prior to September 2017, Respondent did not conduct adequate risk assessment. During this time, Respondent also did not assess risks related to its service providers, even though

its "Third Party Vendor Risk Management" policy required its CISO to "complete a quantitative assessment of risk" for each service provider.

21. In September 2017 and again in October 2018, another company in Respondent's corporate family arranged for a third-party security company to conduct technology risk assessments of the corporate family, which included some evaluation of Respondent's security and risks. However, those assessments were limited to a small subset of Respondent's service providers, and did not assess the security of a long list of other service providers, including OpticsML.

COUNT I
Violation of the GLB Safeguards Rule

22. Respondent is a financial institution, as defined in Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A). Respondent handles and maintains nonpublic personal information, as defined by 16 C.F.R. § 313.3(n), about customers of financial institutions.

23. As set forth in Paragraphs 14-18, Respondent has failed to oversee service providers.

24. As set forth in Paragraphs 19-21, Respondent has failed to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information and failed to assess the sufficiency of any safeguards in place to control those risks.

25. Therefore, the conduct set forth in Paragraphs 23-24 is a violation of the Safeguards Rule, 16 C.F.R. Part 314.

THEREFORE, the Federal Trade Commission this twenty-second day of December 2021, has issued this complaint against Respondent.

By the Commission, Chair Khan not participating and Commissioner Slaughter dissenting.

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's Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, issued pursuant to Title I of the Gramm-Leach-Bliley ("GLB") Act, 15 U.S.C. § 6801 *et seq*.

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

Findings

1. The Respondent is Ascension Data & Analytics, LLC, a Delaware limited liability company with its principal place of business at 701 Highlander Boulevard, Suite 510, Arlington, Texas 76015.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Covered Business" means Respondent or any business that Respondent controls.

B. "Covered Incident" means any instance in which any United States federal, state, or local law or regulation requires a Covered Business to notify any U.S. federal, state, or local government entity that information from or about an individual consumer was, or is reasonably believed to have been, accessed or acquired without authorization.

C. "Covered Information" means (1) Personally Identifiable Financial Information; and (2) any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any Personally Identifiable Financial Information that is not publicly available.

D. "Personally Identifiable Financial Information" means any information:

1. A consumer provides to obtain a financial product or service;

2. About a consumer resulting from any transaction involving a financial product or service; or

3. A Covered Business otherwise obtains about a consumer in connection with providing a financial product or service to that consumer.

E. "Respondent" means Ascension Data & Analytics, LLC, a Delaware limited liability company, and its successors and assigns.

F. "Vendor" means any person or entity that receives, maintains, processes, or otherwise is permitted access to Covered Information from, by, or at the direction of a Covered Business through its provision of services directly to a Covered Business.

Provisions

I. GLB RULE VIOLATIONS

IT IS ORDERED that Respondent, and Respondent's officers, agents, employees and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with any product or service, must not violate any provision of the Standards for Safeguarding Consumer Information Rule, 16 C.F.R. Part 314, a copy of which is attached hereto as Exhibit A.

II. MANDATED DATA SECURITY PROGRAM

IT IS FURTHER ORDERED that each Covered Business must not transfer, sell, share, collect, maintain, or store Covered Information unless it establishes and implements, and thereafter maintains, a comprehensive data security program ("Data Security Program") that protects the security of such Covered Information. To satisfy this requirement, each Covered Business must, at a minimum:

A. Document in writing the content, implementation, and maintenance of the Data Security Program;

B. Provide the written program and any evaluations thereof or updates thereto to its board of directors or governing body or, if no such board or equivalent governing body exists, to a senior officer responsible for its Data Security Program at least once every twelve (12) months and promptly after a Covered Incident;

C. Designate a qualified employee or employees to coordinate and be responsible for the Data Security Program;

D. Assess and document, at least once every twelve (12) months and promptly following a Covered Incident, internal and external risks to the security of Covered Information that could result in the unauthorized disclosure, misuse, loss, theft, alteration, destruction, or other compromise of such information. Each such assessment must evaluate risks in each area of relevant operation, including: (1) employee training and management; (2) information systems, such as network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, or other systems failures;

E. Design, implement, maintain, and document safeguards that control the internal and external risks identified in response to sub-Provision II.D. Each safeguard must be based on the volume and sensitivity of the Covered Information at risk, and the likelihood that the risk could be realized and result in the unauthorized disclosure, misuse, loss, theft, alteration, destruction, or other compromise of such information. Each Covered Business's safeguards must also include:

1. Require each Vendor to:

   a. Before the Covered Business provides access to Covered Information:

      i. Provide documentation of its information security policies and practices related to protecting any Covered Information that may be obtained from the Covered Business;

ii. Describe in writing how and where the Covered Information will be maintained and what safeguards are in place or will be implemented to protect it;

b. Update in writing the information required by sub-Provision II.E.1.a when there is a material change or at least once every twelve (12) months; and

c. Implement measures to assess the cybersecurity risk to Covered Information obtained from the Covered Business that is stored on the Vendor's networks, if any, and if any is stored, provide documentation to the Covered Business of the scope of the measures and their results, including, at least once every twelve (12) months and promptly after a Covered Incident: (i) vulnerability scanning; and (ii) penetration testing;

2. Maintain all documentation provided by each Vendor pursuant to sub-Provision II.E.1 for a period of five (5) years from when it was provided; and

3. At least once every twelve (12) months, and promptly following a Covered Incident involving a Vendor, conduct written assessments of each Vendor to determine the continued adequacy of their safeguards to control the internal and external risks to the security of Covered Information. The level of the assessment for each Vendor should be commensurate with the risk it poses to the security of Covered Information.

4. Provided, however, that sub-Provisions II.E.1-3 are not required of any Covered Business for a Vendor that receives, maintains, processes, or otherwise is permitted access to only names and/or property addresses, and to no other Covered Information, from, by, or at the direction of the Covered Business.

F. Assess, at least once every twelve (12) months and promptly following a Covered Incident, the sufficiency of any safeguards in place to address the risks to the security of Covered Information, and modify the Data Security Program based on the results;

G. Test and monitor the effectiveness of the safeguards at least once every twelve (12) months, and promptly following a Covered Incident, and modify the Data Security Program based on the results;

H. Select and retain Vendors capable of safeguarding Covered Information they access through or receive from Covered Businesses, and contractually require Vendors to implement and maintain safeguards for Covered Information; and

I. Evaluate and adjust the Data Security Program in light of any changes to its operations or business arrangements, a Covered Incident, or any other circumstances that each Covered Business knows or has reason to know may have an impact on the effectiveness of the Data Security Program. At a minimum, each Covered Business must evaluate the Data Security Program at least once every twelve (12) months and modify the Data Security Program based on the results.

III. DATA SECURITY ASSESSMENTS BY A THIRD PARTY

IT IS FURTHER ORDERED that, in connection with compliance with Provision II of this Order titled Mandated Data Security Program, Respondent must obtain, for each Covered Business, initial and biennial assessments ("Assessments"):

A. The Assessments must be obtained from a qualified, objective, independent third-party professional ("Assessor"), who: (1) uses procedures and standards generally accepted in the profession; (2) conducts an independent review of the Data Security Program; and (3) retains all documents relevant to each Assessment for five (5) years after completion of such Assessment and will provide such documents to the Commission within ten (10) days of receipt of a written request from a representative of the Commission. No documents may be withheld on the basis of a claim of confidentiality, proprietary or trade secrets, work product protection, attorney client privilege, statutory exemption, or any similar claim.

B. For each Assessment, Respondent must provide the Associate Director for Enforcement for the Bureau of Consumer Protection at the Federal Trade Commission with the name and affiliation of the person selected to conduct the Assessment, which the Associate Director shall have the authority to approve in his or her sole discretion.

C. 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 ten (10) years after issuance of the Order for the biennial Assessments.

D. Each Assessment must: (1) determine whether each Covered Business has implemented and maintained the Data Security Program required by Provision II of this Order, titled Mandated Data Security Program; (2) assess the effectiveness of each Covered Business's implementation and maintenance of sub-Provisions II.A-I; (3) identify any gaps or weaknesses in the Data Security Program; and (4) identify specific evidence (including, but not limited to documents reviewed, sampling and testing performed, and interviews conducted) examined to make such determinations, assessments, and identifications, and explain why the evidence that the Assessor examined is sufficient to justify the Assessor's findings. No finding of any Assessment shall rely solely on assertions or attestations by a Covered Business's management. The Assessment must be signed by the Assessor and must

state that the Assessor conducted an independent review of the Data Security Program, and did not rely solely on assertions or attestations by a Covered Business's management.

E. Each Assessment must be completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Unless otherwise directed by a Commission representative in writing, Respondent must submit its initial Assessment to the Commission within ten (10) days after the Assessment has been completed via email to DEbrief@ftc.gov or 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 Ascension Data & Analytics, LLC, FTC File No. 1923126." All subsequent biennial Assessments must be retained by Respondent until the order is terminated and provided to the Associate Director for Enforcement within ten (10) days of request.

IV. COOPERATION WITH THIRD PARTY INFORMATION SECURITY ASSESSOR

IT IS FURTHER ORDERED that Respondent, whether acting directly or indirectly, in connection with any Assessment required by Provision III of this Order titled Data Security Assessments by a Third Party, must:

A. Disclose all material facts to the Assessor, and not misrepresent in any manner, expressly or by implication, any fact material to the Assessor's: (1) determination of whether the Covered Business has implemented and maintained the Data Security Program required by Provision II of this Order, titled Mandated Data Security Program; (2) assessment of the effectiveness of the implementation and maintenance of sub-Provisions II.A-I; or (3) identification of any gaps or weaknesses in the Data Security Program; and

B. Provide or otherwise make available to the Assessor all information and material in their possession, custody, or control that is relevant to the Assessment for which there is no reasonable claim of privilege.

V. ANNUAL CERTIFICATION

IT IS FURTHER ORDERED that, in connection with compliance with Provision II of this Order titled Mandated Data Security Program, Respondent must:

A. One year after the issuance date of this Order, and each year thereafter, provide the Commission with a certification from a senior corporate manager, or, if no such senior corporate manager exists, a senior officer of each Covered Business responsible for each Covered Business's Data Security Program that: (1) each Covered Business has established, implemented, and maintained the requirements

of this Order; (2) each Covered Business is not aware of any material noncompliance that has not been (a) corrected or (b) disclosed to the Commission; and (3) includes a brief description of any Covered Incident. The certification must be based on the personal knowledge of the senior corporate manager, senior officer, or subject matter experts upon whom the senior corporate manager or senior officer reasonably relies in making the certification.

B. Unless otherwise directed by a Commission representative in writing, submit all annual certifications to the Commission pursuant to this Order via email to DEbrief@ftc.gov or 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 Ascension Data & Analytics, LLC, FTC File No. 1923126."

VI. COVERED INCIDENT REPORTS

IT IS FURTHER ORDERED that Respondent, for any Covered Business, within a reasonable time after the date of discovery of a Covered Incident, but in any event no later than ten (10) days after the date the Covered Business first notifies any U.S. federal, state, or local government entity of the Covered Incident, must submit a report to the Commission. The report must include, to the extent possible:

A. The date, estimated date, or estimated date range when the Covered Incident occurred;

B. A description of the facts relating to the Covered Incident, including the causes of the Covered Incident, if known;

C. A description of each type of information that triggered the notification obligation to the U.S. federal, state, or local government entity;

D. The number of consumers whose information triggered the notification obligation to the U.S. federal, state, or local government entity;

E. The acts that the Covered Business has taken to date to remediate the Covered Incident and protect Covered Information from further exposure or access, and protect affected individuals from identity theft or other harm that may result from the Covered Incident; and

F. A representative copy of each materially different notice required by U.S. federal, state, or local law or regulation and sent by the Covered Business or any of its clients to consumers or to any U.S. federal, state, or local government entity.

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 Ascension Data & Analytics, LLC, FTC File No. 1923126."

VII. 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 sworn under penalty of perjury.

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 VIII of this Order 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.

VIII. COMPLIANCE REPORTS AND NOTICES

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

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

Order, including a discussion of all of the changes Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order 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: (a) any designated point of contact; or (b) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 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 for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "In re Ascension Data & Analytics, LLC, FTC File No. 1923126."

IX. 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, 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 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. For five (5) years after the date of preparation of each Assessment required by this Order, all materials and evidence that the Assessor considered, reviewed, relied upon or examined to prepare the Assessment, whether prepared by or on behalf of a Covered Business, including all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials concerning Covered Businesses' compliance with related Provisions of this Order, for the compliance period covered by such Assessment;

E. For five (5) years from the date received, copies of all subpoenas and other communications with law enforcement, if such communications relate to a Covered Business's compliance with this Order;

F. For five (5) years from the date created or received, all records, whether prepared by or on behalf of a Covered Business, that address compliance by a Covered Business with this Order or lack thereof; and

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

X. COMPLIANCE MONITORING

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

A. Within 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.

XI. ORDER EFFECTIVE DATES

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on December 22, 2041, 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 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 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 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, Chair Khan not participating, Commissioner Slaughter dissenting.

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

December 14, 2020

Summary

- After an egregious data breach involving extremely sensitive financial information, the Commission has struck a settlement that provides no help for victims and does little to deter.

- It appears Ascension Data & Analytics is really just an offshoot of a large investment fund, and the Commission's proposed order fails to bind the appropriate parties.

- To achieve meaningful results, the Commission must reevaluate its enforcement strategy when it comes to safeguarding consumer financial information by working collaboratively with other regulators and applying its unfairness authority in an even-handed manner.

Americans have been burned by the mortgage industry before – not just by slipshod practices that maximize profits at the expense of responsible stewardship, but also by slippery accountability when things go wrong. Regulators got lost in a labyrinth of shell companies and subsidiaries, and too many who profited escaped unscathed, leaving families in ruin.

To achieve the dream of homeownership, Americans typically have to fork over a boatload of personal data to mortgage lenders, like our Social Security numbers, our driver's license numbers, our pay stubs, and more. This is the norm when you borrow to buy a home. The lender then transfers this data onward through the financial system, with banks, servicers, mortgage funds, investment vehicles – and their vendors – all gaining access.

This data, in the wrong hands, is valuable intelligence not only for identity thieves but also for nation states, leading to threats to our financial and national security. That's why federal law ensures that financial institutions have safeguards in place to secure this highly sensitive data.

After a data breach of highly sensitive data from mortgage applications, the FTC launched an investigation into Ascension Data & Analytics. Ascension worked on behalf of its sister companies, such as investment funds to analyze mortgages. Ascension also hired other vendors to help. Even though Ascension was required under the law to guard consumer financial data, in fact, they were using third parties with shoddy security, as alleged in the complaint. Given the breadth and sensitivity of the data compromised in this breach, an individual consumer would probably prefer to be affected by the Equifax breach than this one, if forced to make a choice.

In my view, the Commission's proposed resolution of this investigation suffers from three key flaws: It fails to hold all of the right parties accountable. It fails to charge unfair conduct as unfair. And it fails to redress consumers or deter other firms from engaging in similar misconduct.

Ascension, Rocktop Partners, and Corporate Musical Chairs

Ascension is not really an independent company.[1] It's in the same corporate family as Rocktop Partners,[2] a multi-billion dollar private equity fund that buys up defective mortgages, such as those with title disputes.[3] Ascension's President, Brett Benson, is also Managing Director of Rocktop Partners.[4] Its office sits on the same floor as Rocktop Partners at 701 Highlander Boulevard in Arlington, Texas.[5] When the Ascension breach hit the news, it was Rocktop's

[1] My office has endeavored to cite public sources showing a portion of the web of companies involving Ascension, Rocktop, and Reidpin LLC.
[2] Zack Whittaker, *Millions of bank loan and mortgage documents have leaked online*, TECHCRUNCH (Jan. 23, 2019), https://techcrunch.com/2019/01/23/financial-files/.
[3] ROCKTOP PARTNERS, https://rocktoppartners.com (last visited on Oct. 2, 2020).
[4] *Id.*
[5] *Id.*, Compl., *In the Matter of Ascension Data & Analytics, LLC*, Fed. Trade Comm'n File No. 1923126.

General Counsel, Sandy Campbell, who confirmed the key details of the incident.[6] It is unclear whether Ascension has any clients *other* than Rocktop Partners or others in its corporate family.[7] This is a common arrangement in finance, since it allows fund managers to profit when they can bill their investors for services.

Further, Rocktop's Managing Director and Chief Financial Officer, Jonathan Bray, is also the sole person ("manager" or "member") listed on the LLC forms for a firm called Reidpin LLC.[8] Langhorne Reid and Jason Pinson ("**Reid**" and "**Pin**son") are cofounders of Rocktop.[9] Unsurprisingly, Reidpin LLC is located at the same address as Ascension and Rocktop.[10] It is therefore clear that Ascension is anything but arms-length from Rocktop. Rocktop's corporate structure confirms this conclusion:

Figure 1. [redacted]

[redacted]

The FTC has charged Ascension Data & Analytics – but not any other parties in the broader Rocktop family – with violating the Safeguards Rule by failing to police its agents processing personal data. I agree that Ascension violated the law, but I am concerned that the proposed settlement will do little to prevent future failures. In addition, our complaint and the Analysis to Aid Public Comment would be strengthened with critical information about the Rocktop corporate structure.[11]

The FTC's order binds only one company: Ascension. The company that actually appears to manage more than $7 billion worth of Americans' mortgages – Rocktop – is not being required to change a single thing about its practices.[12] And while Ascension will be required to clean up its act, nothing is stopping the controllers of Rocktop from creating a "new" analytics firm staffed with exactly the same executives, or even transferring the functions within their corporate family, but without any obligations under the FTC's order. This would be economically rational. The Commission does not cite any sworn testimony or other evidence to show why they believe the controllers of Ascension would act irrationally.

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[6] *Supra* note 2.
[7] *Id.*
[8] Reidpin, LLC, Application to Register a Foreign Limited Liability Company (LLC) (Nov. 17, 2020) https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=201816410221-24379676.
[9] *Supra* note 3.
[10] *Supra* note 8.
[11] Commissioner Phillips points to the fact that Rocktop Partners may be a registered investment fund under the securities laws, but does not discuss the other entities within the corporate family and in any related mortgage vehicles that are not.
[12] *Supra* note 3.

Commissioner Phillips argues that this is a concern in cases involving "boiler rooms and other frauds." I respectfully disagree. When the FTC charged Wyndham in 2012 with lax data security practice, it named not only the parent corporation but also three subsidiaries, alleging that they operated with common control, shared offices, overlapping staff, and as part of a maze of interrelated companies. Defending these charges against dismissal, the Commission argued that "[i]f the Court were to enter an order against only [the subsidiary], Wyndham would be able to transfer responsibility for data security to another Wyndham entity[,]" allowing the company to sidestep its obligations under any order.[13] The court agreed, specifically rejecting the view that only "shell companies designed to perpetrate fraud" can face charges.[14]

The FTC should not be allowing companies to evade accountability through a game of corporate musical chairs. An effective order would bind not only Ascension, but also all of the parties liable under the law. While one of these parties may be outside the jurisdiction of the FTC's Safeguards Rule, there is no question that they are bound by the FTC Act's prohibition on unfair practices.

Unfair Conduct is Unlawful, Regardless of Size

The FTC has declined to include a charge of violating the FTC's prohibition on unfair practices. This represents a departure from previous cases involving similar misconduct, and raises questions as to whether the FTC is engaging in disparate treatment based on business size and type, rather than on facts and evidence.

In 2014, the FTC charged Ajay Prasad, Shreekant Srivastava, and their company, GMR Transcription Services, with violating the FTC Act's prohibition on unfair practices when it failed to ensure its vendors protected sensitive data. As detailed in the Commission's complaint, GMR failed to ensure that their vendors implemented reasonable security measures, and failed to prevent one vendor from storing sensitive files in plain text. The complaint does not allege that malicious actors attacked the vendor's systems, nor does it allege that GMR's failure to oversee the vendor directly led to the improper data disclosure, but nevertheless charges both the firm and its owners with engaging in unfair business practices by failing to employ reasonable security measures.[15]

If GMR faced this scrutiny, why wouldn't Ascension? The FTC's complaint alleged that GMR's lax policies created a vulnerability that was exploited at least once, and the FTC's complaint in this matter details some of the consequences of this catastrophic breach, which involved dozens of actors, mainly from overseas, including those with IP addresses in China and Russia. They were able to access more than 60,000 Americans' sensitive financial information. Furthermore, in failing to prevent this mass theft, Ascension disregarded its own risk management policies, failing to take "any of the steps described in its own policy to evaluate [its vendors'] security practices."[16]

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[13] *Fed. Trade Comm'n v. Wyndham et al.*, 2013 WL 11116791 (D.N.J. May 20, 2013).
[14] *Fed. Trade Comm'n. v. Wyndham Worldwide Corp.*, 2014 WL 2812049, at *7 (D.N.J. June 23, 2014).
[15] Compl., *In the Matter of GMR Transcription Services, Inc.*, Fed. Trade Comm'n File No. 1223095 (Aug. 21, 2014), https://www ftc.gov/system/files/documents/cases/140821gmrcmpt.pdf.
[16] Compl., *In the Matter of Ascension Data & Analytics, LLC*, Fed. Trade Comm'n File No. 1923126.

Taken together, the allegations against Ascension leave little doubt that the company's practices were unfair, causing far more unavoidable injury than GMR, without any apparent benefit to consumers or competition.[17] When the Commission settled with GMR, the law was exactly the same. The only thing that changed is the five members of the Commission.

My colleague suggests there are questions about whether Ascension's practices were unfair, but the Commission's complaint details how elementary the missteps were that led to this breach. A reasonable person would expect if these problems could have been prevented simply by Ascension following its own vendor management policies. Ascension could have also heeded the FTC's 2015 business guidance, which warns firms to "[m]ake sure service providers implement reasonable security measures."[18]

My colleague also cites instances where the Commission has charged a firm with violating the FTC's Safeguards Rule without also including charges of unfair practices. However, these cases do not involve conduct related to inadequate service provider oversight, which is the core allegation at issue with Rocktop and Ascension.

We must apply more evenhanded enforcement to ensure that large businesses and investment firms are not getting less scrutiny than small businesses. The Commission's failure to charge Ascension and its affiliates with an unfairness violation is not only inconsistent with prior practice but also undermines our ability to hold the company accountable for its failures.

Rethinking Remedies

The most effective way to address serious data breaches like this one is to compensate the victims, penalize the wrongdoers, and insist on changes to the responsible company's practices. Unfortunately, the Commission's proposed order misses the mark on identifying the responsible company, while doing nothing to compensate victims or penalize those responsible for this catastrophic breach. I am therefore not confident that the remedies proposed in today's order will deter other companies from engaging in the same slipshod practices.

We could have done more. I recognize that consumers harm can be difficult to estimate in these cases, and that the Commission lacks civil penalty authority for offenses like this one. But that problem can be solved. The FTC is not the only enforcer in this space – dozens of state attorneys general and financial regulators can enforce a nearly identical unfairness authority under federal law that is backed up with strong tools to both seek redress and penalties. By partnering with a state enforcer, the Commission can dramatically improve its data security actions – ensuring that there is compensation for victims and consequences for wrongdoing.[19]

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[17] *See* 15 U.S.C. § 45n Defining as unfair practices that cause or are likely to cause substantial injury that is not reasonably avoidable, and is not outweighed by benefits to consumers or competition.

[18] START WITH SECURITY, A GUIDE FOR BUSINESS, LESSONS LEARNED FROM FTC CASES, FED. TRADE COMM'N (Jun. 2015), https://www ftc.gov/system/files/documents/plain-language/pdf0205-startwithsecurity.pdf.

[19] In addition to having unfairness jurisdiction, many state enforcers have their own versions of the Safeguards Rule. *See, e.g., Industry Guidance Re: Standards for Safeguarding Customer Information and Regulation 173*, NEW YORK STATE DEP'T OF FIN. SERV., https://www.dfs ny.gov/insurance/ogco2002/rg204021.htm.

Unfortunately, the FTC almost never invites state regulators, particularly state banking regulators with significant expertise, to join our investigations and enforcement actions to obtain additional relief when it comes to data protection. This must change.

Conclusion

We should all be unconvinced that chasing after dangerous data breaches and resolving them without any redress or penalties is an effective strategy. Making matters worse, holding a "company" accountable that is really just an extension of a financial firm might allow our order to be completely ignored. After this settlement, Ascension could "fold," and the Rocktop family of companies can reconstitute it, escaping any obligations under the order. [1]

The FTC is currently considering changes to its rule on safeguarding consumer financial information. [2] But, we also need to rethink our enforcement strategy. Our go-it-alone strategy is doing nothing for breach victims and little to deter, and our two-track approach to unfairness is penalizing small companies while giving a pass to financial firms like Rocktop. For these reasons, I respectfully dissent.

STATEMENT OF COMMISSIONER NOAH JOSHUA PHILLIPS
December 15, 2020

The Commission today announced our most recent settlement resolving an alleged violation of the Gramm-Leach-Bliley Safeguards Rule ("Rule"), a critical facet of the Commission's data privacy and security enforcement program. According to the complaint, Ascension Data & Analytics ("Ascension") violated the Rule by failing to vet properly and oversee a provider of optical character recognition (OCR) services, and by failing to conduct appropriate risk assessments. This settlement requires Ascension to implement a comprehensive data security program including annual third-party assessments.

I write to address several points in Commissioner Chopra's dissenting statement.

[1] For context, public information indicates that there are seven companies with interrelated officers or agents currently active, including "Reidpin LLC," "Reidpin, LLC," "Reidpin Investments, LLC," Reidpin Rocktop 1, LLC," "Reidpin Rocktop III, LLC," "Reidpin Rocktop IV, LLC," "Reidpin Rocktop V, LLC" founded in 2011, 2014, 2015, 2016, two in 2017, and one in 2018. There are two other entities with these characteristics which appear to have folded. https://opencorporates.com/companies?q=REIDPIN%2C+LLC.

[2] Fed. Trade Comm'n., Standards on Safeguarding Customer Information, 84 Fed. Reg. 13158 (Apr. 4, 2019), https://www.federalregister.gov/documents/2019/04/04/2019-04981/standards-for-safeguarding-customer-information.

Dissenting Statement

Commissioner Chopra dissents because he believes the Commission should name Rocktop Partners, a company in the same corporate family as Ascension, as a respondent. Commissioner Chopra points to corporate affiliation and certain overlaps in management and facilities between the two firms, and other entities as well. It is not clear under what legal theory—whether veil piercing, common enterprise, or the like—he would name other defendants; but, without more, the facts alleged do not support doing so.[3]

In terms of relief, Commissioner Chopra argues that Rocktop will dissolve Ascension and set up a new firm or transfer its functions, just to avoid its obligations under the settlement. This is the kind of conduct characteristic of boiler rooms and other frauds. It is not clear to me why Rocktop—an entity regulated by the Securities and Exchange Commission—would dissolve and reconstitute an affiliate for the sole purpose of failing to oversee vendors, or otherwise evading this order.[4]

Commissioner Chopra also would have the Commission allege that Ascension's conduct was unfair. In the Gramm-Leach-Bliley (GLB) Act, Congress gave us a specialized data security statute, and the Safeguards Rule, promulgated pursuant to that Act, establishes liability under the facts alleged in this case.[5] We should use that authority, and here we are. I do not see what an additional allegation of unfairness would achieve—certainly, no change in the remedy, and nothing better for consumers. What is more, when pleading that lax data security was unfair under Section 5, we need evidence to satisfy the unfairness test; that gets into thornier questions of whether the oversight failure here can constitute unfairness. Thanks to GLB, we need not answer that.

Commissioner Chopra claims that Ascension is being favored because, in the Commission's 2014 case against GMR Transcription Services, it pleaded an unfairness count. He attributes the difference in treatment to the small size of the respondent in that case. GMR was not a financial services firm, however, so the Commission could not have alleged a violation of the GLB Safeguards Rule in that case; and the respondent in this case, Ascension, is also a small

[3] For example, Commissioner Chopra cites no facts to suggest that corporate formalities were not observed, that Ascension is under-capitalized, or that corporate form was abused to inoculate Rocktop from liability (mind the reader, for Ascension's failure to oversee a vendor) to justify piercing the corporate veil. Courts generally take a dim view of piercing the corporate veil without a substantial basis to do so. *See, e.g.*, *Trinity Indus., Inc. v. Greenlease Holding Co.*, 903 F.3d 333, 365 (3d Cir. 2018) ("the corporate veil may be pierced only in extraordinary circumstances, such as when the corporate form would otherwise be misused to accomplish certain wrongful purposes") (internal citations and quotations omitted). And for good reason: the ability to make investments without risk of liability is foundational to the American legal and economic system.

[4] Commissioner Chopra cites *FTC v. Wyndham Worldwide Corp*., No. 2:13-cv-01887 (ES), 2014 WL 2812049, at *8 (D.N.J. June 23, 2014), for the proposition that companies other than frauds may reorganize in an effort to avoid responsibilities under FTC orders. Of course that is true, but that does not mean that every entity in a corporate family can or should be bound by every FTC order. And, certainly, that is not what the court—considering a motion to dismiss—held in that case.

[5] 15 U.S.C. § 6801 *et seq*; 16 C.F.R. Part 314. The limits of applying Section 5 to data security cases are precisely why the Commission, on a bipartisan basis, seeks data security legislation from Congress.

company. It is not at all unusual for the Commission to charge a violation of the Safeguards Rule without an accompanying unfairness count. [6]

This is a strong case and a good result. I commend Staff for its thoughtful and energetic efforts to use the authority at our disposal to protect American consumers

DISSENTING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

December 22, 2021

The Commission is finalizing an order resolving Ascension Data & Analytics, LLC's alleged violations of the Commission's Standards for Safeguarding Customer Information Rule ("Safeguards Rule"). Ascension is an analytics company that provides data, analytics, and system-based technology services and products to other companies in its corporate family in connection with mortgages. The FTC's complaint alleges that Ascension failed to oversee its vendors or adequately assess risk to ensure that customer data was secure. One of Ascension's vendors had a major security failure that exposed the personal data of tens of thousands of individuals for many months. [1]

According to the FTC's complaint, Ascension did not even fulfill the basic due diligence and oversight steps required by its own risk management policies. [2] Such fundamental failings and lack of care for sensitive personal data is not just a violation of the Safeguards Rule, it is also an unfair practice under Section 5 of the FTC Act. [3] Yet, the proposed complaint alleges *only* a rule violation and does not charge an unfairness violation of Section 5.

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[6] *See, e.g.*, *TaxSlayer, LLC*, No. C-4626 (Nov. 8, 2017), https://www ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer; *James B. Nutter & Co.*, No. C-4258 (June 16, 2009), https://www.ftc.gov/enforcement/casesproceedings/072-3108/james-b-nutter-company-corporation-matter; *United States v. American United Mortgage Co.*, No. 07-cv-7064 (N.D. Ill.), https://www.ftc.gov/enforcement/cases-proceedings/062-3103/american-united-mortgagecompany-united-states-america-ftc. I am unaware of any case where we alleged a failure to oversee as a violation of *both* GLB and Section 5, as Commissioner Chopra would have us do here.

[1] *See* Compl. ¶¶ 3, 9-10, 14-21, *In the Matter of Ascension Data & Analytics, LLC* (Dec. 15, 2020), https://www.ftc.gov/system/files/documents/cases/1923126ascensioncomplaint.pdf.

[2] Compl. ¶¶ 7-8, 15-16, 20-21.

[3] Pleading unfairness in data security cases where a company fails to take steps to ensure that its contractors safeguard personal data is not novel. In 2014, the Commission alleged that GMR Transcription Services' failure to require and verify that its independent service providers implemented reasonable security measures was an unfair practice in violation of Section 5. *See,* Compl., *In the Matter of GMR Transcription Services, Inc*., (Aug. 21, 2014), https://www.ftc.gov/system/files/documents/cases/140821gmrcmpt.pdf.

Analysis to Aid Public Comment

I have consistently argued that when the FTC fails to plead all relevant law violations—particularly unfairness—we miss important opportunities to establish the scope of behavior that is covered by the general statutes we enforce. [1] Especially to the extent that our enforcement program is driven by negotiated consents rather than litigated orders or duly promulgated rules, our consents are extremely important for market participants to understand how particular conduct violates the law. In other words, every time the Commission files a complaint we send a signal to industry about what constitutes a law violation.

Failure to adequately vet and oversee vendors entrusted with sensitive personal information is unlawful not just for financial institutions covered by the Safeguards Rule, but for all companies governed by the FTC Act. I believe the facts here support a count of unfairness under Section 5, as well as Safeguards Rule violations. Because this action fails to fully plead the violations supported by the facts and the law in this case, I respectfully dissent.

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 Ascension Data & Analytics, LLC ("Respondent").

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.

Respondent is a Delaware company with its principal place of business in Texas. Respondent provides data, analytics, and technology services to other companies in its corporate family and their service providers relating to residential mortgages.

In early 2017, as part of work for a related company, Respondent hired a vendor to conduct Optical Character Recognition on a set of documents pertaining to 37,000 residential mortgages. The documents contained the personal information of 60,593 consumers. The type of personal information included names, dates of birth, Social Security numbers, loan information, credit and debit account numbers, drivers' license numbers, and credit files. Before providing the documents to the vendor, Respondent did not take steps to make sure the vendor was capable of protecting

[1] *See, e.g.,* FTC Data Privacy Enforcement: A Time of Change; Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding FTC v. Progressive Leasing; Concurring Statement of Commissioner Rebecca Kelly Slaughter Regarding Vyera Pharmaceuticals.

the personal information in the documents. Furthermore, Respondent did not require the vendor by contract to protect the documents or the consumer information contained therein.

From January 2018 to January 2019, the vendor inadvertently exposed the information from the mortgage documents online, by misconfiguring a cloud server and storage location containing information from the documents. As a result, anyone who could figure out the web address of the server or storage location could view and download the contents. The server and storage location were accessed by fifty-two unauthorized computers during the year they were exposed.

The Commission's proposed one-count complaint alleges that Respondent violated the Standards for Safeguarding Customer Information Rule ("Safeguards Rule") of the Gramm-Leach-Bliley Act ("GLB Act"). The Safeguards Rule requires financial institutions, which includes companies like Respondent, to implement a comprehensive information security program that contains certain elements.

The proposed complaint alleges that Respondent violated the Safeguards Rule by failing to include two of the required elements in its information security program. First, the proposed complaint alleges, Respondent did not oversee service providers, by failing to take reasonable steps to choose service providers capable of safeguarding personal information, and failing to require those service providers by contract to maintain the safeguards. Second, the proposed complaint alleges, Respondent failed to identify risks to the security of personal information, and assess whether any safeguards it had in place were sufficient. Respondent did not satisfy this element of the Safeguards Rule because it failed to consider risks related to many service providers, and did not conduct risk assessments before September 2017.

The Proposed Order contains provisions designed to prevent Respondent from engaging in the same or similar acts or practices in the future. Part I of the Proposed Order prohibits Respondent from violating the Safeguards Rule.

Part II of the Proposed Order requires Respondent to establish and implement, and thereafter maintain, a comprehensive data security program that protects the security of Covered Information, the definition of which is modeled off the definitions of the Safeguards Rule.

Part III of the Proposed Order requires Respondent to obtain initial and biennial data security assessments for ten years.

Part IV of the Proposed Order requires Respondent to disclose all material facts to the assessor and prohibits Respondent from misrepresenting any fact material to the assessments required by Part III.

Part V of the Proposed Order requires Respondent to submit an annual certification from a senior corporate manager (or senior officer responsible for its data security program) that Respondent has implemented the requirements of the Order and is not aware of any material noncompliance that has not been corrected or disclosed to the Commission.

Analysis to Aid Public Comment

Part VI of the Proposed Order requires Respondent to notify the Commission any time it is required to make a notification to a state or local government that personal information has been breached or disclosed.

Parts VII through X of the Proposed Order are reporting and compliance provisions, which include recordkeeping requirements and provisions requiring Respondent to provide information or documents necessary for the Commission to monitor compliance. Part XI states that the Proposed Order will remain in effect for 20 years, with certain exceptions.

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

IN THE MATTER OF

HACKENSACK MERIDIAN HEALTH, INC.
AND
ENGLEWOOD HEALTHCARE FOUNDATION

Docket No. 9399. Order, July 1, 2021

Order granting the joint expedited motion for a continuance of Administrative Proceedings.

ORDER GRANTING FURTHER CONTINUANCE

On June 23, 2021, Complaint Counsel and Respondents Hackensack Meridian Health, Inc. ("HMH") and Englewood Healthcare Foundation ("Englewood") jointly moved to postpone commencement of the evidentiary hearing in this proceeding by approximately thirty days, until August 16, 2021. Joint Expedited Motion for a Continuance of Administrative Proceedings ("Joint Motion"). This represents the second joint request for continuance of the evidentiary hearing. On May 25, 2021, we granted a similar joint motion to continue the commencement of the hearing from June 15, 2021 to July 15, 2021. Order Granting Continuance ("May 25 Order"). For reasons similar to those expressed in our May 25 Order, we have determined to grant a further continuance of the hearing to August 16, 2021.

On December 3, 2020, the Commission issued an administrative complaint challenging a proposed transaction whereby HMH would acquire Englewood ("the Proposed Transaction"). The Commission at that time also filed a complaint in the U.S. District Court for the District of New Jersey seeking a preliminary injunction barring the Proposed Transaction until completion of the administrative proceeding. The preliminary injunction hearing concluded on May 18, 2021, and the district court heard closing arguments on June 2, 2021. The parties anticipate receiving a decision in that action within the next several months. Joint Motion at 2. The parties state that "[i]t is highly likely that [the preliminary injunction] ruling will cause these administrative proceedings to be suspended or rendered moot." *Id*. at 4.

The parties argue that granting the requested continuance and extending pre-hearing deadlines would protect the parties and third parties and their witnesses from unnecessary burdens and expense, without prejudicing the Commission. *Id*. at 1-4. They explain that third parties will need to prepare complex submissions seeking in camera treatment of their discovery materials, and that witnesses – including up to 28 third-party witnesses – face the burden, expense, and disruption of preparing to testify and testifying. *Id*. at 3. *See* May 25 Order at 1-2.

Commission Rule 3.41(f) provides that a pending "collateral federal court action that relates to the administrative adjudication shall not stay the proceeding [u]nless a court of competent jurisdiction, or the Commission for good cause, so directs." 16 C.F.R. § 3.41(f). This reflects the Commission's commitment to move forward as expeditiously as possible with its administrative proceedings. *See*, *e.g.*, 16 C.F.R. §§ 3.1, 3.11(b)(4), 3.41(b). Nonetheless, the public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary. May 25 Order at 2.

Under the circumstances presented, we find good cause for the requested continuance. Deferring the start of trial, and extending pre-hearing deadlines accordingly, will provide additional time for resolution of the district court action, which could obviate the need for an administrative hearing, without unduly delaying the Commission proceeding. We have granted continuances under comparable circumstances in the past. *See*, *e.g.*, *In re Thomas Jefferson Univ.*, Docket No. 9392, 2020 WL 7237952 (F.T.C. Nov. 6, 2020); *In re RAG-Stiftung*, Docket No. 9384, 2020 WL 91294 (F.T.C. Jan. 2, 2020); *In re Sanford Health*, Docket No. 9376, 2017 WL 6604532 (F.T.C. Dec. 21, 2017); *In re The Penn State Hershey Med. Ctr.*, Docket No. 9368, 2016 WL 3345405 (F.T.C. June 10, 2016); *In re Advocate Health Care Network*, Docket No. 9369, 2016 WL 3182774 (F.T.C. June 2, 2016).

Accordingly,

IT IS HEREBY ORDERED that the Joint Expedited Motion for a Continuance of Administrative Proceedings is **GRANTED**; and

IT IS FURTHER ORDERED that the evidentiary hearing in this proceeding shall commence at 10:00 a.m. on August 16, 2021, and that, unless modified by the Chief Administrative Law Judge, all related pre-hearing deadlines shall be extended by thirty-two (32) days.

By the Commission, Chair Khan not participating.

Interlocutory Orders, Etc.

IN THE MATTER OF

HACKENSACK MERIDIAN HEALTH, INC.
AND
ENGLEWOOD HEALTHCARE FOUNDATION

Docket No. 9399. Order, July 27, 2021

Order granting the continuance of the hearing and rescheduling the Administrative Proceedings commencement date.

ORDER GRANTING THIRD CONTINUANCE

On July 20, 2021, Complaint Counsel and Respondents Hackensack Meridian Health, Inc. ("HMH") and Englewood Healthcare Foundation ("Englewood") jointly moved to postpone commencement of the evidentiary hearing in this proceeding by thirty days, until September 15,2021 or such later date as may be convenient for the Chief Administrative Law Judge and the Commission. Joint Expedited Motion for a Continuance of Administrative Proceedings ("Joint Motion"). This represents the parties' third request for continuance of the evidentiary hearing. On May 25, 2021 and July 1, 2021, we granted similar requests to continue the commencement of the hearing from June 15, 2021, to July 15, 2021, and then to August 16, 2021. Order Granting Continuance ("May 25 Order"); Order Granting Further Continuance ("July 1 Order"). For reasons similar to those expressed in our May 25 and July 1 Orders, we have determined to grant a further continuance of the hearing to October 12, 2021.

On December 3, 2020, the Commission issued an administrative complaint challenging a proposed transaction whereby HMH would acquire Englewood ("the Proposed Transaction"). The Commission at that time also filed a complaint in the U.S. District Court for the District of New Jersey seeking a preliminary injunction barring the Proposed Transaction until completion of the administrative proceeding. The preliminary injunction hearing concluded on May 18, 2021, and the district court heard closing arguments on June 2, 2021. The parties anticipate receiving a decision in that action within the next several months. Joint Motion at 2. The parties state that "[i]t is highly likely that [the preliminary injunction] ruling will cause these administrative proceedings to be suspended or rendered moot." *Id.* at 4.

The parties argue that granting the requested continuance and extending pre-hearing deadlines would protect the parties and third parties and their witnesses from unnecessary burdens and expense, without prejudicing the Commission. *Id.* at 1-4; *see* May 25 Order at 1-2. We found these arguments persuasive in granting prior continuances of similar duration. *See* May 25 Order; July 1 Order.

Commission Rule 3.41(f) provides that a pending "collateral federal court action that relates to the administrative adjudication shall not stay the proceeding [u]nless a court of competent jurisdiction, or the Commission for good cause, so directs." 16 C.F.R. § 3.41(f). This reflects the Commission's commitment to move forward as expeditiously as possible with its administrative proceedings. *See, e.g.*, 16 C.F.R. §§ 3.1, 3.11(b)(4), 3.41(b). Nonetheless, the public

interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary. May 25 Order at 2. For the reasons stated in our May 25 and July 1 Orders, and based on the authorities cited therein, we find that there is good cause to continue the commencement of the evidentiary hearing in order to protect the parties and third parties from likely unnecessary burden and expense.

Another Commission matter is currently set for hearing before the Chief Administrative Law Judge beginning one day before the parties' proposed date of September 15, 2021. To avoid a potential schedule conflict with that matter, we will re-set the hearing in this proceeding to begin on October 12, 2021.

Accordingly,

IT IS HEREBY ORDERED that the Joint Expedited Motion for a Continuance of Administrative Proceedings is **GRANTED**; and

IT IS FURTHER ORDERED that the evidentiary hearing in this proceeding shall commence at 10:00 a.m. on October 12, 2021, and that, unless modified by the Chief Administrative Law Judge, all related pre-hearing deadlines shall be extended by fifty-seven (57) days.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HEALTH RESEARCH LABORATORIES, LLC., WHOLE BODY SUPPLEMENTS, LLC., AND KRAMER DUHON

Docket No. 9397. Order, July 30, 2021

Order directing parties to submit all material pertinent to the motion.

ORDER DIRECTING PARTIES TO SUBMIT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND PROVIDING FOR SUMMARY DECISION PROCEEDING

On April 20, 2021, the Chief Administrative Law Judge ("ALJ") transferred this matter to the Commission for further proceedings pursuant to Commission Rule 3.12(b)(2), 16 C.F.R. § 3.12(b)(2). Order Granting In Part and Denying In Part Respondents' Motion to Enter New Scheduling Order or, in the Alternative, to Transfer Case to the Commission (Apr. 20, 2021). To determine the appropriate next step, the Commission sought clarification concerning whether any factual issues remained and whether additional discovery and fact-finding was needed. On May 14, 2021, the Commission issued an order directing the parties to submit filings identifying any additional material facts that they intend to assert, listing the decisional issues to which each asserted additional fact relates, stating whether they dispute the facts identified by the other party, and explaining the basis for any such dispute. Order for Further Proceedings Before the Commission (May 14, 2021) ("Order for Further Proceedings"). The Commission also asked Respondents to clarify their position on the items in the Notice of Contemplated Relief attached to the Complaint that initiated this proceeding.

On May 25, 2021, Complaint Counsel submitted their Statement of Additional Material Facts. All of the additional facts citing documents other than the Complaint and its exhibits were identified as relating to the scope of relief. *See* Complaint Counsel's Statement of Additional Material Facts, Att. A (May 25, 2021). On June 1, 2021, Respondents submitted their response. Respondents' Response to Complaint Counsel's Statement of Additional Material Facts (June 1, 2021) ("Respondents' Response"). In that submission, Respondents advanced a number of objections and arguments in opposition to allowing Complaint Counsel to introduce their additional material facts. Respondents, however, did not specifically dispute any of the individual asserted facts, nor did they identify additional material facts of their own. On June 21, 2021, Complaint Counsel submitted a reply responding to Respondents' various arguments. Reply to Respondents' Response to Complaint Counsel's Statement of Additional Material Facts (June 21, 2021).

Although Respondents have not disputed the veracity of any of Complaint Counsel's additional material facts, they object to including those facts in the record for a variety of reasons. We address these in turn.

First, Respondents argue that Complaint Counsel have not provided enough information regarding the decisional issues to which their additional facts relate. Respondents' Response at 10-12. Complaint Counsel, however, indicated that these additional facts are relevant to the scope of relief. [1]In most cases, Complaint Counsel went further by identifying the particular factor used in remedy selection to which the asserted fact relates. *See* Complaint Counsel's Statement of Additional Material Facts, Att. A; *see also Telebrands Corp. v. F.T.C.*, 457 F.3d 354, 358 (4th Cir. 2006) ("The FTC considers three factors in determining whether order coverage bears a reasonable relationship to the violation it is intended to remedy: '(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations.'") (quoting *Stouffer Foods Corp*., 118 F.T.C. 746, 811 (1994)). This is sufficient to comply with the requirements in our Order for Further Proceedings.

Respondents' second argument is that Complaint Counsel's factual assertions are irrelevant and must be excluded because only legal issues remain in the case. Respondents' Response at 12-13. Respondents have admitted all of the Complaint's factual allegations and have "agree[d] and accept[ed]" the remedies in the Notice of Contemplated Relief, subject only to two purely legal objections regarding constitutionality and the FTC's remedial authority under Section 5(b) of the Federal Trade Commission Act. *Id.* at 7-10, 12. Complaint Counsel, however, indicated in briefing before the ALJ that, although it was not expressly requested in the Notice of Contemplated Relief, they also intend to seek to ban Respondents from the supplements industry. *See* Complaint Counsel's Opposition to Motion to Amend Answer and Cross Motion to Amend Complaint at 8 n.3 (Feb. 24, 2021). Respondents have not conceded the appropriateness of an industry ban, so the question of the proper remedy remains a potentially contested issue. Complaint Counsel's additional facts are therefore not irrelevant.

Third, Respondents argue that allowing Complaint Counsel to rely on facts outside the Complaint would be inconsistent with Rule 3.12(b)(2) and the Commission's explanatory statement in the Federal Register and contrary to Respondents' right to expedited proceedings under Rule 3.12(b)(2). Respondents' Response at 13-15. We disagree. Nothing in Rule 3.12(b)(2) prohibits the Commission from considering facts outside the pleadings but established in the record where appropriate, in rendering a final decision. The Rule states that the complaint and answer "provide a record basis on which the Commission shall issue a final decision," but it does not state that these pleadings provide *the sole* record basis for a final decision. Further, the Rule provides that an answer admitting the facts in the complaint waives hearings "as to the facts alleged in the complaint," not all hearings as to all pertinent facts. That the Rule allows the parties to file proposed findings of fact further suggests that the Commission may deal with matters that arise outside the pleadings; otherwise, such proposed findings would simply duplicate the complaint and answer.

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1 In one instance, Complaint Counsel indicated that facts drawn from Complaint Exhibits (referenced and quoted in the Complaint allegations) are related to the materiality of Respondents' claims. Complaint Counsel's Statement of Additional Material Facts, Att. A, Item 3.

Nor does the Commission's statement in the Federal Register discussing a 2009 amendment to Rule 3.12(b) bar consideration of facts outside the Complaint. The 2009 amendment eliminated the intermediate step of requiring an administrative law judge to issue an initial decision when the answer admits all of the material allegations in the complaint. The Commission reasoned that, since the only issues remaining at that point are legal and policy ones, for expediency it makes sense to bypass the administrative law judge and have the Commission issue a final decision on the basis of the facts alleged in the complaint. *See* Rules of Practice, 74 Fed. Reg. 1804, 1808-09 (Jan. 13, 2009) (interim final rules with request for comment). This explanation, however, was not meant to limit the Commission's authority or to address every circumstance that may arise. Where, as here, issues regarding the choice of remedy remain in the case despite the admissions in the answer, it is appropriate to look to established evidence outside the pleadings to resolve the dispute. As to Respondents' claim that considering outside evidence violates their "right" to expedited proceedings, Rule 3.12(b)(2) in fact expedites the process by avoiding litigation of issues that have been admitted, but gives Respondents no "right" to terminate the proceeding without consideration of evidence relevant to the choice of remedy or to other unresolved issues such as affirmative defenses.

Respondents' final argument is that the Commission's issuance of a decision and order based on facts not in the Complaint would violate Respondents' due process rights under the Fifth Amendment. Respondents' Response at 15-16. Respondents do not object to Commission action based on the Complaint alone, but take issue with the Commission or the ALJ "deciding any additional facts beyond those alleged in the Complaint" because "[t]he FTC's combined role of prosecutor, trial judge, jury, and appellate court in the administrative proceedings" allegedly deprives Respondents of a neutral decision maker. *Id.* at 15. But the Supreme Court rejected this same argument in *Withrow v. Larkin*, 421 U.S. 35 (1975), holding that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation[.]" *Id.* at 58; *see also Gibson v. F.T.C.*, 682 F.2d 554, 560 (5th Cir. 1982) ("The combination of investigative and judicial functions within an agency has been upheld against due 4 process challenges, both in the context of the FTC and other agencies."). Thus, the combined roles of the FTC do not render the Commission's decisions and orders due process violations.[2]

Consequently, Respondents' objections are not persuasive, and we will not bar Complaint Counsel from presenting facts beyond those alleged in the Complaint. As the Commission explained in *Zale Corp.*, 77 F.T.C. 1635 (1970), "The selection of an appropriate remedy, and the admissibility of evidence with regard thereto, are governed by the unlawful practices actually found to exist, and not by the allegations of the complaint." *Id.* at 1636. The additional material facts identified by Complaint Counsel are appropriate for Commission consideration.

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2 Respondents also argue that provisions within the FTC Act that make the Commission's findings of fact, if supported by evidence, "conclusive" for purposes of subsequent review by a court of appeals under 15 U.S.C. § 45(c) or that make the Commission's findings of fact "conclusive" in later enforcement actions under 15 U.S.C. § 57b are unconstitutional because the Commissioners and ALJs who decide the facts are not neutral decision makers. Respondents' Response at 15-16. We need not address the constitutionality of provisions about possible future review or enforcement actions because it is not raised by the issues presently before us.

Indeed, in a similar setting, the Federal Rules of Civil Procedure contemplate and provide for consideration of such facts beyond those in the complaint.[3] Specifically, Rule 12(d) states, "If, on a motion under Rule 12(b)(6) or 12(c) [providing for judgment on the pleadings], matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). Thus, where, as here, judgment is sought based on the facts of the complaint and the answer, courts have discretion to consider additional facts by treating the matter as one for summary judgment. We exercise analogous discretion here. Respondents' Response does not identify a factual dispute with any of the additional facts that Complaint Counsel have identified as material, *see* Respondents' Response at 10-16, so summary decision procedures are appropriate. The Federal Rules, however, caution that when a motion for judgment on the pleadings is converted to one for summary decision, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). By drawing upon the summary decision procedures of Commission Rule 3.24, 16 C.F.R. § 3.24, we afford the parties that opportunity.

Accordingly,

IT IS HEREBY ORDERED that on August 20, 2021, Complaint Counsel and Respondents shall file with the Commission proposed findings of fact and conclusions of law, along with a proposed order and briefs addressing liability, remedy, and defenses, in the form required by Commission Rule 3.46; if any party chooses to rely on facts outside the allegations of the Complaint, it shall state whether summary decision or partial summary decision is warranted and shall include, either within its proposed findings of fact or in a separate document, a concise statement of the material facts as to which it contends there is no genuine issue for trial, as specified in Commission Rule 3.24(a)(1);

IT IS FURTHER ORDERED that on September 10, 2021, Complaint Counsel and Respondents shall file with the Commission reply findings of fact, conclusions of law, and briefs; also on September 10, 2021 any party against whom summary decision or partial summary decision has been sought may file opposition papers as specified in Commission Rule 3.24(a)(2), either as part of or separate from its reply findings, conclusions, and briefs; and

IT IS FURTHER ORDERED that any party that requests summary decision or partial summary decision may file a reply in support of that request within five days after service of the filings specified in the second ordering paragraph.

By the Commission.

3 The Commission may look to the Federal Rules of Civil Procedure for guidance when its own rules do not mandate a result. *See, e.g.*, *LabMd, Inc.*, 2014-1 Trade Cas. (CCH) ¶ 78784, 2014 WL 253518, at *2 n.3 (F.T.C. Jan. 16, 2014).

Interlocutory Orders, Etc.

IN THE MATTER OF

ILLUMINA, INC.
AND
GRAIL, INC.

Docket No. 9401. Order, August 12, 2021

Order moving evidentiary hearing to video conferencing and public live web streaming to mitigate COVID-19 spread.

ORDER REGARDING PUBLIC ACCESS TO AND MEANS OF CONDUCTING THE EVIDENTIARY HEARING IN LIGHT OF THE PUBLIC HEALTH EMERGENCY

Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2, and because it has been advised that gatherings of people in close proximity may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to issue an order addressing public access to the evidentiary hearing in this proceeding pursuant to Commission Rule 3.41(a), 16 C.F.R. § 3.41(a) and providing that that hearing be conducted electronically. Accordingly,

IT IS HEREBY ORDERED THAT

(1) the evidentiary hearing in this proceeding will take place virtually via video conferencing; and

(2) public access to the evidentiary hearing in this proceeding, to the extent permitted by any *in camera* orders, shall be allowed only via telephone or live web streaming, in either instance, only for monitoring purposes.

By the Commission.

[1] Pursuant to the Public Health Services Act, 42 U.S.C. § 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a public health emergency exists because of COVID-19; and on March 13, 2020, former President Trump issued a proclamation that a national emergency exists concerning COVID- 19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefingsstatements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020). A continuation of this public health emergency was issued by President Joseph R. Biden on February 24, 2021. Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, available at https://www.whitehouse.gov/briefing-room/presidentialactions/2021/02/24/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic/ (Feb. 24, 2021).

Interlocutory Orders, Etc.

IN THE MATTER OF

TRAFFIC JAM EVENTS, LLC.
AND
DAVID J. JEANSONNE II

Docket No. 9395. Order, August 24, 2021

Order directing Respondents to provide expedited response to Complaint Counsel's expedited motion to continue evidentiary hearing and prehearing deadlines.

ORDER DIRECTING RESPONDENTS TO PROVIDE EXPEDITED RESPONSE TO COMPLAINT COUNSEL'S EXPEDITED MOTION TO CONTINUE EVIDENTIARY HEARING AND PREHEARING DEADLINES

On August 18, 2021, Complaint Counsel moved for a continuance of the date of the evidentiary hearing from September 14, 2021, to November 16, 2021, and corresponding adjustment of the deadlines for prehearing submissions, because the hearing and prehearing proceedings may be rendered moot be the Commission's resolution of Complaint Counsel's pending Motion for Summary Decision. Complaint Counsel's Expedited Motion to Continue Evidentiary Hearing and Prehearing Deadlines ("Motion for Continuance"). Complaint Counsel requested expedited treatment of the Motion for Continuance because of the approaching hearing date and deadlines for pretrial submissions, beginning on August 30, 2021. Complaint Counsel stated, however, that Respondents' counsel has not assented to continuing the hearing and indicated that Respondents may seek other relief. Under Commission Rules 3.22(d) and 4.3(c), Respondents normally would have ten days to respond to the Motion for Continuance, plus an additional day reflecting electronic service. Rule 3.22(d), however, authorizes the Commission to adjust the response period. To facilitate prompt resolution of the Motion for Continuance in the face of imminent prehearing deadline, we direct Respondents to provide an expedited response to Complaint Counsel's expedited Motion for Continuance. Accordingly,

IT IS HEREBY ORDERED that Respondents Traffic Jam Events, LLC. and David J. Jeansonne II shall submit their response (if any) to Complaint Counsel's Expedited Motion to Continue Evidentiary Hearing and Prehearing Deadlines by no later than 12:00 p.m. (noon), August 25, 2021.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

ILLUMINA, INC.
AND
GRAIL, INC.

Docket No. 9401. Order, August 24, 2021

Order directing general counsel to enforce two nonparty subpoenas.

ORDER DIRECTING GENERAL COUNSEL TO ENFORCE NONPARTY SUBPOENAS

On August 4, 2021, Respondents filed a motion requesting that the Chief Administrative Law Judge ("ALJ") certify to the Commission, pursuant to Commission Rule 3.38(c), 16 C.F.R. § 3.38(c), Respondents' request for court enforcement of two subpoenas for documents and testimony to nonparty Caris Life Sciences, Inc. ("Caris"). Caris opposed the Motion, asserting that (1) Respondents waited too long to bring the Motion, risking prejudice to Caris in potentially having to comply with the subpoenas in a short time frame; (2) the information demanded by the subpoenas was unnecessarily broad; and (3) collecting and producing the necessary documents and disclosing Caris's confidential information to a competitor would be unduly burdensome. On August 16, 2021, the ALJ granted Respondents' Motion, certifying their request for court enforcement of the subpoenas and recommending that court enforcement be sought. Having reviewed the parties' filings and the ALJ's certification and recommendation, we direct the General Counsel to seek enforcement of the subpoenas in federal district court. [1]

I. BACKGROUND

This dispute arises in the context of the Commission's challenge to the proposed acquisition of Respondent GRAIL, Inc. ("GRAIL") by Respondent Illumina, Inc. ("Illumina"). The following summary is based on allegations in the administrative complaint brought under Section 5 of the FTC Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18. [2]

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[1] We use the following abbreviations for citations to the pleadings:

Motion:	[Sealed] Respondents' Motion to Certify to the Commission a Request Seeking Court Enforcement of Document and Testimony Subpoenas Issued to Caris Life Sciences (Aug. 4, 2021)
Opposition:	Non-Party Caris Life Sciences, Inc.'s [Sealed] Response to Respondents' Motion to Certify to the Commission a Request Seeking Court Enforcement of Document and Testimony Subpoenas Issued to Caris Life Sciences (Aug. 10, 2021)
Goswami Decl.	[Sealed] Declaration of Sharonmoyee Goswami, attached to Motion (Aug. 3, 2021)
ALJ Order:	Order Granting Motion for Certification to the Commission of Request for Court Enforcement of Nonparty Subpoena (Aug. 16, 2021)

[2] In addition to this administrative proceeding, Complaint Counsel also brought a parallel action in federal court seeking a preliminary injunction against the transaction. *See* Case No. 3:21-cv-800-CAB-BGS (S.D. Cal.), transferred from Case No. 21-cv-873 (D.D.C.). Complaint Counsel have since voluntarily dismissed that action.

According to the Complaint, GRAIL is a diagnostics company that is "racing against several other firms" to develop and commercialize a cancer screening test that relies on blood samples to detect a range of cancers. Complaint ¶¶ 2-4, 21. Such tests, known as "multi-cancer early detection" ("MCED") tests, are poised to revolutionize how cancer is detected and treated. *Id.* ¶¶ 1-2. If they achieve their promise, MCEDs will allow for earlier and more successful treatment of various cancers, potentially saving thousands of lives. *Id.* ¶¶ 3-4.

The Complaint alleges that GRAIL's proposed acquirer, Illumina, is a dominant supplier of next-generation genetic sequencing platforms ("NGS platforms") that are essential inputs to the development and commercialization of MCED tests. *Id.* ¶¶ 3, 5-6. According to the Complaint, both GRAIL and its rivals with MCED tests in development rely on Illumina's NGS platform to sequence the short fragments of DNA in the bloodstream that may reveal the presence of cancer. *Id.* ¶ 5. Once Illumina acquires GRAIL, the Complaint alleges, Illumina's incentives as a supplier will change. Specifically, Illumina allegedly will gain the incentive to disadvantage GRAIL's MCED competitors who pose a threat to GRAIL by raising their costs for NGS or otherwise disrupting their efforts to develop and commercialize their products. *Id.* ¶¶ 11-12. GRAIL's MCED competitors, the Complaint alleges, lack alternative NGS suppliers to whom they could turn in the event that Illumina engages in these tactics. *Id.* ¶ 13. If Illumina follows through on its changed incentives, the transaction allegedly would cause reduced innovation in MCED tests, as well as potentially higher costs and reduced quality and choice in such tests. *Id.* ¶ 14. Of particular relevance to the subpoenas at issue here, the Complaint alleges that [redacted] would be disadvantaged if Illumina were to engage in anticompetitive strategies post-transaction. *Id.* ¶¶ 46, 72. The Complaint alleges that [redacted] *Id.* at ¶ 46.

Respondents raise a number of defenses to the Complaint, including asserting that the proposed transaction will accelerate, not retard, the development of blood-based cancer screening tests. Answer at 1. Respondents assert that GRAIL's test is unique in that no other company has publicly disclosed a test in development that can identify such a broad range of cancers in asymptomatic patients. *Id.* at 3. Further, Respondents state that "[t]here are no 'rivals' to GRAIL" because "no NGS-based cancer screening tests have been launched on the market anywhere in the world." *Id.* Respondents specifically deny the Complaint's allegation that [redacted] *Id.* ¶72.

II. DISCOVERY TAKEN OF CARIS

Some discovery of Caris has occurred. In December 2020, before any case was filed, Complaint Counsel served a Civil Investigative Demand on Caris. Motion at 3; Goswami Decl. Ex. 1. In response to the CID, Caris asserted that [redacted]

Goswami Decl. Ex. 3 at 3.[3] During the pre-filing investigation, Complaint Counsel convened an investigational hearing of Dr. David Spetzler, Caris's President and Chief Scientific Officer, at which Dr. Spetzler testified under oath that [redacted]. Goswami Decl. Ex. 2. By rule, Respondents' counsel did not attend the investigational hearing and were not able to cross-examine Dr. Spetzler.[4] Respondents' counsel received copies of the CID response and the investigational hearing transcript after the Complaint was filed.

On April 8, 2021, Respondents issued a subpoena *duces tecum* to Caris in the parallel district court action. Goswami Decl. Ex. 4. The subpoena sought, *inter alia,* documents relating to [redacted] Respondents re-served the subpoena in the administrative proceeding after the voluntary dismissal of the federal case. Goswami Decl. Ex. 17. In the intervening four months, the parties met and conferred repeatedly in an effort to resolve disputes over the scope of the subpoena. In total, Caris states that [redacted] Opposition at 3. Caris asserts that such documents are confidential and proprietary and need not be produced. Goswami Decl. Ex. 14 p. 1; Opposition at 3, 8-9.

On May 21, 2021, Respondents served an administrative subpoena for a deposition of Dr. Spetzler. Goswami Decl. Ex. 18. The deposition has not yet taken place, and Caris's counsel has stated that Caris would not only withhold the responsive documents but would forbid Dr. Spetzler from testifying on the topic [redacted]. Goswami Decl. Ex. 23 (Emails, S. Jones to S. Goswami *et al.* (Jun. 17 and 22, 2021); S. Goswami to S. Jones *et al.* (Jun. 22, 2021)).

III. RESPONDENTS' MOTION TO CERTIFY, CARIS'S RESPONSE, AND THE ALJ'S ORDER

Facing an impasse on both subpoenas, Respondents filed the Motion seeking certification to the Commission for enforcement. Respondents' Motion explained that the Complaint referenced [redacted] and asserted that [redacted] Motion at 1. Respondents explained that [redacted] but declined to cooperate with Respondents in their efforts to validate and flesh out this information. Motion at 2-4.

[3] Caris also appears to have produced certain documents in response to the CID, with copies produced to Respondents. However, Respondents' counsel characterized the documents as [redacted] Goswami Decl. Ex. 10 at 2.

[4] *See* Commission Rule 2.7(f)(3), 16 C.F.R. § 2.7(f)(3) ("For investigational hearings [for] oral testimony, the hearing official shall exclude from the hearing room all persons other than the person being examined, counsel for the person being examined, Commission staff, and any stenographer or other person recording such testimony.").

In response to Respondents' Motion, Caris asserted that Respondents had refused reasonable attempts at compromise regarding the scope of their requests and had instead chosen to file an "eleventh hour" Motion nine business days before trial. Opposition at 1-2. Caris also claimed that Respondents' information requests were irrelevant and excessive, particularly with regard to [redacted] *Id.* at 7. According to Caris, Respondents should have no need for [redacted] *Id.* at 8. Finally, Caris asserted that Respondents' requests imposed an undue burden on Caris because (1) Respondents sought [redacted] and (2) the requests would require Caris to conduct time-consuming document searches on an expedited basis. *Id.* at 8-9. Finally, although Caris acknowledged the existence of a protective order covering proprietary information of non-parties, Caris asserted that Respondents had demonstrated a lack of concern about the terms of this order by improperly supplying confidential Caris documents to a GRAIL-affiliated consultant. Opposition at 5.

The ALJ granted the Motion and recommended that the Commission seek enforcement of the subpoenas, as narrowed to the scope that Respondents' counsel indicated willingness to accept during the meet-and-confer process with Caris. [5] Under that narrowed scope, the subpoenas would cover (1) the production of documentary material sufficient to [redacted] and (2) the deposition of Dr. David Spetzler, within one week of the district court order. ALJ Order at 6 n.8.

Regarding relevance, the ALJ found that the Complaint alleges Caris to be [redacted] is among those entities whose ability to compete will allegedly be adversely affected by the acquisition. *Id.* at 4. Regarding timeliness, the ALJ determined that, while it would have been better for Respondent to have filed earlier, the record revealed that the parties were actively attempting to reach agreement on documents, and then on deposition topics, up until impasse was finally reached on August 2, 2021, with the Motion filed two days later. *Id.* at 5. Regarding alleged burden, the ALJ's reasoning was twofold. On the matter of the alleged protective order violation, Respondents had denied violating the order and had represented, among other things, that the consultant subsequently destroyed the materials; that he would not rely on them for any opinions; and that, except for outside counsel, Respondents had not received the material provided to the consultant. *Id.* Finally, as to Caris's concerns about the document search, the ALJ found that Caris's assertions of burden were conclusory and did not go beyond the imposition on subpoenaed parties that "is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Id.* at 5-6, quoting *FTC v. Dresser Indus., Inc.,* Misc. No. 77-44, 1977 WL 1394 at *5 (D.D.C. Apr. 26, 1977).

[5] *See, e.g.,* Goswami Decl. Ex. 23 p. 1 (Email, S. Goswami to S. Jones *et al.,* Jun. 22, 2021); Goswami Decl. Ex. 24 p. 4 (Email, S. Goswami to S. Jones *et al.,* Jun. 8, 2021).

IV. ANALYSIS

The subpoenas, as narrowed, seek documents and testimony that are relevant to allegations and defenses in the case. The Complaint alleges that [redacted] and that [redacted] is close to competing with GRAIL. The materials that Caris seeks to withhold are likely to help resolve this dispute. Therefore, we agree with the ALJ's conclusions.

Caris's objection that the materials include confidential and trade secret information does not carry the day. The traditional solution to confidentiality issues is for materials to be produced to outside counsel under a protective order similar to that in place here. *See FTC v. Dresser Indus.*, 1977 WL 1394 at *5 ("The mere fact that some of the subpoenaed material may be confidential does not, however, excuse compliance with the subpoena"; FTC protective order deemed adequate); *Dean v. Anderson*, No. 01-2599-JAR, 2002 WL 1377729, at *3 (D. Kan. June 6, 2002) ("[I[t is well settled that confidentiality does not act as a bar to discovery and is generally not grounds to withhold documents from discovery. Confidentiality concerns in many cases may be addressed with an appropriate protective order.") (citations omitted); *Barrington v. Mortage IT, Inc.*, No. 07-61304-CIV, 2007 WL 4370647, at *1 (S.D. Fla. Dec. 10, 2007) (accord); *Aquastar Pool Prod. Inc. v. Paramount Pool & Spa Sys.*, No. CV-19-00257-PHXDWL, 2019 WL 250429, at *4 (D. Ariz. Jan. 17, 2019) ("Paramount is not entitled to withhold those materials [that contain confidential information] from Aquastar because a protective order is already in place that will prevent Aquastar from misusing the information."); *FTC v. Rockefeller*, 441 F. Supp. 234, 242 (S.D. N.Y. 1977), *aff'd* 591 F.2d 182 (2d Cir. 1979) (stating that an objection to a subpoena on grounds that it seeks confidential information "poses no obstacle to enforcement"). As for the claimed protective order infraction, we concur with the ALJ. As far as the record before us shows, a violation of the protective order may not have occurred; Caris's materials apparently were not disclosed to Respondents' personnel, and the documents have since been destroyed and will have no impact on the case. Opposition Ex. 3.

Finally, we are unpersuaded by Caris's argument that Respondents are barred from enforcing the subpoenas by their delay or by having taken putatively unreasonable positions in meet-and-confer negotiations. Respondents' counsel met and conferred with Caris numerous times, reasonably compromising and reducing the scope of their requests down to what appears to be a minimum. *See, e.g.,* Goswami Decl. Ex. 12 at 1 (Email, S. Goswami to S. Jones *et al.* (May 21, 2021) stating that "we have a clear need for at least *some* documents sufficient to describe [redacted] "We are not looking for every single document" [redacted]) [6] In response, Caris's counsel disagreed that any of the requested information regarding [redacted] was relevant, and stated that Caris would not only withhold the responsive documents, but would forbid

[6] *See also,* Goswami Decl. Ex. 19 at 1 (Email, S. Goswami to S. Jones (Jun. 1, 2021), explaining that the request for [redacted]

Dr. Spetzler from testifying on the topic. Goswami Decl. Ex. 23 (Emails, S. Jones to S. Goswami *et al.* (Jun. 17 and 22, 2021)). While we agree with the ALJ that Respondents could usefully have declared an impasse and brought the Motion earlier, we also note (as he did) that under Commission Rule 3.44(c), the evidentiary record remains open until three business days after the conclusion of trial, unless supplementation is required. Furthermore, under Commission Rule 3.51(e), "At any time from the close of the hearing record pursuant to § 3.44(c) until the filing of his or her initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence for good cause shown." Thus, there are multiple mechanisms by which Caris's evidence can enter the trial record. We conclude that it is appropriate to seek enforcement of the subpoenas.

Accordingly,

IT IS HEREBY ORDERED that the General Counsel take appropriate action to enforce in federal district court (1) Respondents' subpoena *duces tecum* to Caris Life Sciences, Inc., narrowed to cover documents sufficient to describe [redacted] and (2) Respondents' subpoena for the deposition of Dr. David Spetzler, with document production to be completed within one week of the district court's order and the deposition of Dr. Spetzler to take place promptly thereafter.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

FLEETCOR TECHNOLOGIES, INC.
AND
RONALD CLARKE

Docket No. 9403. Order, August 25, 2021

Order granting to stay the administrative proceeding.

ORDER STAYING ADMINISTRATIVE PROCEEDING

On August 13, 2021, Complaint Counsel moved to stay this administrative proceeding pending resolution of the Federal Trade Commission's motion to stay or dismiss without prejudice an action the Commission is litigating against FleetCor Technologies, Inc. and its CEO Ronald Clarke (collectively, "Respondents") in federal court, FTC v. FleetCor Technologies, Inc., No. 1:19-cv-5727-AT (N.D. Ga.). Complaint Counsel's Unopposed Motion to Stay Administrative Proceedings ("Motion to Stay"). Complaint Counsel state that Respondents do not oppose the Motion to Stay. *Id.* at 1. On August 17, 2021, the Chief Administrative Law certified the Motion to Stay for disposition by the Commission. We have determined to grant the requested stay.

Complaint Counsel explain that, seeking to avoid duplicative actions against Respondents in federal court and in the FTC's administrative adjudication, they have filed in the pending federal court action a motion to stay that proceeding or to dismiss it without prejudice. Motion to Stay at 2 The federal court motion will not be fully briefed until September. *Id.* Absent a stay of the administrative proceeding, the parties will have to spend resources litigating the same case in two forums. Complaint Counsel state that once the status of the federal court action has been resolved, there will be no need for duplicative litigation. *Id.* at 3.

Commission Rule 3.41(f) provides that a pending "collateral federal court action that relates to the administrative adjudication shall not stay the proceeding [u]nless a court of competent jurisdiction, or the Commission for good cause, so directs." 16 C.F.R. § 3.41(f). In this instance, where a stay at the start of the administrative proceeding will avoid unnecessary burden and expense while a pending motion to stay or dismiss without prejudice a duplicative action in federal court is resolved, we find that there is good cause to stay the Commission's administrative proceeding. Accordingly,

IT IS HEREBY ORDERED that Complaint Counsel's Unopposed Motion to Stay Administrative Proceedings is **GRANTED**;

IT IS FURTHER ORDERED that all proceedings before the Commission and the Chief Administrative Law Judge in this matter, including all filing deadlines and the evidentiary hearing currently scheduled to commence on January 25, 2022, are hereby stayed pending further order by the Commission; and

IT IS FURTHER ORDERED that Complaint Counsel shall inform the Commission of the resolution of the motion to stay or dismiss without prejudice filed in the federal court action, FTC v. FleetCor Technologies. Inc., No. 1:19-cv-5727-AT (N.D. Ga.), promptly upon issuance.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

TRAFFIC JAM EVENTS, LLC.
AND
DAVID J. JEANSONNE II

Docket No. 9395. Order, August 26, 2021

Oder rescheduling evidentiary hearing and extending prehearing deadlines.

ORDER RESCHEDULING EVIDENTIARY HEARING AND CONTINUING PREHEARING DEADLINES

Complaint Counsel have moved to reschedule the date of commencement of the evidentiary hearing in this proceeding from September 14, 2021, to November 16, 2021, and to extend all existing prehearing deadlines by the same 63 days. Complaint Counsel's Expedited Motion to Continue Evidentiary Hearing and Prehearing Deadlines (Aug. 18, 2021) ("Motion to Continue"). Respondents oppose the motion but do not explain to the Commission why it should be denied. Email from counsel for Respondents to Mr. Pablo Zylberglait (Aug. 25, 2021).

Complaint Counsel maintain that the requested adjustments are desirable in light of a motion for summary decision dated August 14, 2021, filed by Complaint Counsel and pending before the Commission. Complaint Counsel's Motion for Summary Decision. Briefing on this motion will run into September, and there is insufficient time for the Commission to rule on it by September 14.

Complaint Counsel urge that the motion for summary decision could obviate the need for the evidentiary hearing or narrow the scope of that hearing and prehearing submissions Motion to Continue at 3. Indeed, conducting an evidentiary hearing in a context where all or some of the issues may be decided by summary decision could impose unnecessary burdens and expenses on the parties and nonparty witnesses. Commission rules authorize the Commission to defer the start of an evidentiary hearing upon a showing of good cause. 16 C.F.R. §§ 3.21(c)(1) & 3.41(b). In order to allow time for the Commission to address the summary decision motion, we find good cause to reschedule the evidentiary hearing to commence on November 16, 2021, and to extend all prehearing deadlines by a corresponding period. *Cf. In re Hackensack Meridian Health, Inc.*, 2021 WL 3109607 (F.T.C. July 1, 2021) (finding a continuance justified when additional tine could obviate the need for an evidentiary hearing without unduly delaying the Commission proceeding); *In re Thomas Jefferson Univ.,* Docket No. 9392, 2020 WL 7237952, at *2 (F.T.C., Nov. 6, 2020) (same). Accordingly,

IT IS HEREBY ORDERED that Complaint Counsel's Expedited Motion to Continue Evidentiary Hearing and Prehearing Deadlines is **GRANTED**; and

IT IS FURTHER ORDERED that the evidentiary hearing in this proceeding shall commence at 10:00 a.m. on November 16, 2021, and, unless modified by the Chief Administrative Law Judge, all prehearing deadlines in this proceeding shall be extended by sixty-three (63) days.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

TRAFFIC JAM EVENTS, LLC.
AND
DAVID J. JEANSONNE II

Docket No. 9395. Order, August 30, 2021

Order extending the deadline for the Respondents' submission.

ORDER EXTENDING BRIEFING SCHEDULE

Respondents' answer to Complaint Counsel's Motion for Summary Decisions is due today. Respondents counsel, however, are located in New Orleans and have advised that the power outages attributable to Hurricane Ida have made phone and internet service in New Orleans spotty and that it may not be possible to file their Opposition on time. Counsel state that the city may remain without power for some time. Pursuant to Commission Rule 3.22(d), 16 C.F.R. § 3.22(d), we have determined that good cause exists to extend the deadline for Respondents' submission. Accordingly,

IT IS HEREBY ORDERED that Respondents' filing in response to Complaint Counsel's Motion for Summary Decision shall be due on September 7, 2021.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HEALTH RESEARCH LABORATORIES, LLC., WHOLE BODY SUPPLEMENTS, LLC., AND KRAMER DUHON

Docket No. 9397. Order, September 16, 2021

Order directing Respondents to provide response by reply date.

ORDER DIRECTING RESPONDENTS TO PROVIDE EXPEDITED RESPONSE TO EXPEDITED MOTION TO EXTEND COMPLAINT COUNSEL'S REPLY DATE

On September 13, 2021, Complaint Counsel filed an expedited motion asking the Commission to extend until October 8, 2021 the deadline for Complaint Counsel to file their reply in support of summary decision. The reply is currently due on September 20, 2021. *See* Order Directing Parties to Submit Proposed Findings of Fact and Conclusions of Law and Providing for Summary Decision at 5 (July 30, 2021); 16 C.F.R. § 4.3(a), (c). In light of the imminent deadline for Complaint Counsel to file their reply, we direct Respondents to provide an expedited response to the Expedited Motion to Extend Complaint Counsel's Reply Date. Accordingly,

IT IS HEREBY ORDERED that Respondents Health Research Laboratories, LLC, Whole Body Supplements, LLC, and Kramer Duhon shall submit their response (if any) to the Expedited Motion to Extend Complaint Counsel's Reply Date by no later than 12:00 p.m. (noon) E.D.T., September 17, 2021.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

TRAFFIC JAM EVENTS, LLC.
AND
DAVID J. JEANSONNE II

Docket No. 9395. Order, September 20, 2021

Order directing General Counsel to enforce nonparty subpoena *Ad Testificandum*.

ORDER DIRECTING GENERAL COUNSEL TO ENFORCE SUBPOENA *AD TESTIFICANDUM*

On July 28, 2021, Complaint Counsel filed a motion requesting that the Chief Administrative Law Judge ("ALJ") certify to the Commission, pursuant to Commission Rule 3.38(c), 16 C.F.R. § 3.38(c), Complaint Counsel's request for court enforcement of a subpoena *ad testificandum* to nonparty Justin Brophy. Respondents Traffic Jam Events, LLC and David J. Jeansonne II opposed the motion on the ground that the subpoena was untimely. On August 10, 2021, the ALJ granted Complaint Counsel's motion, certifying their request for court enforcement of the subpoena and recommending that court enforcement be sought. Having reviewed the parties' respective filings and the ALJ's certification and recommendation, we direct the General Counsel to seek enforcement of the subpoena in federal district court. [1]

Respondents Traffic Jam Events, LLC and its owner, managing member, and president, David J. Jeansonne II, provide marketing services to auto dealerships nationwide. Complaint ¶¶ 2, 3; Answer ¶¶ 2, 3. Traffic Jam Events has described its business as "creating mailers on behalf of automotive dealerships to promote automotive sales." Answer at 1. The Commission's Complaint charges that Respondents violated the FTC Act by (1) providing false or misleading information about COVID-19 stimulus relief in connection with their marketing of motor vehicles and (2) falsely or misleadingly advertising that consumers had won a specific prize that could be collected by visiting a particular auto dealership, when consumers had not won the specific prize. Complaint ¶¶ 15-19. The Complaint also charges that Respondents failed to make certain disclosures required by the Truth in Lending Act and Regulation Z, 12 C.F.R.§ 226.24(d). Complaint ¶¶ 20-23.

Justin Brophy was an employee of Traffic Jam Events at the time of the activities described in the Complaint. Respondents identified Mr. Brophy in their initial and supplemental disclosures as an individual likely to have discoverable information relevant to the complaint allegations,

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[1] We use the following abbreviations for citations to the pleadings:

Motion:	Complaint Counsel's Motion to Certify to the Commission a Request Seeking Court Enforcement of a Subpoena *Ad Testificandum* Issued to Justin Brophy (July 28, 2021)
Widor Decl.:	Declaration of Thomas J. Widor attached to Motion
Opposition:	Respondents' Memorandum in Opposition to Complaint Counsel's Motion to Certify to the Commission a Request Seeking Court Enforcement of a Subpoena *Ad Testificandum* Issued to Justin Brophy (Aug. 3, 2021)
ALJ Order:	Order Granting Motion for Certification to the Commission of Request for Court Enforcement of Nonparty Subpoena (Aug. 10, 2021)

proposed relief, or defenses. Widor Decl. ¶¶ 3, 5, Exs. A, C. Respondents also listed Mr. Brophy on their preliminary witness list and their supplemental preliminary witness list, which stated that Mr. Brophy would be providing "[t]estimony regarding the products and services developed, disseminated, marketed, promoted, or provided by Respondents; communications with current and prospective customers; Respondents' role in creating, developing, reviewing, editing, approving, and disseminating any advertisements or promotional materials." *Id*. ¶¶ 4, 6, Ex. D. The initial and supplemental disclosures, as well as the preliminary witness lists, indicated that Mr. Brophy should be contacted through Respondents' counsel. *Id*. ¶¶ 3-5, Exs. A-D. On May 18, 2021, Complaint Counsel sent a Notice of Deposition to Traffic Jam Events seeking to depose several Traffic Jam Events employees, including Justin Brophy. *Id.* ¶ 11, Ex. G. According to Respondents, they advised Complaint Counsel that Traffic Jam Events' employees had resigned and could not be produced by counsel. Opposition at 2. Complaint Counsel advised that, if Respondents' counsel could not confirm that Mr. Brophy's deposition could be arranged through them, Respondents should supplement their initial disclosures to provide his contact information. *See* Widor Decl. ¶ 12, Ex. H (June 3, 2021 email from Thomas Widor).

Respondent Jeansonne provided Mr. Brophy's telephone number during his deposition on June 22, 2021. *Id*. Ex. J (Tr. at 29, lines 13-18). Complaint Counsel made several efforts in June to reach Mr. Brophy by phone and email to schedule his deposition, but the phone calls, voicemails, and emails went unanswered. *Id.* ¶¶ 17-18. Complaint Counsel continued to press Respondents for Mr. Brophy's last-known address. *Id.* ¶ 19, Ex. K (emails from Michael Tankersley on July 8, 2021, July 9, 2021, and July 12, 2021). Respondents finally provided that information on July 14, 2021. *Id.* ¶ 23, Ex. K.

On July 20, 2021, Complaint Counsel issued a subpoena *ad testificandum* for Mr. Brophy, with the deposition to take place remotely on July 27, 2021. *Id*. ¶ 25, Ex. M. The subpoena was served on July 22, 2021 on an individual residing at the last known address provided by Respondents, which is also associated with Mr. Brophy in property records. *Id.* ¶ 26, Ex. N. Complaint Counsel's paralegal also sent the subpoena to Mr. Brophy's email address. *Id.* ¶ 27, Ex. O. Mr. Brophy did not move to limit or quash the subpoena, did not respond to Complaint Counsel's paralegal's phone or email attempts to confirm his receipt of the subpoena and participation in the deposition, and failed to appear at the deposition. Motion at 2; Widor Decl. ¶¶ 28-32, Ex. P. Mr. Brophy also did not respond to telephone calls and emails from Complaint Counsel's paralegal regarding his failure to appear. *Id*. ¶¶ 31-32.

On July 28, 2021, Complaint Counsel sought to enforce the subpoena by moving the ALJ for a certification under Rule 3.38(c), which provides that "in instances where a nonparty fails to comply with a subpoena or order, [the ALJ] shall certify to the Commission a request that court enforcement of the subpoena or order be sought." 16 C.F.R. § 3.38(c). Respondents opposed Complaint Counsel's motion on the ground that the subpoena was issued after the discovery deadlines in the ALJ's First Revised Scheduling Order, issued May 7, 2021. Opposition at 2. That scheduling order set the deadlines of June 11, 2021 for the issuance of most discovery requests and July 16, 2021 for the close of fact discovery.

The ALJ rejected Respondents' timeliness argument because he had previously extended the discovery deadlines in light of Respondents' discovery delays, which included failure to timely supplement their initial disclosures to provide contact information for the now-former employees. ALJ Order at 4 (citing Order Granting Motion to Extend Discovery Deadlines at 1 (June 15, 2021) ("Discovery Extension Order") and Order on Complaint Counsel's Motion for Sanctions (June 29, 2021)).[2] Specifically, the Discovery Extension Order allowed Complaint Counsel ten days "to examine any discovery information or materials Respondents provide after June 11, 2021 and to issue any additional discovery requests based on such information or materials." Order Granting Motion to Extend Discovery Deadlines at 1. Respondents did not provide Mr. Brophy's last-known address until July 14, 2021. The ALJ therefore concluded that Complaint Counsel's issuance of the subpoena on July 20, 2021, and convening of the deposition on July 27, 2021, were not untimely. ALJ Order at 4. Further, the ALJ found that the information sought through the subpoena was relevant and that Mr. Brophy failed to appear for the scheduled deposition, despite Complaint Counsel's reasonable efforts to procure his attendance. *Id.* Accordingly, the ALJ certified to the Commission the request for court enforcement of the subpoena with the recommendation that court enforcement be sought. *Id*.

We agree that court enforcement is appropriate. Complaint Counsel issued the subpoena *ad testificandum* in accordance with the discovery deadlines set out in the Discovery Extension Order, and Mr. Brophy has not complied. Further, the subpoena is within the proper scope of discovery because, by Respondents' own admission, Mr. Brophy is "likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the Respondent." Widor Decl. Ex. A at 1-2 (Respondents' Initial Disclosures), Ex. C at 1-2 (Respondents' Supplemental Initial Disclosures). *See* 16 C.F.R. § 3.31(c)(1) (providing for discovery that "may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent"). Respondents also listed Mr. Brophy as a potential witness on their first and supplemental preliminary witness lists. Widor Decl. ¶¶ 4, 6, Exs. B, D. Moreover, Respondent Jeansonne repeatedly mentioned Mr. Brophy at his deposition and identified Mr. Brophy as the person who could answer Complaint Counsel's questions. *Id.* ¶ 15, *citing, e.g.,* Ex. I (Tr. at 79-80, lines 24-25 & 1; 92-93, lines 23-25 & 1-2; 94 lines 4-7; 101, lines 16-19). Accordingly,

IT IS HEREBY ORDERED that the General Counsel take appropriate action to enforce in federal district court Complaint Counsel's subpoena *ad testificandum* to Justin Brophy.

By the Commission.

[2] As the ALJ noted in the Order on Complaint Counsel's Motion for Sanctions, pursuant to Rule 3.31(e), 16 C.F.R. § 3.31(e), Respondents had a duty to supplement their prior disclosures to provide updated contact information for Traffic Jam Events' former employees.

Interlocutory Orders, Etc.

IN THE MATTER OF

HEALTH RESEARCH LABORATORIES, LLC., WHOLE BODY SUPPLEMENTS, LLC., AND KRAMER DUHON

Docket No. 9397. Order, September 17, 2021

Order extending the date for Complaint Counsel's reply in support of summary decision.

ORDER EXTENDING COMPLAINT COUNSEL'S REPLY DATE

On September 13, 2021, Complaint Counsel filed an expedited motion asking the Commission to extend until October 8, 2021, the deadline for Complaint Counsel to file their reply in support of summary decision. Complaint Counsel argue that Respondents, in Respondents' Opposition to Summary Disposition and Reply Findings of Fact, Conclusions of Law, and Brief (Sept. 10, 2021), have asserted a host of new facts and for the first time have articulated a very narrow interpretation of their Rule 3.12(b)(2) admissions. Complaint Counsel assert that it would not be possible to prepare a thorough response to Respondents' new factual and legal claims by the original reply date of September 20, 2021. Respondents, in turn, argue that Complaint Counsel have not "demonstrated" good cause for an extension, as they did not provide any affidavits or evidence or cite other commitments that would interfere with the completion of the reply. Respondents' Response to Complaint Counsel's Expedited Motion to Extend Complaint Counsel's Reply Date at 2 (Sept. 17, 2021).

Affidavits and extrinsic evidence, however, are not necessary. Complaint Counsel have explained with sufficient specificity that, because they must address Respondents' new position that disputes a number of central allegations in the Complaint—a position Respondents chose not to articulate when presented with opportunities to do so earlier—the short timeframe for a reply is insufficient. Pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), we have determined that good cause exists to extend the deadline for Complaint Counsel's submission. Accordingly,

IT IS HEREBY ORDERED that Complaint Counsel's reply in support of summary decision shall be due on October 8, 2021.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HACKENSACK MERIDIAN HEALTH, INC.
AND
ENGLEWOOD HEALTHCARE FOUNDATION

Docket No. 9399. Order, September 24, 2021

Order granting in part to defer the commencement of the evidentiary hearing.

ORDER GRANTING FOURTH CONTINUANCE

On September 14, 2021, Complaint Counsel and Respondents Hackensack Meridian Health, Inc. ("HMH") and Englewood Healthcare Foundation ("Englewood") jointly moved to defer commencement of the evidentiary hearing in this proceeding until thirty days after the United States Court of Appeals for the Third Circuit renders its judgment on Respondents' appeal of the August 4, 2021 order by the United States District Court for the District of New Jersey granting a preliminary injunction requested by Complaint Counsel. Joint Expedited Motion for Further Continuance of Administrative Proceedings Pending Federal Court Appeal of Order Granting Motion for Preliminary Injunction ("Joint Motion"). Complaint Counsel and Respondents further requested that interim prehearing deadlines be continued for the same period of time. We have previously granted similar requests to continue the commencement of the hearing and to defer the prehearing deadlines on May 25, 2021, July 1, 2021, and July 27, 2021. Order Granting Continuance ("May 25 Order"); Order Granting Further Continuance ("July 1 Order"); Order Granting Third Continuance ("July 27 Order"). For reasons similar to those expressed in these prior orders, we have determined to defer commencement of the evidentiary hearing as requested by the parties.

On December 3, 2020, the Commission issued an administrative complaint challenging a proposed transaction whereby HMH would acquire Englewood ("the Proposed Transaction"). The Commission at that time also filed a complaint in the U.S. District Court for the District of New Jersey seeking a preliminary injunction barring the Proposed Transaction until completion of the administrative proceeding. The District Court granted that preliminary injunction on August 4, 2021. Respondents have appealed the preliminary injunction order, and briefing is scheduled to conclude on November 12, 2021. The parties state that "[i]f after all appeals in the federal court proceeding are exhausted [R]espondents continue to be preliminarily enjoined from consummating the proposed transaction, it is highly likely Respondents will abandon the transaction and this administrative proceeding will be moot." Joint Motion at 2; *see id.* at 3.

The parties argue that granting the requested continuance and extending prehearing deadlines would protect the parties and third parties and their witnesses from unnecessary burdens and expense, without prejudicing the Commission. *Id.* at 1-5; *see* May 25 Order at 1-2. We found these arguments persuasive in granting prior continuances in this proceeding. *See* May 25 Order; July 1 Order; July 27 Order.

Commission Rule 3.41(f) provides that a pending "collateral federal court action that relates to the administrative adjudication shall not stay the proceeding [u]nless a court of competent jurisdiction, or the Commission for good cause, so directs." 16 C.F.R. § 3.41(f). This reflects the Commission's commitment to move forward as expeditiously as possible with its administrative proceedings. *See, e.g.*, 16 C.F.R. §§ 3.1, 3.11(b)(4), 3.41(b). Nonetheless, the public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary. May 25 Order at 2. For the reasons stated in our May 25, July 1, and July 27 Orders, and based on the authorities cited therein, we find that there is good cause to continue the commencement of the evidentiary hearing in order to protect the parties and third parties from unnecessary burden and expense.

Because we are not rescheduling the evidentiary hearing to commence on a specific calendar day, a delay of prehearing deadlines by the same interval would create uncertainty. Consequently, we will continue all prehearing deadlines for sixty days, with the understanding that the Chief Administrative Law Judge can further adjust those deadlines if that proves appropriate.

Accordingly,

IT IS HEREBY ORDERED that the Joint Expedited Motion for Further Continuance of Administrative Proceedings Pending Federal Court Appeal of Order Granting Motion for Preliminary Injunction is **GRANTED IN PART**;

IT IS FURTHER ORDERED that the evidentiary hearing in this proceeding shall commence at 10:00 a.m. on the first working day that is at least thirty days after the United States Court of Appeals for the Third Circuit renders its judgment on Respondents' appeal of the August 4, 2021 order by the United States District Court for the District of New Jersey granting a preliminary injunction requested by Complaint Counsel; and

IT IS FURTHER ORDERED that unless modified by the Chief Administrative Law Judge, all related prehearing deadlines shall be extended by sixty (60) days.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HEALTH RESEARCH LABORATORIES, LLC., WHOLE BODY SUPPLEMENTS, LLC., AND KRAMER DUHON

Docket No. 9397. Order, November 19, 2021

Order denying either a final or summary decision, remanding the case to the FTC Administrative Law Judge, and allowing the Complaint Counsel to amend the complaint.

ORDER DENYING FINAL DECISION UNDER RULE 3.12(B)(2) AND DENYING SUMMARY DECISION

The Complaint in this case alleges that Health Research Laboratories, LLC ("HRL"), Whole Body Supplements, LLC ("WBS"), and their owner Kramer Duhon (collectively, "Respondents") violated the Federal Trade Commission Act by making unsubstantiated health claims concerning their Black Garlic Botanicals, BG18, The Ultimate Heart Formula ("UHF"), and Neupathic products. Respondents seek a final decision and order under Commission Rule 3.12(b)(2), 16 C.F.R. § 3.12(b)(2), based on their purported admission of all material facts in the Complaint, while Complaint Counsel seek summary decision under Commission Rule 3.24, 16 C.F.R. § 3.24. We find that significant questions of material fact remain in dispute which make the case inappropriate for either a summary decision or a decision under Rule 3.12(b)(2). Therefore, this matter will be remanded to the Chief Administrative Law Judge ("ALJ") for additional discovery, evidentiary hearing, and initial decision, consistent with our opinion below. Before remanding, however, we will provide opportunity for Complaint Counsel to move to amend the Complaint.

I. PROCEDURAL HISTORY

A. The Complaint

On November 13, 2020, the Commission issued an administrative Complaint charging HRL, WBS, and Kramer Duhon, individually and as an owner and officer of the aforementioned companies, with violating Sections 5(a) and 12 of the FTC Act. The Complaint alleges that HRL's and WBS's advertisements conveyed expressly or by implication, and without substantiation, claims that the Black Garlic Botanicals, BG18, and UHF products: (a) prevent or reduce the risk of and treat cardiovascular disease, including by lowering blood pressure, improving blood flow, reducing cholesterol, or decreasing arterial plaque; (b) prevent or reduce the risk of and treat atherosclerosis, including by reducing cholesterol or decreasing arterial plaque; and (c) cure, treat, or mitigate hypertension, including by decreasing arterial plaque or lowering blood pressure. Complaint ¶¶ 14-19. The Complaint also alleges that HRL's advertisements conveyed expressly or by implication, and without substantiation, claims that the Neupathic dietary supplement cures, treats, or mitigates diabetic neuropathy, including by improving blood circulation, or eliminating or alleviating diabetic nerve pain and discomfort. Id. ¶¶ 20-21. To support these claims, the

Complaint attaches and extensively quotes from promotional mailers sent by Respondents to consumer residences. See id. ¶¶ 7, 9, 11, 13. The Complaint also includes a Notice of Contemplated Relief, which contains various prohibitions on representations, record-keeping and notice requirements, and other fencing-in provisions. Id. at 14-15.

B. Proceedings before the ALJ

On December 4, 2020, Respondents filed an Answer denying the alleged violations and asserting a variety of defenses. On February 12, 2021, Respondents moved for leave to amend their Answer to admit all of the material allegations pursuant to Commission Rule 3.12(b)(2), which provides:

> If the respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that the respondent admits all of the material allegations to be true. Such 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 an answer, the respondent may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46.

16 C.F.R. § 3.12(b)(2).

Complaint Counsel opposed the motion, arguing among other things that Respondents' proposed amendments to the Answer did not conform to the requirements of Rule 3.12(b)(2) because Respondents continued to assert defenses that contested material facts, namely the defenses of mootness and lack of public interest. Complaint Counsel's Opposition to Motion to Amend Answer and Cross Motion to Amend Complaint at 5 (Feb. 24, 2021). Complaint Counsel also argued that, should the ALJ grant Respondents leave to amend the Answer, he should require Respondents to admit the allegations on a paragraph-by-paragraph basis and permit discovery on any remaining factual issues. *Id*. at 6-7. Further, Complaint Counsel cross-moved for leave to amend the Complaint to add allegations related to the factual issues raised by Respondents' defenses and the scope of relief. *Id*. at 7. The proposed amendments included, among other things, two new paragraphs concerning the lack of substantiation for Respondents' health claims. See id. Ex. CCX-A ¶¶ 6, 23; see also Respondents' Response to Cross Motion to Amend Complaint at 2-4 (Feb. 26, 2021) (listing Complaint Counsel's proposed new and revised paragraphs). With respect to the scope of relief, Complaint Counsel explained that, as they had already informed Respondents, they would be seeking to ban Respondents from the supplement industry. Complaint Counsel's Opposition to Motion to Amend Answer and Cross Motion to Amend Complaint at 8 n.3. Complaint Counsel stated that they wanted to amend the Complaint to "support the broad relief Complaint Counsel seeks." *Id*. at 7.

The next day, Respondents submitted a waiver of the defenses of mootness and lack of public interest, which Complaint Counsel had identified as raising factual issues. Respondents' Waiver of Affirmative Defenses of Mootness and Lack of Public Interest (Feb. 25, 2021).

Respondents then argued that, in light of this waiver, there was no need for Complaint Counsel to amend the Complaint to add factual allegations concerning those defenses. See Respondents' Response to Cross Motion to Amend Complaint at 6. As for the proposed factual allegations addressing the appropriate relief, Respondents stated that "[t]he scope of relief provided by the FTC Act is a pure question of law, not a factual issue that needs to be alleged." *Id*. Thus, they asserted, "there are no outstanding factual issues that justify the proposed amendments." *Id*.

On March 10, 2021, the ALJ granted Respondents leave to amend the Answer and, on March 12, 2021, denied Complaint Counsel's cross-motion to amend the Complaint. The ALJ found that Complaint Counsel's proposed amendments did not add new legal theories or allege new or different violations of the FTC Act but would nonetheless complicate resolution of the case on the merits and "unnecessarily frustrate the right to obtain expedited proceedings under Rule 3.12(b)(2)[,]" since Respondents had admitted all of the material allegations in the existing Complaint. Order Denying Complaint Counsel's Motion to Amend the Complaint at 5. The ALJ further determined that "a paragraph-by-paragraph response to each allegation of the Complaint was not contemplated by Rule 3.12(b)(2) and could create ambiguity, when the proposed amended answer already expressly admits 'all material allegations' of the Complaint." Order Granting Respondents' Motion for Leave to Amend Answer at 4-5. On the issue of discovery, the ALJ held that nothing in Rule 3.12(b)(2) prohibited Complaint Counsel from pursuing discovery regarding issues that remained relevant after the amendment of the Answer. *Id*. at 5. Complaint Counsel moved the ALJ to certify his rulings on the parties' motions for interlocutory appeal to the Commission, but the ALJ denied certification. See Complaint Counsel's Motion to Certify Rulings for Interlocutory Appeal (Mar. 29, 2021); Order Denying Motion for Interlocutory Appeal (Apr. 2, 2021).

On March 30, 2021, Respondents filed an Amended Answer stating: "Pursuant to 16 CFR § 3.12(b)(2), Respondents elect not to contest the allegations of fact set forth in the complaint. Respondents admit all of the material allegations to be true." Amended Answer at 1. Respondents also reserved the right to submit proposed findings of fact and conclusions of law. *Id*. The sole remaining defense asserted that the FTC's administrative process and structure violates the Constitution. *Id*. 1-2.

The next day, on March 31, 2021, Respondents filed a motion asking the ALJ to either issue a new scheduling order setting out the deadlines for final briefing or transfer the case to the Commission for issuance of a final decision. *See generally* Expedited Motion to Enter New Scheduling Order or, in the Alternative, Transfer Case to the Commission. Complaint Counsel opposed the motion because it would terminate discovery regarding the appropriate relief, an issue that remained in dispute despite the admissions in the Amended Answer. Opposition to Respondents' Expedited Motion to Enter New Scheduling Order or, in the Alternative, Transfer Case to the Commission at 1-2 (Apr. 9, 2021). Just three days earlier, the ALJ had ordered Respondents to provide discovery relating to the appropriate fencing-in relief, including the seriousness and deliberateness of Respondents' conduct. Order Granting Complaint Counsel's Motions to Compel (Apr. 6, 2021). On April 13, 2021, Respondent submitted a stipulation stating that "Respondents hereby stipulate and agree that the Initial Decision of the ALJ can include whatever 'fencing in' relief is permitted by statute and requested in the Complaint." Respondents'

Stipulation as to "Fencing-In" Relief at 1-2. Respondents also asked the ALJ to reconsider his discovery order, asserting that there was no need for additional discovery because they had "admitted all material facts in the Complaint and agreed to the 'fencing in' relief." Respondents' Expedited Motion to Partially Reconsider May [sic] 6 Order Granting Complaint Counsel's Motions to Compel and Statement of Impasse at 4 (Apr. 13, 2021). 1 In light of Respondents' admissions in the Amended Answer and concessions on fencing-in relief, the ALJ held that discovery was now moot and transferred the case to the Commission for a final decision and order under Rule 3.12(b)(2). Order Granting in Part and Denying in Part Respondents' Motion to Enter New Scheduling Order or, in the Alternative, to Transfer the Case to the Commission at 5 (Apr. 20, 2021).

C. Proceedings before the Commission

To determine the appropriate next steps following transfer and ascertain whether any factual issues remained to be resolved, on May 14, 2021, the Commission directed the parties to submit filings identifying any additional material facts that they intended to assert, listing the decisional issues to which each asserted additional fact related, stating whether they disputed the facts identified by the other party, and explaining the basis for any such dispute. Order for Further Proceedings before the Commission (May 14, 2021) ("Order for Further Proceedings"). The Commission also asked Respondents to clarify their position on the items in the Notice of Contemplated Relief, as the Respondents' prior stipulation had been limited to fencing-in relief that would be ordered by the ALJ.

Complaint Counsel's submission repeated numerous allegations from the Complaint, including allegations regarding Respondents' representations and lack of substantiation, and listed a number of additional facts they sought to introduce from outside the Complaint relating to the scope of relief. See Complaint Counsel's Statement of Additional Material Facts, Att. A (May 25, 2021). Respondents' submission did not identify any additional facts they intended to introduce and did not indicate a substantive dispute with the additional facts submitted by Complaint Counsel. Respondents' Response to Complaint Counsel's Statement of Additional Material Facts (June 1, 2021). Respondents asserted, however, that Complaint Counsel's recitation of allegations in the Complaint was outside the scope of the Commission's May 14 order, which asked for facts other than those expressly alleged in the Complaint, and stated that Respondents would not be responding to that part of the Complaint Counsel's submission. Id. at 5-6. Respondents also raised a number of objections to allowing material facts beyond the Complaint. Most notably, Respondents argued that Complaint Counsel's factual assertions must be excluded as irrelevant because only legal issues remained in the case. *Id*. at 12-13. Respondents stated that "[a]ll material facts in the live Complaint have been admitted, so it is not necessary to add 'additional facts' to prove any of the facts in the Complaint." Id. at 12. Further, they asserted that allowing Complaint Counsel to rely on facts outside the Complaint would be inconsistent with Rule 3.12(b)(2) and the Commission's related explanatory statement in the Federal Register. *Id*. at 13. Respondents also

1 Respondents also stated that "Respondents have no objection to a *blanket* prohibition on disseminating or causing to be disseminated *any* advertising or promotional materials for *any* supplements that makes *any* representations regarding health or disease." *Id*. at 7.

clarified, per the Commission's request, that they have "agree[d] and accept[ed]" the remedies in the Notice of Contemplated Relief, subject only to two purely legal objections regarding constitutionality and the FTC's authority to impose affirmative remedial requirements. *Id*. at 7-8.

In a July 30, 2021 order, the Commission rejected Respondents' objections to the introduction of facts beyond the Complaint. The Commission found that Complaint Counsel's factual assertions regarding the scope of relief were not irrelevant because Complaint Counsel had indicated they intended to seek to ban Respondents from the supplements industry, and Respondents had not conceded the appropriateness of such a ban. Order Directing Parties to Submit Proposed Findings of Fact and Conclusions of Law and Providing for Summary Decision Proceedings at 2. The Commission also explained that Rule 3.12(b)(2) does not prohibit the Commission from considering facts outside the pleadings in rendering a final decision. *Id*. at 3. The Commission ruled that any party that wished to rely on facts outside the pleadings could invoke summary decision procedures, similar to the process used by federal courts in analogous circumstances. *Id*. at 4. Accordingly, we directed the parties to file their proposed findings of fact and conclusions of law and supporting documents as indicated in Commission Rule 3.12(b)(2) and, if a party chose to rely on facts outside the Complaint and found summary decision appropriate, a statement of material facts as to which there is no genuine issue for trial and supporting documents, per the Commission's summary decision procedures.

The parties filed their initial submissions on August 20, 2021. Respondents' proposed findings of fact consisted of four short statements summarizing the Complaint and Respondents' admissions and concessions. Respondents' Findings of Fact and Conclusions of Law at 2-3. Complaint Counsel, on the other hand, submitted a statement of material facts citing the Complaint as well as sources outside the Complaint, with the effect of converting their filing into a motion for summary decision. *See generally* Complaint Counsel's Proposed Findings of Fact, Statement of Material Facts as to Which There is No Genuine Issue, and Proposed Conclusions of Law ("Complaint Counsel's Proposed Findings and Statement of Material Facts").

On September 10, 2021, Respondents filed their opposition to Complaint Counsel's motion for summary decision. Respondents contested a number of Complaint Counsel's factual statements, including some key propositions that appeared as allegations in the Complaint. The disputed allegations included (1) that Respondents' advertisements represented that their products prevented, reduced the risk of, treated, or mitigated certain diseases or health concerns, and (2) that those representations were not substantiated at the time they were made. Respondents' Opposition to Summary Disposition and Reply Findings of Fact, Conclusions of Law, and Brief at 13-14 ("Opposition to Summary Disposition") (disputing proposed findings of fact ¶¶ 23, 33, 34, 42, 43, 50, 59, 67, which cited *inter alia* Complaint ¶¶ 14-21). Respondents claimed that their Amended Answer had not admitted these allegations because they were "in the legal counts, not the allegations of fact, of the Complaint." *Id.* Respondents also took issue with Complaint Counsel's assertions regarding the intent and deliberateness of any violation. *Id.* at 17-18, Ex. RX1. Respondents sought to submit evidence of their compliance with the FTC's requests and of substantiation of their product claims. *Id.*

On reply, Complaint Counsel argued that the Commission should disregard Respondents' late factual contentions and issue a final decision based on Respondents' prior admissions and the undisputed facts previously set forth by Complaint Counsel. Complaint Counsel's Response to

Respondents' September 10, 2021 Submission at 1 (Oct. 8, 2021). Complaint Counsel requested that if the Commission determined to permit Respondents to withdraw or limit their Rule 3.12(b)(2) admissions, Complaint Counsel be given an opportunity to move to amend the Complaint before any remand.

II. ANALYSIS

"An advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances, and that representation or omission is material to a consumer's purchasing decision." *In re POM Wonderful LLC,* 2013 WL 268926, at *18 (FTC Jan. 16, 2013), *aff'd sub nom. POM Wonderful, LLC v. FTC,* 777 F.3d 478 (D.C. Cir. 2015); *see also, In re California Naturel, Inc.,* 2016 WL 7228668, at *5 (FTC Dec. 5, 2016); *FTC Policy Statement on Deception,* 103 F.T.C. 174, 175 (1984), appended to *Cliffdale Assocs., Inc.,*103 F.T.C. 110 (1984). Thus, in determining whether an advertisement is deceptive, the Commission considers (1) what claims are conveyed in the ad; (2) whether those claims are false or misleading; and (3) whether the claims are material. *In re Traffic Jam Events*, 2021 WL 5124183, at *12 (FTC Oct. 25, 2021); *California Naturel,* 2016 WL 7228668, at *5. Misleading claims include those that are not substantiated at the time they are disseminated. *See, e.g., ECM BioFilms, Inc.*, 160 F.T.C. 652, 709 (2015) ("Because an objective claim about a product's performance or efficacy carries with it the express or implied representation that the advertiser had a reasonable basis to substantiate the claim, failure to have a reasonable basis is misleading."), *aff'd sub nom., ECM BioFilms, Inc. v. FTC*, 851 F.3d 599 (6th Cir. 2017); *FTC Policy Statement Regarding Advertising Substantiation*, appended to *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984) (advertisers must "have a reasonable basis for advertising claims before they are disseminated").

Here, the Complaint alleges that Respondents' advertisements conveyed that Black Garlic Botanicals, BG18, and UHF products prevent or reduce the risk of and treat cardiovascular disease, prevent or reduce the risk of and treat atherosclerosis, and cure, treat, or mitigate hypertension. Complaint ¶¶ 14, 16, and 18. The Complaint also alleges that HRL's advertisements conveyed that Neupathic cures, treats, or mitigates diabetic neuropathy. *Id*. ¶ 20. Further, the Complaint alleges that these claims were not substantiated at the time they were made. *Id*. ¶¶ 15, 17, 19, 21. Respondents now challenge these core allegations of the Complaint, while urging that, pursuant to Commission Rule 3.12(b)(2), the Commission enter a cease and desist order limited to prohibiting the acts or practices alleged in the Complaint on the basis of the Complaint and the Amended Answer. 2 Complaint Counsel have requested a summary decision, pursuant to Commission Rule 3.24 and our order dated July 30, 2021, that Respondents have engaged in deceptive advertising.

2 Opposition to Summary Disposition at 31. Alternatively, Respondents request in one clause of a single sentence in the concluding paragraph of their Opposition to Summary Disposition that the Commission dismiss the Complaint. *Id*. Prior to that, Respondents had steadfastly maintained that the Commission should issue a final decision under Rule 3.12(b)(2). *See, e.g.*, Respondents' Response to Complaint Counsel's Statement of Additional Material Facts at 16 (June 1, 2021) ("Respondents respectfully request that the Commission issue a cease and desist order based on the facts alleged in the November 13, 2020 Complaint"). The case was transferred to the Commission based on Respondents' admissions under Rule 3.12(b)(2), and Respondents have not filed a motion to dismiss. Under these circumstances, consideration of dismissal is not appropriate.

Rule 3.12(b)(2) applies when a respondent "elects not to contest the allegations of fact set forth in the complaint." 16 C.F.R. § 3.12(b)(2). Although Respondents' Amended Answer states that they admit all of the material allegations in the Complaint, Respondents now assert that allegations regarding what claims were conveyed by the ads and the lack of substantiation have not been admitted and are in fact contested. Opposition to Summary Disposition at 13-14. The allegations that Respondents made health claims without substantiation are factual and essential; without them, the Complaint would not state a cause of action. If Respondents do not admit these allegations, then they do not admit the material allegations of fact in the Complaint, and the matter is not appropriate for Rule 3.12(b)(2) disposition.

The case is also not appropriate for summary decision under Rule 3.24, which provides standards analogous to those for motions for summary judgment under Federal Rule of Civil Procedure 56. *See In re McWane, Inc. & Star Pipe Prods., Ltd.*, 2012 WL 4101793, at *5 (FTC Sept. 14, 2012); *In re Polygram Holding, Inc.*, 2002 WL 31433923, at *1 (FTC Feb. 26, 2002). A party moving for summary decision must show that "there is no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); 16 C.F.R. § 3.24(a)(2).

Complaint Counsel urge us to disregard Respondents' late-claimed factual disputes and issue a final decision based on Respondents' admissions in the Amended Answer and concessions in other filings. While there may be some justification for Complaint Counsel's arguments, we find it more appropriate to accept Respondents' current, clear statements that they dispute the material allegations at issue, and we will allow them an opportunity to contest the disputed issues. Respondents are now asserting that they have not admitted a lack of substantiation, thereby depriving Complaint Counsel of their asserted proof that substantiation was absent[3] and precluding summary decision on the central issue of substantiation. Although we might be able to ascertain the claims conveyed by Respondents' advertisements from materials in the summary decision record, we are concerned that, as a result of Respondents' perceived admissions, the issue has not yet been squarely joined. We find it preferable to make the determination of what claims were conveyed after thorough briefing, without the overlay of the purported admissions. Accordingly, we will remand this proceeding to the ALJ for discovery and trial.

We are, however, deeply troubled by Respondents' counsel's gamesmanship and tactics. Their misleading assertions to the ALJ and the Commission regarding the scope and effect of Respondents' Amended Answer have delayed the case by months and have wasted many hours of attorney time and agency resources. Time and again, Respondents claimed that there was no factual dispute and no need for further fact development because all material facts in the Complaint had been admitted. Respondents opposed Complaint Counsel's motion to amend the Complaint, which would have included among other things two new paragraphs regarding the lack of substantiation for Respondents' health claims,[4] on grounds that "Respondents have admitted all material facts in the Complaint" and "none of the new facts are necessary to obtain a cease-and-desist order." Respondents' Response to Cross Motion to Amend Complaint at 8-9; *see also id*. at 6 ("[T]here

3 *See* Complaint Counsel's Proposed Findings and Statement of Material Facts ¶¶ 33, 42, 50, 67 (relying solely on the Amended Answer to demonstrate that substantiation was absent).
4 *See* Complaint Counsel's Opposition to Motion to Amend Answer and Cross Motion to Amend Complaint, Ex. CCX-A ¶¶ 6, 23.

are no outstanding factual issues that justify the proposed amendments"). They argued that, in light of their admissions, discovery was not only unnecessary but would be "manifestly unjust." Respondents' Expedited Motion to Partially Reconsider May [sic] 6 Order Granting Complaint Counsel's Motions to Compel and Statement of Impasse at 4 (Apr. 13, 2021). When the Commission specifically instructed Respondents to identify any factual assertions in dispute, Respondents not only failed to indicate that they disputed any of Complaint Counsel's factual assertions but reiterated that all material allegations in the Complaint had been admitted and, on that basis, argued that factual assertions beyond the Complaint were irrelevant. *See* Respondents' Response to Complaint Counsel's Statement of Additional Material Facts at 12 ("All material facts in the live Complaint have been admitted, so it is not necessary to add 'additional facts' to prove any of the facts in the Complaint."); *id*. at 4 ("[T]he only 'live' factual issues in this case are the facts in the November 13, 2020 Complaint—all of which have been admitted[.]").

Now, in a responsive brief following their own request for a final decision under Rule 3.12(b)(2), Respondents claim that their Amended Answer did not actually admit the Complaint's paramount allegations – those that allege that Respondents made unsubstantiated health claims. *See* Opposition to Summary Disposition at 13-14. Respondents claim that the Amended Answer did not admit these allegations because they were "included in the legal counts, not the allegations of fact, of the Complaint." *Id*. at 13 (emphasis omitted). The suggestion that any text under the heading of "Count" is by definition "legal" and not factual is patently erroneous. Indeed, federal courts have specifically required counts to contain allegations of fact. *See, e.g., Samuels v. WMC Mortg., LLC*, No. 620CV1441ORL37LRH, 2021 WL 3054836, at *2 (M.D. Fla. Feb. 2, 2021) ("[E]ach count must contain allegations showing the factual basis for that particular count."); *Menard v. Miami-Dade Cty.*, No. 19-21268-CIV, 2019 WL 4247627, at *3 (S.D. Fla. Sept. 6, 2019) (Count must include "specific factual allegations to support the particular claim asserted in that count"); *George Shapiro v. Suga*, No. CV164068ESMAH, 2016 WL 3951379, at *2 (D.N.J. July 21, 2016) ("[A] properly pleaded complaint must contain, under each count . . . the specific factual allegations that would permit the court to draw the reasonable inference that the identified defendant or defendants are liable for that cause of action."); *Swift v. Pandey*, No. CIV.A. 13-649 JLL, 2013 WL 3336768, at *3 (D.N.J. July 2, 2013) ("Although there may be circumstances in which it is appropriate to incorporate certain allegations by reference, there is no question that each count of a properly pled complaint *must* contain: (a) its own cause of action against a clearly identified defendant(s), and (b) those particular factual allegations that would allow the court to draw the reasonable inference that the defendant is liable for that cause of action."). Thus, the sole explanation now offered in limiting the reach of Respondents' admissions is unsustainable.

In light of Respondents' repeated misrepresentations regarding their positions and intentions, the ALJ should consider on remand whether Respondents' counsel should be suspended or barred from participating in this proceeding under Commission Rule 3.42(d), 16 C.F.R. § 3.42(d), for dilatory and obstructionist conduct.

Before remanding the case, however, we will address Complaint Counsel's request to amend the Complaint. *See* Complaint Counsel's Response to Respondents' September 10, 2021 Submission at 20. Complaint Counsel previously moved the ALJ to amend the Complaint to add factual allegations, but the ALJ, despite finding that the amendments sought did not add new legal

theories or allege new or different violations of the FTC Act, denied the motion and the request for certification for interlocutory appeal in reliance on Respondents' admissions and invocation of Rule 3.12(b)(2). Since Respondents contest factual allegations in the Complaint, however, Rule 3.12(b)(2) is inapplicable. Moreover, Respondents have argued that the Complaint does not provide sufficient notice of the relief sought. Accordingly, we will provide an opportunity for Complaint Counsel to move to amend the Complaint, including the Notice of Contemplated Relief. 5

Accordingly,

IT IS HEREBY ORDERED that Complaint Counsel may file with the Commission a motion to amend the Complaint by no later than December 1, 2021; and

IT IS FURTHER ORDERED that, within ten days after service of a motion filed pursuant to the preceding ordering paragraph, Respondents may file a response to the motion.

By the Commission.

[5] We note, however, that the appropriate remedy is determined by the unlawful practices actually found to exist, not by the allegations of the complaint. *Zale Corp.*, 77 F.T.C. 1635, 1636 (1970).

Interlocutory Orders, Etc.

IN THE MATTER OF

DTE ENERGY COMPANY, ENBRIDGE, INC., AND NEXUS GAS TRANSMISSION, LLC.

Docket Number C-4691. Order, November 23, 2021

Order to reopen and modify the order where DTE Energy Company's successor, DT Midstream, Inc., will fulfill the obligations of the order.

ORDER REOPENING AND MODIFYING ORDER

DTE Energy Company ("DTE") submitted a petition to the Commission on September 21, 2021, to request that the Decision and Order ("Order") in this matter be set aside as to it, and continue as to its successor, DT Midstream, Inc. DTE bases its request on the fact that it spun off its non-utility natural gas pipeline, storage, and gathering business, including its ownership interest in Respondent NEXUS Gas Transmission, LLC ("Nexus"), to DT Midstream. DTE no longer has any natural gas pipeline transportation assets or business in the area addressed by the Order, i.e., Lucas, Ottawa, and Wood counties in northwest Ohio ("Relevant Area"). DT Midstream, a standalone publicly traded company, acknowledges itself as successor of DTE for purposes of complying with the Order.

DTE's petition was available for public comment for thirty days until November 5, 2021, and no public comments were filed. For the reasons stated below, the Commission has determined to grant DTE's petition and reopen and modify the Order as requested.

I. BACKGROUND

The Commission issued the Order on November 21, 2019, to remedy the anticompetitive effects resulting from Nexus's acquisition of Generation Pipeline LLC ("Generation") from North Coast Gas Transmission LLC ("NCGT") and its joint owners. DTE held a 50% ownership interest in Nexus at the time of the transaction. The Commission did not find the transaction to substantially lessen competition in natural gas pipeline transportation. However, the Commission found that a non-compete provision in the parties' purchase agreement unreasonably restrained trade by prohibiting NCGT from competing for new natural gas pipeline transportation business in the Relevant Area three years post-close.

Nexus, along with its parents at the time, DTE and Enbridge, were named as Respondents to the Order. The Order addressed the concern relating to the non-compete by requiring the parties to remove the provision from the purchase agreement, and the parties to the agreement executed an amendment that eliminated the non-compete prior to closing of Nexus's acquisition of Generation. The Order also prohibits Respondents from entering into, enforcing, or soliciting any

agreements with a "Pipeline Competitor" that restrict competition for natural gas pipeline transportation in the Relevant Area, absent prior Commission approval. The Order defines "Pipeline Competitor" as a firm that owns, operates, or markets capacity on a natural gas pipeline in the Relevant Area. The Order further requires Respondents to provide prior notice of intent to acquire an interest in NCGT's pipeline or another natural gas transportation pipeline in the Relevant Area, and to file annual compliance reports. The Order terminates on November 21, 2029.

II. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER

A final order may be reopened and modified on the grounds set forth in Section 5(b) of the Federal Trade Commission Act and Section 2.51(b) of the Commission's Rules of Practice and Procedure. [1] Section 5(b) and Commission Rule 2.51(b) provide that the Commission must reopen an order to consider whether it should be modified if the respondent makes either "a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified or set aside" or if the public interest so requires. [2] A satisfactory showing sufficient to require reopening is made when a request demonstrates in detail the nature of the changed conditions and the reasons why these changes eliminate the need for the order or make continued application of it inequitable or harmful to competition, or provides specific reasons why the public interest would be served by the requested modification. [3] The requester's showing must be supported by evidence that is credible and reliable. Commission Rule 2.51(b) requires, for example, affidavits setting forth admissible facts, and that all information and material that the requester would like the Commission to consider be contained in the request at the time of filing. [4] The requester's burden is not a light one given the broad public interest in the finality of Commission orders. [5]

III. DTE'S PETITION

DTE's petition establishes that DTE experienced a significant change in circumstances after the Order was issued. DTE exited the natural gas pipeline transportation business in the Relevant Area pursuant to its spin-off of DT Midstream on July 1, 2021. Therefore, DTE no longer holds an ownership interest in Respondent Nexus or in Generation, nor does it hold an ownership interest in DT Midstream. [6] DTE's Senior Vice President and Chief Legal Officer, who has been responsible for overseeing DTE's compliance with the Order, affirms in an affidavit that DTE is

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[1] 15 USC §45(b); 16 C.F.R. 2.51(b).

[2] *Id.*

[3] 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) ("A decision to reopen does not necessarily entail a decision to modify the Order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

[4] 16 C.F.R. § 2.51 (b).

[5] *See, e.g., Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[6] DTE Petition at 5.

no longer a competitor for natural gas pipeline transportation in the Relevant Area and has no plans to re-enter the market that it has recently exited. [7]

As a result of the spin-off of DT Midstream, DTE's petition explains that requiring DTE to continue to comply with the Order's obligations is not needed to protect the public interest. [8] The potential harm that the Order seeks to prevent is related to agreements that may restrict competition for natural gas pipeline transportation in the Relevant Area. DTE, however, no longer has any natural gas pipeline transportation assets or business in the Relevant Area; DT Midstream has assumed this business. DT Midstream acknowledges and agrees to assume the Order's obligations as DTE's successor. [9]

IV. THE ORDER WILL BE REOPENED AND MODIFIED

DTE has made the requisite showing that changed conditions and the public interest support setting aside the Order as to DTE. DTE's spin-off of its non-utility natural gas assets, including its ownership interest in Respondent Nexus, to DT Midstream is a material change of fact. DT Midstream is successor to DTE under the Order and is in the best position to fulfill the continuing obligations of the Order. Further, DT Midstream acknowledges and agrees to assume DTE's obligations under the Order. DTE has no ownership interest in DT Midstream or in any natural gas pipeline transportation assets or business in the Relevant Area, and as such, does not have the ability or incentive to interfere with the remedial purposes of the Order. Neither the interests of the Commission nor the public interest requires DTE to remain subject to the Order. Setting aside the Order as to DTE, but not as to DT Midstream, is consistent with past Commission rulings on similar petitions. [10]

Accordingly,

IT IS ORDERED that the Order in Docket No. C-4691 be, and hereby is, reopened; and

IT IS FURTHER ORDERED that the Order be, and it hereby is, set aside as to DTE Energy Company but not as to DTE Energy Company's successor, DT Midstream, Inc.

By the Commission.

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[7] DTE Petition at Exhibit 4; DTE Petition at 5.

8 DTE Petition at 8.

9 DTE Petition at Exhibit 5.

10 *See, e.g.,* Pfizer Inc., et al., Docket No. C-4267, Order Reopening and Modifying Order (Apr. 6, 2016); AEA Investors 2006 Fund L.P., et al., Docket No. C-4297, Order Reopening and Modifying Order (Apr. 30, 2013); Duke Energy Corp., et al., Docket No. C-3932, Order Reopening and Modifying Order (Sept. 26, 2007); and Entergy Corporation, et al., Docket No. C-3998, Order Reopening and Modifying Order (July 8, 2005).

Interlocutory Orders, Etc.

IN THE MATTER OF

CORPUS CHRISTI POLYMERS, LLC., ALFA, S.A.B. DE C.V. INDORAMA VENTURES USA, PLC., ALOKE AND SUCHITRA LOHIA, AND FAR EASTERN NEW CENTUREY CORPORATION.

Docket Number C-4672. Order, December 1, 2021

Order of appointment of a substitute monitor.

Jeff White, Esquire
Weil, Gotshal & Manges LLP
[redacted]

Re: In the Matter of Corpus Christi Polymers LLC, FTC File No. 181-0030, Docket No. 4672.

Dear Mr. White:

This is to notify you that, pursuant to Paragraph VI.G of the Decision and Order issued in this matter, the Federal Trade Commission has appointed Gregory E. Heltzer as the Substitute Monitor. Pursuant to Paragraph VI.G.2, the Respondents must enter into a Monitor Agreement with Mr. Heltzer no later than 5 days after the Commission appoints him as the substitute Monitor.

By the direction of the Commission.

Jamie Sadler, Esquire
Sidley Austin LLP
[redacted]

Re: In the Matter of Corpus Christi Polymers LLC, FTC File No. 181-0030, Docket No. 4672.

Dear Ms. Sadler:

This is to notify you that, pursuant to Paragraph VI.G of the Decision and Order issued in this matter, the Federal Trade Commission has appointed Gregory E. Heltzer as the Substitute Monitor. Pursuant to Paragraph VI.G.2, the Respondents must enter into a Monitor Agreement with Mr. Heltzer no later than 5 days after the Commission appoints him as the substitute Monitor.

By the direction of the Commission.

William Shotzbarger, Esquire
Duane Morris LLP
[redacted]

Re: In the Matter of Corpus Christi Polymers LLC, FTC File No. 181-0030, Docket No. 4672.

Dear Mr. Shotzbarger:

This is to notify you that, pursuant to Paragraph VI.G of the Decision and Order issued in this matter, the Federal Trade Commission has appointed Gregory E. Heltzer as the Substitute Monitor. Pursuant to Paragraph VI.G.2, the Respondents must enter into a Monitor Agreement with Mr. Heltzer no later than 5 days after the Commission appoints him as the substitute Monitor.

By the direction of the Commission.

Timothy Singer, Esquire
Baker Botts LLP
[redacted]

Re: In the Matter of Corpus Christi Polymers LLC, FTC File No. 181-0030, Docket No. 4672.

Dear Mr. Singer:

This is to notify you that, pursuant to Paragraph VI.G of the Decision and Order issued in this matter, the Federal Trade Commission has appointed Gregory E. Heltzer as the Substitute Monitor.

Pursuant to Paragraph VI.G.2, the Respondents must enter into a Monitor Agreement with Mr. Heltzer no later than 5 days after the Commission appoints him as the substitute Monitor.

By the direction of the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

INNOVATIVE CAPITAL STRATEGIES

FTC File No. 202 3164 – Decision, July 19, 2021

RESPONSE TO INNOVATIVE CAPITAL STRATEGIES; CONTRARIAN ACCOUNTING & BOOKKEEPING, LLC.; CONTRARIAN FINANCIAL SERVICE, LLC.; SMART MONEY ALLIANCE; BUSINESS CREDIT LITERACY INITIATIVE; INSTITUTE FOR IMPROVED MINORITY FINANCIAL LITERACY; AND STARS & STRIPES BUSINESS FINANCIAL LITERACY A/D/B/A STARS AND STRIPES FINANCIAL LITERACY'S PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMANDS DATED MAY 24, 2021

By CHOPRA, Commissioner:

Innovative Capital Strategies, Inc., along with six affiliated companies (collectively, "Petitioners"), petition the Commission to quash or limit Civil Investigative Demands ("CIDs") issued to them on May 13, 2021.[1] The CIDs were issued to these seven companies in connection with the Commission's investigation into whether these entities have engaged in violations of Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, the Credit Repair Organization Act ("CROA"), 15 U.S.C. §§ 1679-1679j, and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310.

Petitioners seek to quash or modify the CIDs and request that the Commission: (1) grant an extension of the return date and/or rolling production based on the volume of requests and current unavailability of certain information; (2) place limitations on definitions and requests which Petitioners claim are overly broad, unduly burdensome, and insufficiently definite; and (3) quash requests issued to four of the seven entities based on their non-profit status. For the reasons set forth below, the Commission denies the Petitions. The Commission encourages Petitioners to resume meet and confer conversations with attorneys in the Bureau of Consumer Protection, who have expressed their continued willingness to negotiate with Petitioners on the scope of and/or extensions to the CIDs.

[1] CIDs were also issued to Contrarian Accounting & Bookkeeping, LLC, Contrarian Financial Services, LLC, Smart Money Alliance, Business Credit Literacy Initiative, Institute for Improved Minority Financial Literacy, and Stars & Stripes Business Financial Literacy also doing business as Stars and Stripes Financial Literacy. Each CID recipient has filed a petition to quash or limit the CIDs. These petitions are identical except that Petitioners Smart Money Alliance, Business Credit Literacy Initiative, Institute for Improved Minority Financial Literacy, and Stars & Stripes Business Financial Literacy also object to CID specifications concerning their non-profit status and all have included arguments against these requests in their motions to quash (Section IV in those Petitions). In addition, certain footnotes in the Petition issued by Contrarian Accounting and Bookkeeping, LLC, vary from those Petitions previously filed.

I. Background

These Petitions arise out of the Commission's investigation of Petitioners' practices surrounding their marketing to small businesses and entrepreneurs of funding, credit repair services, insurance policies, and business opportunities. The seven Petitioners are commonly owned companies. On May 13, 2021, the Commission issued CIDs to each of the seven entities seeking information regarding their marketing of these products in potential violation of the FTC Act, CROA, and TSR. The CIDs seek information regarding the entities' corporate structures and relationships to each other, their advertising and marketing efforts, substantiation for marketing claims, policies relating to customer interactions and legal compliance, and consumer contact information and records. The seven CIDs are substantively identical except that CIDs to four of the affiliated entities contain specifications concerning their non-profit status. The CIDs cover a period from January 1, 2018 until the date of full compliance with the CIDs. The return date for the CIDs was June 28, 2021.

The parties have met and conferred several times since the CIDs were issued. Pet. at 12. [2] Although Commission attorneys offered multiple accommodations to Petitioners, including those that would limit the scope of certain requests, allow rolling productions, and delay the return date if Petitioners would agree to enter into a tolling agreement, Petitioners have reached no firm agreement on any accommodation offered by Commission attorneys. Instead, Petitioners filed the instant Petitions. [3]

II. Analysis

FTC compulsory process is proper "if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant" to the investigation. *United States v. Morton Salt Co*., 338 U.S. 632, 652 (1950). Petitioners have raised three objections to the CIDs. First, they claim that the original return dates for the CIDs are "unreasonable" because of the volume of requests and the fact that some of the records Petitioners need to respond to the requests are not currently in their possession. [4] Second, Petitioners argue that certain definitions and requests are overbroad, unduly burdensome, or insufficiently definite and should be quashed or modified. Third, four of the seven Petitioners argue that requests relating to their non-profit status is irrelevant and exceeds the Commission's jurisdiction. We deny each of Petitioners' requests and address each argument in turn.

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[2] For the sake of clarity, each reference to "the Petitions" or "Pet." in this order will refer to the pagination and content in the Motion to Quash or Limit submitted by the Institute for Improved Minority Financial Literacy, except where explicitly stated otherwise.

[3] On June 25, after filing their Petitions, five out of the seven Petitioners produced CID responses asserting a Fifth Amendment privilege to each and every CID request. Because they did not raise this objection in their Petitions, we do not consider it here.

[4] Respondents indicate that the records have been collected in a separate investigation. Pet at 5.

A. Petitioners Have Failed to Show That the CID Return Dates Are Unreasonable

Petitioners first contend that the Commission's return date of June 28, 2021, 45 days after the CIDs were issued, is unreasonable due to the number of requests, and that their responses "practically cannot be completed on this timeline." Pet. at 4-5. They also contend that many of their documents are "not currently within Petitioner's possession, custody, and control, because of a separate investigative action." *Id.* at 5.

By stating that the return date is "not reasonable" due to the number of demands, the Commission takes the Petitioners to mean that responding within the allotted time is unduly burdensome. Agency process is not unduly burdensome unless compliance "threatens to unduly disrupt or seriously hinder" the normal operations of the recipient's business. *FTC v. Texaco*, *Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). This test is "not easily met" because "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Texaco*, 555 F.2d at 882. Moreover, the recipient of process must make "a record . . . of the measure of [its] grievance rather than ask [the court] to assume it." *United States v. Morton Salt Co.*, 338 U.S. 632, 654 (1950).

Petitioners' bald assertion that its CID responses "cannot be completed on this timeline" does not satisfy the required showing. Merely reciting the number of interrogatories (78 numbered interrogatories with 167 total subsections) and document requests (64 numbered requests with 129 total subsections) does not demonstrate how business operations would be seriously hindered by compliance. *Texaco*, 555 F.2d at 882. [5] As we have noted in the past, "[t]he number of requests, by itself, says little or nothing about the burden of compliance because complying with many of the specifications would require little time, effort, or money." *In the Matter of March 19, 2014 Civil Investigative Demand Issue to Police Protective Fund, Inc*., File No. 1323239, *7 (May 22, 2014). Petitioners provide no evidence of undue burden beyond recitation of the number of requests.

Moreover, because the filing of a petition to quash or limit compulsory process "shall stay the remaining amount of time permitted for compliance," 16 C.F.R. § 2.10(b), the original return date has already been effectively extended by three weeks. The Commission declines to grant an additional extension, beyond a modest two weeks' time for compliance following issuance of this order. The Commission notes that attorneys in the Bureau of Consumer Protection proposed entering into a tolling agreement, multiple times, to allow consideration of a rolling production while still providing the Commission the information it needs. If Petitioners doubt their ability to comply in full with the CID by the deadline set forth in this order, they may wish to revisit this proposal previously made by Commission attorneys.

Petitioners also claim that they should be granted an extension because the CIDs see information and documents that Petitioners do not currently have in their possession. Pet. at 5. A

[5] Note that in the other version of the CID, received by the parties that have not claimed non-profit status, there were 47 numbered interrogatories with 121 subsections, and 39 requests for production with 83 subsections. *See* Innovative Capital Strategies Petition to Quash at 3.

recipient's lack of certain responsive information or documents, however, is not a valid reason to quash or grant extension for the return date of the entire CID. *New York Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, 186 F.R.D. 317, 321 (S.D.N.Y. 1999) (denying a motion to quash a subpoena based in part on the recipient's purported lack of responsive documents). The Commission declines to extend the return date based on Petitioners' bare representation that some documents are currently in possession of other investigative authorities, where Petitioners have failed even to identify which requests are affected by this circumstance. Here, as well, if Petitioners are prepared to be forthcoming with the necessary details, they may seek an agreement with attorneys in the Bureau of Consumer Protection allowing for extensions and rolling productions to accommodate this purported impediment to prompt compliance with the CIDs.

B. Petitioners Arguments of Undue Burden, Overbreadth, and Insufficient Specificity Are Unavailing

Petitioners have made numerous arguments that specific definitions or requests should be quashed or modified. They have failed, however, to support their assertions of insufficient definiteness, overbreadth, or undue burden with more than conclusory statements. For the reasons stated below, the Commission declines to quash or modify any of the CID definitions or requests.

1. Definitions of "Business Opportunity Program" and "Insurance Product" Are Sufficiently Definite and Not Overbroad

Petitioners ask the Commission to limit two definitions which they argue render CID requests overbroad, irrelevant, and insufficiently definite. Pet. at 6.

A CID request is overbroad only where it is "out of proportion to the ends sought," and "of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." *U.S. v. Wyatt*, 637 F.2d 293, 302 (5th Cir. 1981) (quoting, inter alia, Morton Salt, 338 U.S. at 652). Generally, "[b]roadness alone is not sufficient justification to refuse enforcement" of compulsory process." *Texaco,* 555 F.2d at 882. Moreover, the Commission has wide latitude to determine what information is relevant to its law enforcement investigations. *See, e.g., Morton Salt*, 338 U.S. at 642-43 ("[Administrative agencies have] a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."). The Commission's compulsory process need not be limited to information necessary to prove a specific charge; it can demand any documents or information "relevant to the investigation—the boundary of which may be defined quite generally" by the Commission. *Id*. A request is impermissibly vague where it lacks reasonable specificity or is too indefinite to allow a responding party to comply. *See, e.g., Robert Larson Auto. Grp., Inc.,* FTC No. 162-3006, 2016 WL 807984, at *4.

The first definition, "Business Opportunity Program," is defined as,

> …[A]ny service, product, plan, or program advertised, marketed, offered, or sold by the Company, directly or indirectly, including those offered free of charge, which represent consumers may earn compensation by participation in the program or through recruitment of other consumers into the program or through the sale of various programs, products, or services (e.g., Affiliate, Branch Manager, Regional Director, offers of compensation for lead referral, insurance sales, or similar opportunities).

CID at 17.

Petitioners state that they are "not certain what would fall within the definition provided, and therefore request that this definition be limited to the examples provided in the parenthetical, or other specific examples provided by the Agency." Pet. at 6. However, the definition of "Business Opportunity Program" is clear in that it encompasses all programs offered by Petitioners for which consumers may earn compensation. The definition is not overly broad and the Commission declines to limit the definition to those programs in the parenthetical because it is possible that Petitioners offer other programs beyond those specifically listed. Such programs are clearly relevant to a stated purpose of the CID, to determine whether Petitioners "have made false, deceptive, or unsubstantiated representations in connection with the marketing and sale of…business opportunities…in violation" of the FTC Act, CROA, or TSR. CID at 2.

The second definition objected to by Petitioners is "Insurance Product," defined as,

> …[A]ny type of insurance advertised, marketed, offered, or sold by the Company or its affiliates, regardless of whether the insurance is sold through the Company, an employee, or on behalf of a third party or affiliate.

CID at 18.

Petitioners object that inclusion of third parties or affiliates renders the requests related to insurance products overbroad and ask that the definition be limited to "insurance obtained in connection with a program or service provided by Petitioner." Contrary to Petitioner's assertion, the inclusion of third parties and affiliates in the definition does not extend the CID beyond the scope of the investigation and is directly relevant. This definition seeks to capture all insurance products offered by Petitioners, including those that might be *sold through* the efforts of others (*e.g.*, consumers engaged in Petitioners' business opportunity programs). This definition clearly seeks information related to the investigation, which covers "the marketing of…insurance products in violation of" the FTC Act, CROA and TSR. CID at 2.

For these reasons, the Commission denies Petitioners requests to modify the CID definitions.

2. Requests 23, 31, 32, 34 and Interrogatories 7, 13, 16-18, 22-25, and 29 are Sufficiently Definite and Not Overbroad or Burdensome

Petitioners also assert that certain requests should be quashed or limited because they seek irrelevant information, are overbroad, and/or are unduly burdensome. Pet. at 7-9. These requests can be categorized into four groups: (1) requests involving "insurance products," (2) interrogatories seeking information Petitioners claim is available in documents it will produce, (3) requests for documents consumers view or receive from Petitioners; and (4) requests for consumer data and information. *Id.* Petitioners fail to substantiate their claims as to all of these requests.

For requests involving insurance products (Interrogatories Nos, 31 and 32, Requests for Production Nos. 22, 23, and 24), Petitioners suggest that they should be limited for the same reasons and in the same manner as the definitions of insurance products. Pet. at 7. For the reasons set for in Section I.B.1, the Commission finds that these requests are sufficiently definite and not overbroad.

For Interrogatories 23 and 34, Petitioners claim they should be allowed to respond merely by referencing documents they will produce in response to the CIDs. They claim that having to "review and analyze the documents being produced in response to the CID in order to compile such information" for the interrogatories would be "heavily burdensome." Pet. at 7-8. However, "some burden" on the party receiving compulsory process is acceptable and expected. *Texaco*, 555 F.2d at 882. And Petitioners have not made any specific showing of anticipated disruption or serious hinderance to their business operations by having to review those documents. *Id.* Petitioners must respond to these interrogatories in full and not merely refer the Commission to produced documents.

Next, Petitioners claim that Requests for Production Nos. 25 and 29, which seek documents consumers might see when signing up for or using Petitioners' programs, are insufficiently definite and duplicative. Pet. at 8. To the extent Requests 25 and 29 seek advertisements Petitioners produce in response to Request 28, Petitioners may reference those documents in their responses and need not produce those documents twice. *See* CID at 27 ("[y]ou must identify in writing the Documents that are responsive to the specification. Documents that may be responsive to more than one specification of this CID need not be produced more than once."). Requests 25 and 29, however, clearly seek documents beyond advertisements. Request 25 seeks all materials that a consumer might see when interacting with Petitioners' websites or mobile apps ("visual content, including screenshots…Consumers have seen during the process of applying…") and not merely advertisements. Request 29 seeks all documents "other than advertisements" made available to Petitioners' customers. CID at 14 (emphasis added). While the Commission need not enumerate all web or app content or documents that consumers might see when engaging in Petitioners programs, those materials clearly go beyond advertisements. Petitioners must respond to these two requests as written.

Petitioners further argue that Requests for Production Nos. 7 and 13 are insufficiently definite and overbroad. Pet. at 8-9. Request 7 seeks all documents exchanged between Petitioners themselves and between Petitioners and specific named companies. This request explicitly seeks documents shared or exchanged between Petitioner and other listed entities, which is a clearly delineated set of documents. Such documents may provide information about the relationship between the Petitioners themselves and with other entities involved in the Petitioners' business, all

of which is relevant to the investigation. Request 13 seeks documents concerning the relationship between Petitioners and other entities providing services or products to Petitioners in connection with programs offered by the company. Such documents are limited to entities which are involved in the programs at issue, thus the requests are not out of proportion to the needs of the investigation. Nor, as Petitioners argue, should these requests be limited to contracts and written communications because other documents might reflect those relationships, including, for example, internal memoranda or records of oral communications. As such, the Commission declines to limit Request 7 or 13.

Finally, Requests for Production Nos. 16-18 seek information about the consumers of Petitioners' services or products. Petitioners argue that locating and compiling such information, which is not in a database, would require "an immense amount of resources." Pet. at 9. Petitioners have, again, failed to show how the request might be "highly disruptive" and, therefore, unduly burdensome. *See FTC v. Standard American, Inc*., 306 F.2d 231, 235 (3d Cir. 1962). Information about consumers who may have engaged in Petitioners' programs at issue in the investigation is highly relevant in determining issues of liability and identifying consumers who may be entitled to redress. Petitioners must respond to Requests 16-18.

C. Requests Related to Non-Profit Status Are Within FTC's Investigative Authority

Four of the seven Petitioners also move to quash all CID specifications related to their non-profit status (Interrogatories Nos. 48-78 and Requests for Product Nos. 40-64), claiming that they are "not subject to the Agency's jurisdiction" and that their non-profit status is "not relevant to the CID[s]." [6] Pet. at 9-10.

The Commission is authorized to issue CIDs to both non-profit and for-profit companies under its investigative authority. While the Commission's authority to enforce the prohibitions of Section 5 applies to corporations that are "organized to carry on business for [their] own profit or that of [their] members," 15 U.S.C. § 44, Section 20 authorizes the FTC to issue a CID "[w]henever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 57b- 1(c)(1). Courts have consistently held that "an individual may not normally resist [investigative process] on the ground that the agency lacks regulatory jurisdiction …." *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) ("… courts of appeals have consistently deferred to agency determinations of their own investigative authority, and have generally refused to entertain challenges to agency authority in proceedings to enforce compulsory process." (citing *United States v. Sturm, Roger & Co*, 84 F.3d 1, 5 (lst Cir. 1996))); *United States v. Construction Prods. Research, Inc.*, 73 F.3d 464, 468-73 (2d Cir. 1996). Thus, the Commission may issue CIDs to organizations that may have relevant documents in their possession, custody, or control, or have information relevant to violations of

[6] Section IV only appears in Petitions submitted by Smart Money Alliance, Business Credit Literacy Initiative, Institute for Improved Minority Financial Literacy, and Stars & Stripes Business Financial Literacy, and thus this section of the order applies to them.

Section 5 of the FTC Act, regardless of those organizations' not-for-profit status or potential liability.

Moreover, the Commission regularly issues CID requests to companies, like Petitioners, who claim non-profit status in order to evaluate that status for liability purposes. *See Police Protective Fund Order*, File No. 1323239 (May 22, 2014) at *3-4 (discussing FTC's authority to issue CIDs to companies to evaluate their non-profit status). If a company carries on business as a de facto for-profit organization, it is subject to FTC jurisdiction under Section 5. While the Commission may take into account Petitioners' form of organization and tax exemption status in making an initial determination of regulatory coverage, these factors are not dispositive.[7] As the Commission has previously explained,

> [T]he Commission is not required to take at face value an organization's claim that it is a charitable organization, and can require it to produce documents and other information to enable the Commission to make that determination itself…[j]ust as a court has the power to determine whether it possesses jurisdiction to address and resolve any given case, the FTC has the power to determine whether it possesses jurisdiction over a given matter or entity." [The entity] may not foreclose that inquiry simply by asserting that, *if* conducted, the inquiry would yield facts favorable to [it].

Police Protective Fund Order, at *4.[8]

Through its CID requests, Commission attorneys will examine information and documents to determine whether Petitioners who claim non-profit status "[are] organized to carry on business for its own profit or that of its members," and thus subject to the Commission's enforcement authority. 15 U.S.C. § 44. This inquiry encompasses multiple factors, including the organization's primary purpose, the extent to which funds or other benefits may have been conferred on related for-profit companies or individuals, the relationship between the non-profit and related for-profit

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[7] *See, e.g., Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1019 (8th Cir. 1969) ("mere form of incorporation does not put them outside the jurisdiction of the Commission"); *FTC v. Ameridebt, Inc*., 343 F. Supp. 2d 451, 460 (D. Md. 2004) ("Although Ameridebt is incorporated as a non-stock corporation with tax-exempt status, the Court finds this insufficient to insulate it from the regulatory coverage of the FTC Act."); *In re Daniel Chapter One*, 2009 WL 5160000 at *12 (F.T.C. 2009) ("As recognized by the ALJ, however, 'courts and the Commission look to the substance, rather than the form, of incorporation in determining jurisdiction under the FTC Act.'"), *aff'd*, 405 Fed. Appx. 505 (D.C. Cir. 2010) (unpublished opinion); *In re College Football Association*, 117 F.T.C. 971, 1004 (1994) (IRS determinations are not binding on the Commission); *In re Am. Medical Ass'n*, 94 F.T.C. 701, 990 (1979) ("status as . . . tax-exempt organization does not obviate the relevance of further inquiry"), *enforced as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982); *In re Ohio Christian College*, 80 F.T.C. 815, 949-50 (1972) ("Notwithstanding the fact the [defendant] had been afforded an exemption certificate . . . it was not in fact an exempt corporation.").
For this reason, the Commission also denies Petitioners' request to "provide documents supporting its status as a non-profit organization, such as copies of organizational documents and other filings with federal and state authorities" in lieu of responding to Interrogatory Nos. 48-78 and Document Requests Nos. 40-64. Pet. at 10-11.

[8] *See also, FMC v. Port of Seattle*, 521 F.2d 431, 434 (9th Cir. 1975) *(*"Each independent regulatory administrative agency has the power to obtain the facts requisite to determining whether it has jurisdiction over the matter sought to be investigated.").

companies, and the extent to which the organization may have been used by individuals or for-profit entities as a device to seek monetary gain. *See Police Protective Fund Order,* at *4. The specifications of the CIDs related to non-profit status are properly designed to elicit information to determine if Petitioners operate as de facto for-profit companies. [9]

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Petitioners' Motions to Quash or Modify Civil Investigative Demands be, and they hereby are, **DENIED**.

IT IS FURTHER ORDERED THAT Petitioners shall comply in full with the Commission's Civil Investigative Demand no later than August 2, 2021, subject to any modifications as to scope or timing that attorneys in the Bureau of Consumer Protection may determine.

By the Commission.

[9] Nor are these requests overbroad or unduly burdensome. Pet. at 10. Again, Petitioners merely assert that the requests are "far reaching" and the information would be "burdensome to collect" without any showing of how it would be highly disruptive to business to respond to these requests. *Texaco*, 555 F.2d at 882.

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